NEW JERSEY STATE BAR ASSOCIATION

Statement On S3343 (Sacco)
Senate Judiciary Committee
February 23, 2023

The New Jersey State Bar Association urges caution before voting in support of S3343 (Sacco), which establishes a cap on the recovery of compensatory damages and limits contingency fees in medical malpractice cases. The bill also permits the periodic payment of damages in cases where the award equals or exceeds $250,000 and precludes statements, writings or benevolent gestures as evidence of admission of liability or for any purpose. The bill portends to establish "an environment in the health care delivery setting that encourages transparency and open communication" to protect New Jersey patients and improve the well-being of health care providers. The NJSBA knows the importance of protecting the well-being of professionals and supports policies that do so, but not at the expense of patients who suffer significant, many times irreversible damages as a result of malpracticing health care professionals. To the extent that this bill seeks to limit those damages without a basis for doing so, and without the benefit of the legal process to seek redress of these claims, it falls far short of protecting New Jersey patients.

The New Jersey State Bar Association has always championed access to justice for the members of the public we represent. This bill places impediments and obstacles that will limit a patients ability to have their day in court. The bill has the potential to block a very important avenue for victims of medical malpractice to seek redress for – in some cases – significant and catastrophic damages suffered as a result of this malpractice. It also disincentivizes practitioners

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from taking on these costly, complex matters because it would restrict the amount of recovery for costs spent litigating the matter that are unavoidable and are borne by the very people who are called upon to advocate for these victims of medical malpractice. The bill also seems to ignore the Patient Safety Act, which was designed to encourage voluntary disclosures by creating privileges for documents produced pursuant to the mandatory disclosure provisions. As a result, these documents, which may include evidence of benevolent gestures, are protected from discovery and inadmissible as evidence in civil, trial or administrative actions. Finally, the bill seeks to limit recovery by practitioners by reducing contingency fees, which are governed by the Supreme Court under the Rules of Professional Conduct.

Medical malpractice cases are arguably one of the most complex cases to litigate. These cases require an affidavit of merit in order to proceed, which in and of itself can be costly as it requires an expert to opine on the breach of duty of the health care professional. It is only after this step that a case can move forward and at this point, the case requires not just many hours of time and research in order to properly litigate it, but also often cost-prohibitive experts to support a cause of action for medical malpractice. This is because the jury charges place a very high burden on victims of medical malpractice to prove malpractice, which evidence relies upon experts in various fields of medical study. By way of comparison, automobile cases do not require affidavit of merits and would not be subject to this lowered contingency structure. A proposal to lower the maximum contingency for a complicated medical malpractice case to below the threshold for an automobile case is not supported by any explanation within this legislation or logic and seems intentionally designed to discourage attorneys from advocating for victims of medical malpractice. Previous legislation has greatly reduced the number of medical malpractice claims that can be brough to court. There is no evidence to suggest that there are an

excessive amount of medical malpractice claims being filed. There is no showing of an insurance coverage crisis that supports the passage of this act.

Further, with regard to contingency fees, it is well established that the Supreme Court is vested with the authority under the New Jersey Constitution to regulate the practice of law as well as its consequent responsibilities in that regard. See N.J. Const. (1947), Art. VI, s. II, par. 3; see also American Trial Lawyers Ass'n v. N.J. Supreme Court, 66 N.J. 258, 259 (1974). Contingency cases are a way to incentivize attorneys to zealously advocate difficult and costly cases such as these, often without payment of out-of-pocket costs until the conclusion of the matter. These cases are expensive – often costing tens of thousands of dollars of which a victim of malpractice does not have, nor will have to spend if the case is lost. And if successful, the attorney is bound by the Rules of Professional Conduct to recover fees. Those rules, the subject of a lawsuit challenging the contingency fee system, were promulgated by the Supreme Court with a view towards regulating the ethical conduct of attorneys who work on a contingency basis. "The Court does not adopt its rules to promote or brook injustice but, as best it can, to secure justice, and justice under Constitution and law." Id. at 267. It is not just improper, but unconstitutional to legislate contingency fees. There is no justification for the setting of contingency fees for medical malpractice cases at less than the rate for other personal injury matters other than to dissuade lawyers from taking on these matters. This is an improper impediment to the public's access to justice. There is no compelling reason for making the fee structure lower on medical negligence cases that are more complicated than other personal injury cases to pursue.

In addition to the problematic contingency fee structure, the arbitrary cap on noneconomic damages works as a bar against the full and fair recovery of damages for the victim

of malpractice. Damages are awarded only upon the establishment of malpractice. Economic damages such as loss of income and earning capacity and cost of medical treatment are ascertainable. Noneconomic damages, which are very real, are more difficult to value and requires a more searching analysis. Damages are decided by a jury. To cap these damages at an arbitrary figure and call this a protection for New Jersey patients misses the point of why these victims of malpractice are in court to begin with. Victims of malpractice are entitled to bring their claims to court and have a jury decide what is fair. The only conceivable justification of an arbitrary cap of $250,000 is to dissuade lawyers from taking on representation of this particular category of negligence victims. There is no compelling argument for the proposition that the compensatory value of injuries from medical negligence should be treated any differently than injuries from fall downs, construction cases, automobile accidents or products liability cases.

A further consideration is that by capping noneconomic damages, insurance companies will be disincentivized from negotiating settlements in good faith because they know that the cost and expense of a trial will almost always outweigh damages capped at $250,000. It also results in the complete loss of recovery of noneconomic damages as those costs will necessarily go to the cost of litigation. Recently, the Governor signed into law a bill that obligates auto insurance companies to act in good faith and not unreasonably deny an insured's claims. Failure to act in good faith results in a civil cause of action. This does not apply to medical malpractice insurers. A medical malpractice insurer that goes into a case knowing its maximum exposure is $250,000 is no more incentivized than an auto insurer prior to the enactment of the aforementioned legislation to negotiate in good faith. And a matter as costly as medical malpractice will easily reach as much in the costs of litigation for the victim of malpractice. Therefore, a medical malpractice insurer will almost always opt to go to trial as there is little to

lose knowing its maximum exposure is $250,000. This does a disservice to a victim of malpractice with a catastrophic injury.

The bill also seems to overlook the state of the law with regard to the admissibility of benevolent gestures. The Patient Safety Act, N.J.S.A. 26:2H-12.23, *et seq.*, already provides protections for health care facilities that undertake reviews of malpractice cases. Documents prepared pursuant to the mandatory reporting requirements under this act are privileged and cannot be used as evidence of liability or disclosed during discovery. As such, to the extent this bill limits benevolent gestures from consideration in these matters, the Patient Safety Act already addresses this issue.

When victims of justice need access to justice, that access is best accomplished through an attorney who will zealously fight on their behalf. The time and expense of doing so is only part of the equation in considering whether a case should be tried. The cap on noneconomic damages makes it nearly impossible for a victim of malpractice to fully realize the full and fair compensation for an injury suffered by medical malpractice. This bill will have a devastating impact on patients who seek redress for their injuries.

For these reasons, we urge you to vote no to this legislation. We thank you for the opportunity to submit our statement.

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