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Public Hearing, March 3, 2021

Judiciary Committee
Legislative Office Building, Room 2500
Hartford, CT 06106

RE: Connecticut Defense Lawyers Association Testimony in Support of H.B. No. 6465 An Act Concerning the Reduction of Economic Damages in a Personal Injury or Wrongful Death Action for Collateral Source Payments Made on Behalf of a Claimant

Good afternoon,

My name is Kelly Petter. I am a Partner in the Hartford office of Hassett & Donnelly, P.C., and I am testifying today in my capacity as a member of the Board of Directors of the Connecticut Defense Lawyers Association. The Connecticut Defense Lawyers Association supports Raised Bill No. 6465 and we urge this committee to support the bill as it is in the best interest of its constituents, and meets the goals intended under Connecticut law regarding damages in personal injury and wrongful death cases.

The question raised by Bill No. 6465 has been erroneously characterized as "who should receive the windfall, plaintiff or defendant" when, in fact, the cost of any windfall received by plaintiff is passed on to consumers in Connecticut that purchase Connecticut insurance policies. Following the release of the *Marciano*[1] decision in December 2016, the *Marciano* decision has been cited as the basis for increasing economic damages awards for which defendants will not receive collateral source reduction after verdict thereby increasing verdict and settlement values in personal injury and wrongful death cases in Connecticut. The logical result is that liability insurance carriers must charge higher premiums to insure Connecticut risks. Accordingly, we submit that the proper question for this committee to consider is whether a bill aimed at reducing the cost of liability insurance for all consumers in Connecticut is appropriate, or if it should be defeated to allow an

[1] *Marciano v. Jimenez*, 324 Conn. 70, 151 A.3d 1280 (2016).

individual litigant to continue to collect damages that she has not paid, does not owe, and that another does not owe on her behalf.

The growing cost of medical care in this country is no secret. However, when an insurer that affords coverage for medical expenses is involved, it does not pay the "sticker price" for care, nor is the "sticker price" reflective of the amount to be paid. Rather, the insurer pays a negotiated rate, which is often substantially less than the "sticker price" and neither the party receiving the medical services, nor the insurer are expected to pay the difference.

By way of example, one member of the Connecticut Defense Lawyers Association recently defended an action in which plaintiff fell through a ceiling resulting in extended hospitalization with complications. The medical bills exceeded $565,000.00. Plaintiff was insured by Connecticut Husky insurance, which paid roughly $80,000.00 in full satisfaction of all medical bills claimed in the case and, pursuant to Connecticut law, Husky asserted its right of subrogation via a lien against plaintiff's recovery in the lawsuit. Under the current interpretation of Conn. Gen. Stat. 52-225a, pursuant to *Marciano*, the liability insurer that insured the defendant would have been obligated to pay the total medical bills charged by the medical providers - $565,000.00 – as a result of the instructions given to the jury in the event of a trial and verdict, even though neither plaintiff, nor his medical insurer paid, or were obligated to pay any amounts in excess of the $80,000.00 paid to satisfy the medical bills.

A similar example was submitted by the Connecticut Defense Lawyers Association in 2019 wherein plaintiff claimed medical bills from two hospitals totaling approximately $135,000.00. Medicare paid approximately $15,000.00 and State insurance paid approximately $5,000.00 for a total payment of approximately $20,000.00 in full satisfaction of the $135,000.00. Plaintiff's counsel argued, in an effort to obtain a more substantial settlement in favor of plaintiff, that, in the event of a trial and verdict, the jury would be instructed to award the full $135,000.00 without any reduction and, accordingly, the settlement value of the case was increased. Similar arguments are presented by plaintiffs' attorneys statewide resulting in wide scale increase of settlement and verdict payouts for amounts never paid by or on behalf of plaintiff, and which will not be owed in the future.

The gap between the amount charged by the medical provider, and the amount actually paid to satisfy the bill for care continues to expand, and the current interpretation of Conn. Gen. Stat. 52-225a, pursuant to *Marciano*, is frequently argued as the basis for increasing settlement values and verdict payouts, which are more often than not satisfied by defendant's liability insurance. The increasing cost of settlements and verdicts are then passed along to Connecticut consumers as a whole through increasing insurance premiums.

Contrary to popular belief, Connecticut juries are not permitted to use their common knowledge of the involvement of insurance – medical or liability – in rendering a verdict in civil cases. In fact, jurors are strictly admonished to only consider evidence that is presented in the Court and, in the event insurance is raised during trial, the Court provides a limiting instruction directing the jury

that insurance should play no part in the jury's deliberations[2]. The result is that the jury renders an award that accounts for damages that have not been paid by or on behalf of plaintiff, and that will not be owed in the future, but for which the Court is prohibited from reducing the award in a collateral source hearing after trial due to the current interpretation of Conn. Gen. Stat. 52-225a.

Amendment is further appropriate to ensure consistent results for all Connecticut plaintiffs. Notably, had the aforementioned plaintiffs received benefits from a private health insurance plan that was not a fully self-funded ERISA plan, an entirely different result would have occurred. Pursuant to Conn. Gen. Stat. § 52-225c, insurers paying economic damages to or on behalf of plaintiffs are prohibited from seeking recovery of those payments from defendant in a civil action, unless otherwise provided by law. The result is that only fully self-funded ERISA health insurance plans, Medicare, Medicaid/State insurance and Workers Compensation have valid rights to subrogation against plaintiff's recovery in a civil lawsuit in Connecticut for economic damages paid to or on behalf of plaintiff, and the amount to which plaintiff is entitled after trial in Connecticut for substantially identical claims is dependent on the insignificant factor of whether plaintiff's economic damages were paid by a non-ERISA private health insurance, or fully self-funded ERISA health insurance plan, Medicare, Medicaid or Workers Compensation.

By way of example, if the $565,000.00 in medical bills satisfied by Husky in the prior example were, instead, paid by a non-ERISA private health insurance plan, defendant would have been entitled to a collateral source reduction, pursuant to Conn. Gen. Stat. § 52-225a, for the total amount of the medical bills less the amount of the annual insurance premiums paid to obtain the insurance affording plaintiff benefits[3]. Accordingly, the verdicts to which two plaintiffs with substantially identical claims would be entitled would be entirely different with the Husky recipient actually receiving the $565,000.00 in medical bills satisfied by Husky, as well as any non-economic damages award, and the private health insurance recipient receiving the non-economic damages award and an economic damages award in the amount of the annual insurance premiums to obtain the insurance that satisfied the medical bills. Similarly, had the Medicare and State insurance recipient, instead, received benefits from a non-ERISA private health insurance plan that satisfied the approximate $135,000.00 in medical bills, plaintiff would be entitled to a non-economic damages award and an economic damages award in the amount of the annual insurance premiums paid to obtain the benefits that satisfied the medical bills. Meanwhile, under the the current interpretation of Conn. Gen. Stat. 52-225a, pursuant to *Marciano*, the Medicare and State insurance recipient is entitled to an economic damages award of the total medical bills charged - $135,000.00 – plus an additional award for non-economic damages. None of the aforementioned plaintiffs would have actually paid the full amount of the medical bills claimed, nor would they be required to in the future.

In addition to benefiting Connecticut consumers as a whole by preventing ever-increasing liability insurance premiums, and ensuring consistent results, the amendment serves the goals of Connecticut damages law with respect to personal injury and wrongful death actions. The

[2] See Connecticut Judicial Branch Civil Jury Instructions 1.1-1 Obligation of Juror's Oath and 2.9-2 Mention of Insurance, attached hereto in support of this testimony.
[3] See C.G.S.A. 52-225a(c).

Connecticut Judicial Branch Civil Jury Instruction 3.4-1 Damages – General[4] states the following, in relevant part, with respect to personal injury damages:

> The rule of damages is as follows. Insofar as money can do it, the plaintiff is to receive fair, just and reasonable compensation for all injuries and losses, past and future, which are proximately caused by the defendant's proven negligence. Under this rule, the purpose of an award of damages is not to punish or penalize the defendant for (his/her) negligence, but to compensate the plaintiff for (his/her) resulting injuries and losses. You must attempt to put the plaintiff in the same position, as far as money can do it, that (he/she) would have been in had the defendant not been negligent.

Connecticut Judicial Branch Civil Jury Instruction 3.4-7 Damages - Wrongful Death[5] similarly states:

> Insofar as money can do it, a plaintiff is to receive fair, just and reasonable compensation for all injuries and losses, past and future, which are legally caused by the defendant's proven negligence. Under this rule, the purpose of an award of damages is not to punish or penalize the defendant for (his/her) negligence but to compensate the plaintiff, and in this case the estate, for the decedent's resulting injuries and losses.

With respect to economic damages, Civil Jury Instruction 3.4-1 Damages – General goes on to state: "[e]conomic damages are monies awarded as compensation for monetary losses and expenses which the plaintiff has ***incurred***, or is reasonably likely to ***incur*** in the future, as a result of the defendant's negligence" (emphasis added). Civil Jury Instruction 3.4-7 Damages - Wrongful Death similarly states: "[e]conomic damages are monies awarded as compensation for monetary losses and expenses which have been ***incurred*** as a result of the defendant's negligence. They are awarded for such things as the cost of reasonable and necessary medical care and lost earnings" (emphasis added).

Contrary to the intent of damages law in personal injury and wrongful death matters, the current interpretation of Conn. Gen. Stat. 52-225a, pursuant to *Marciano*, allows plaintiff to collect an award for economic damages that plaintiff did not incur, nor is she likely to incur in the future. Moreover, we submit that allowing plaintiff to collect a windfall for such damages is inconsistent with awarding "fair, just and reasonable compensation" and exceeds any award necessary to compensate plaintiff for the resulting injuries or losses, or the amount necessary to put plaintiff in the same position she would have been had defendant's conduct not caused injury. To be sure, any windfall received by plaintiff does not fill a gap in damages law, as plaintiffs also claim and may be entitled to non-economic damages awards, which are in addition to any award for economic

[4] See Connecticut Judicial branch Civil Jury Instruction 3.4-1 Damages – General, attached hereto in support of this testimony.
[5] See Connecticut Judicial branch Civil Jury Instruction 3.4-7 Damages - Wrongful Death, attached hereto in support of this testimony.

damages. Accordingly, the current interpretation of Conn. Gen. Stat. 52-225a, pursuant to *Marciano*, permits a true windfall to plaintiff which is without any basis in law.

Marciano may not have changed the words used within Conn. Gen. Stat. 52-225a, but, in practice, it changed the entire process of case evaluation and negotiation of settlements. Prior to *Marciano*, it was a commonly accepted practice that the value of plaintiff's claims would be estimated based on the amount actually paid by or on behalf of, and/or owed by plaintiff, rather than the amount charged by the medical provider. Following *Marciano*, *Marciano* is routinely used as a bargaining chip to inflate settlement values resulting in a windfall to plaintiff and her counsel. H.B. No. 6465 does not seek to upend a well-settled and fair practice. Rather, H.B. No. 6465 seeks to restore balance and fairness to a system intended to award plaintiff only that which is fair, just and reasonable, and H.B. No. 6465 further seeks to prevent unnecessary inflation of insurance premiums in a state with a high economic cost of living, and in a time where profit margins for businesses and income for individuals are substantially reduced due to the state of the economy.

In respect of the separation of powers, the Connecticut Supreme Court made clear that it must interpret the statute as written and the legislature must exercise its power to change the statute to effectuate a reasonable purpose. *See Marciano v. Jimenez*, 324 Conn. 70, 77, 151 A.3d 1280 (2016) ("As this court has emphasized, 'a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature.' (Internal quotation marks omitted.) *Cruz v. Montanez*, 294 Conn. 357, 370, 984 A.2d 705 (2009)."). We call upon the Judiciary Committee to favorably advance H.B. No. 6465 to serve the best interest of all Connecticut residents and consumers, and advance the intended purpose of Connecticut damages law.

Very truly yours,

Kelly E. Petter

Kelly E. Petter, Esq.