S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

February 20, 2009

Introduced by Sens. LAVALLE, DIAZ, LARKIN, MORAHAN, SALAND, VOLKER -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the general obligations law, the civil practice law and rules and the public health law, in relation to holding health care organizations accountable for the consequences of their decisions

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative findings. The legislature finds that a wide variety of entities are integrating the functions of paying for health care, determining what health care is paid for, and providing the care. This integration of functions is breaking down traditional distinctions. Increasingly, payor determinations are governing health care and controlling decisions that in the past were the exclusive domain of health care professionals and patients. The legislature further finds that this integration of functions makes it imperative that health care organizations be held fully responsible for the consequences of their decisions, much as health care professionals have been held accountable for the consequences of their decisions.

S 2. The general obligations law is amended by adding two new sections 11-108 and 11-109 to read as follows:

S 11-108. ACCOUNTABILITY OF HEALTH CARE ORGANIZATIONS. 1. DEFINITIONS. FOR PURPOSES OF THIS SECTION AND SECTION 11-109 OF THIS TITLE, UNLESS THE CONTEXT CLEARLY REQUIRES OTHERWISE:

(A) "HEALTH CARE ORGANIZATION" MEANS AN ENTITY (OTHER THAN A HEALTH CARE PROVIDER) THAT APPROVES, PROVIDES, ARRANGES FOR, OR PAYS FOR HEALTH CARE SERVICES, INCLUDING BUT NOT LIMITED TO:

(I) A HEALTH MAINTENANCE ORGANIZATION LICENSED PURSUANT TO ARTICLE FORTY-THREE OF THE INSURANCE LAW OR CERTIFIED PURSUANT TO ARTICLE FORTY-FOUR OF THE PUBLIC HEALTH LAW,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(II) ANY OTHER ORGANIZATION CERTIFIED PURSUANT TO ARTICLE FORTY-FOUR OF THE PUBLIC HEALTH LAW, OR

(III) AN INSURER OR CORPORATION SUBJECT TO THE INSURANCE LAW.

NO ENTITY OR PERSON SHALL BE DEEMED TO BE A HEALTH CARE ORGANIZATION BECAUSE THE ENTITY OR PERSON PROCURES OR PAYS FOR HEALTH COVERAGE THROUGH AN ENTITY ACTING UNDER THE INSURANCE LAW OR ARTICLE FORTY-FOUR OF THE PUBLIC HEALTH LAW.

(B) "HEALTH CARE PROVIDER" MEANS AN ENTITY LICENSED OR CERTIFIED UNDER ARTICLE TWENTY-EIGHT OR THIRTY-SIX OF THE PUBLIC HEALTH LAW, A PREFERRED PROVIDER ORGANIZATION, A PARTICIPATING ENTITY THROUGH WHICH A HEALTH MAINTENANCE ORGANIZATION OFFERS HEALTH SERVICES UNDER ARTICLE FORTY-FOUR OF THE PUBLIC HEALTH LAW, AN ENTITY LICENSED OR CERTIFIED UNDER ARTICLE SIXTEEN, THIRTY-ONE OR THIRTY-TWO OF THE MENTAL HYGIENE LAW, A HEALTH CARE PRACTITIONER LICENSED, REGISTERED OR CERTIFIED UNDER TITLE EIGHT OF THE EDUCATION LAW, OR A PROVIDER OF PHARMACEUTICAL PRODUCTS OR SERVICES OR DURABLE MEDICAL EQUIPMENT.

(C) "HEALTH CARE SERVICE" MEANS HEALTH CARE SERVICES, TREATMENTS, PRODUCTS OR EQUIPMENT PROVIDED BY A HEALTH CARE PROVIDER.

2. (A) WHENEVER A HEALTH CARE ORGANIZATION DELAYS, FAILS OR REFUSES TO APPROVE, PROVIDE, ARRANGE FOR, OR PAY FOR, IN A TIMELY MANNER, ANY HEALTH CARE SERVICE TO A PERSON TO THE EXTENT IT IS CONTRACTUALLY OR LEGALLY OBLIGATED TO DO SO, IT SHALL BE LIABLE FOR ANY PERSONAL INJURY, DEATH OR DAMAGES CAUSED BY THE DELAY, FAILURE OR REFUSAL.

(B) A HEALTH CARE ORGANIZATION SHALL BE LIABLE UNDER THIS SECTION, UNDER OTHERWISE APPLICABLE RULES OF TORT AND CONTRACT LIABILITY, INCLUDING BUT NOT LIMITED TO RULES RELATING TO AGENCY, VICARIOUS LIABILITY, AND JOINT AND SEVERAL LIABILITY, FOR ANY ACT BY AN AGENT, CONTRACTOR, PARTICIPATING ENTITY, OR HEALTH CARE PROVIDER, FOR WHICH THE HEALTH CARE ORGANIZATION WOULD BE LIABLE IF IT WERE COMMITTED BY THE HEALTH CARE ORGANIZATION.

3. THE FAILURE OF THE PERSON (OR OF ANY OTHER PERSON ACTING ON THE PERSON'S BEHALF) TO SEEK AN ALTERNATIVE PROVIDER OF OR TO PAY FOR THE HEALTH CARE SERVICE SHALL NOT DIMINISH THE HEALTH CARE ORGANIZATION'S LIABILITY OR CONSTITUTE CULPABLE CONDUCT FOR THE PURPOSES OF SECTION FOURTEEN HUNDRED ELEVEN OF THE CIVIL PRACTICE LAW AND RULES.

4. NOTHING IN THIS SECTION SHALL LIMIT ANY OTHER RIGHT, REMEDY OR CAUSE OF ACTION THAT ANY PERSON MAY OTHERWISE HAVE.

5. NO CONTRACT OR AGREEMENT BETWEEN A HEALTH CARE ORGANIZATION AND A HEALTH CARE PROVIDER SHALL:

(A) DIRECTLY OR INDIRECTLY REQUIRE A HEALTH CARE PROVIDER TO INDEMNIFY OR HOLD HARMLESS THE HEALTH CARE ORGANIZATION FOR ANY LIABILITY RESULTING FROM THE HEALTH CARE ORGANIZATION'S ACTS OR OMISSIONS; OR

(B) WAIVE, LIMIT, OR DELEGATE THE LIABILITY OF THE HEALTH CARE ORGANIZATION UNDER THIS SECTION TO ANY HEALTH CARE PROVIDER.

6. NO CONTRACT OR AGREEMENT BETWEEN A HEALTH CARE ORGANIZATION AND ANY PERSON SHALL WAIVE OR LIMIT ANY LIABILITY OF THE HEALTH CARE ORGANIZATION UNDER THIS SECTION TO THE PERSON.

7. IF THE TIME IN WHICH A PLAINTIFF COULD HAVE COMMENCED AN ACTION FOR PROFESSIONAL MALPRACTICE FOR THE ACT, ERROR OR OMISSION COMPLAINED OF HAS EXPIRED PRIOR TO THE COMMENCEMENT OF AN ACTION BROUGHT PURSUANT TO THIS SECTION AGAINST A HEALTH CARE ORGANIZATION, THE DEFENDANT IN SAID ACTION SHALL BE BARRED FROM COMMENCING A THIRD-PARTY ACTION AGAINST A PERSON NOT A PARTY WHO IS OR MAY BE LIABLE TO THAT DEFENDANT FOR ALL OR PART OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANT AND AGAINST WHOM THE PLAINTIFF CANNOT COMMENCE AN ACTION FOR PROFESSIONAL MALPRACTICE DUE TO

THE EXPIRATION OF THE STATUTE OF LIMITATIONS PRIOR TO THE COMMENCEMENT OF THE ACTION AGAINST THE DEFENDANT.

8. A HEALTH CARE ORGANIZATION SHALL EXERCISE REASONABLE CARE: (A) WHEN MAKING DECISIONS WHICH AFFECT THE HEALTH CARE SERVICE OF AN ENROLLEE; AND (B) IN SELECTING AND EXERCISING INFLUENCE OR CONTROL OVER ITS EMPLOYEES, AGENTS, OSTENSIBLE AGENTS, OR REPRESENTATIVES WHO ARE ACTING ON ITS BEHALF, RESPECTING DECISIONS WHICH MAY AFFECT THE QUALITY OF THE HEALTH CARE SERVICE PROVIDED TO ITS ENROLLEES.

9. THIS SECTION SHALL NOT BE CONSTRUED TO DIMINISH ANY CONTRACTUAL OR LEGAL OBLIGATION OF THE HEALTH CARE ORGANIZATION, NOR TO CREATE AN OBLIGATION ON THE PART OF THE HEALTH CARE ORGANIZATION TO PROVIDE ANY HEALTH CARE SERVICE TO AN ENROLLEE THAT IS NOT A COVERED BENEFIT.

S 11-109. PROTECTION OF HEALTH CARE PROVIDERS. 1. NO HEALTH CARE ORGANIZATION OR HEALTH CARE PROVIDER SHALL, BY CONTRACT, POLICY OR PROCEDURE:

(A) PROHIBIT OR RESTRICT ANY HEALTH CARE PROVIDER FROM FILING A COMPLAINT;

(B) PROHIBIT OR RESTRICT ANY HEALTH CARE PROVIDER FROM MAKING A REPORT OR COMMENTING TO THE APPROPRIATE GOVERNMENT AGENCY REGARDING THE POLICIES OR PRACTICES OF THE ORGANIZATION WHICH MAY NEGATIVELY AFFECT THE QUALITY OF OR ACCESS TO HEALTH CARE SERVICES; OR

(C) PROHIBIT OR RESTRICT ANY HEALTH CARE PROVIDER FROM DISCLOSING OR COMMENTING ON POLICIES OR PRACTICES OF THE ORGANIZATION WHICH MAY NEGATIVELY AFFECT THE QUALITY OF OR ACCESS TO HEALTH CARE SERVICES TO THE PUBLIC.

THIS SUBDIVISION SHALL NOT BE CONSTRUED TO PERMIT A HEALTH CARE PROVIDER TO DISCLOSE ANY INFORMATION REGARDING A PATIENT WHICH WOULD OTHERWISE BE DEEMED CONFIDENTIAL OR PRIVILEGED, OR WHICH SHOULD NOT BE DISCLOSED OR DISCUSSED ACCORDING TO LAW OR REASONABLE PROFESSIONAL STANDARDS.

2. NO HEALTH CARE ORGANIZATION OR HEALTH CARE PROVIDER SHALL TERMINATE A CONTRACT OR EMPLOYMENT OF A HEALTH CARE PROVIDER, OR REFUSE TO RENEW SUCH A CONTRACT, OR PENALIZE A HEALTH CARE PROVIDER OR REDUCE OR LIMIT THE COMPENSATION OF A HEALTH CARE PROVIDER SOLELY BECAUSE A HEALTH CARE PROVIDER HAS:

(A) ADVOCATED FOR, RECOMMENDED OR PROVIDED A PARTICULAR HEALTH CARE SERVICE TO A PATIENT, TO WHICH THE PATIENT WAS ENTITLED BY CONTRACT OR LAW;

(B) TAKEN ANY ACTION UNDER SUBDIVISION ONE OF THIS SECTION;

(C) APPEALED OR ASSISTED IN APPEALING A DECISION OF THE HEALTH CARE ORGANIZATION; OR

(D) REQUESTED A HEARING OR REVIEW TO WHICH THE PROVIDER WAS ENTITLED.

3. NO HEALTH CARE ORGANIZATION OR HEALTH CARE PROVIDER SHALL APPLY ANY INCENTIVE, WHETHER MONETARY OR OTHERWISE, TO A HEALTH CARE PROVIDER INTENDED OR HAVING THE EFFECT OF INDUCING THE HEALTH CARE PROVIDER TO DELAY, FAIL OR REFUSE TO PROVIDE ANY HEALTH CARE SERVICE TO WHICH A PATIENT IS ENTITLED BY CONTRACT OR LAW.

S 3. Section 1602 of the civil practice law and rules is amended by adding a new subdivision 14 to read as follows:

14. NOT APPLY TO AN ACTION AGAINST A HEALTH CARE ORGANIZATION BROUGHT PURSUANT TO SECTION 11-108 OF THE GENERAL OBLIGATIONS LAW.

S 4. Subdivision 1 of section 4410 of the public health law, as added by chapter 938 of the laws of 1976, is amended to read as follows:

1. The provision of comprehensive health services directly or indirectly, by a health maintenance organization through its comprehensive health services plan shall not be considered the practice of the profes-

sion of medicine by such organization or plan. [However, each] EXCEPT THAT:

(A) THIS SUBDIVISION SHALL NOT BE CONSTRUED TO LIMIT ANY LIABILITY THE HEALTH MAINTENANCE ORGANIZATION OR ITS COMPREHENSIVE HEALTH SERVICES PLAN WOULD OTHERWISE HAVE RELATING TO ANY PROFESSIONAL SERVICES RENDERED BY, ON BEHALF OF, OR IN CONNECTION WITH THE ORGANIZATION OR PLAN.

(B) EACH member, employee or agent of such organization or plan shall be fully and personally liable and accountable for any negligent or wrongful act or misconduct committed by him OR HER or any person under his OR HER direct supervision and control while rendering professional services on behalf of [such] THE organization or plan.

(C) NO CONTRACT OR AGREEMENT BETWEEN A HEALTH MAINTENANCE ORGANIZATION OR ITS COMPREHENSIVE HEALTH SERVICES PLAN AND ANY HEALTH CARE PROVIDER SHALL DELEGATE THE LIABILITY OF THE HEALTH MAINTENANCE ORGANIZATION TO ANY HEALTH CARE PROVIDER OR SHALL REQUIRE THE HEALTH CARE PROVIDER TO INDEMNIFY OR HOLD HARMLESS THE ORGANIZATION OR PLAN FOR ANY LIABILITY THE ORGANIZATION OR PLAN MAY INCUR.

S 5. If any provision of this act or the application thereof shall be held to be invalid, such invalidity shall not affect other provisions or other applications of any provision of this act which can be given effect without the invalid provision or application, and to that end, the provisions and application of this act are severable.

S 6. This act shall take effect immediately.