

## BILL TEXT:

## STATE OF NEW YORK

5408--A

2005-2006 Regular Sessions

## IN ASSEMBLY

February 22, 2005

Introduced by M. of A. GOTTFRIED, GRANNIS, SCARBOROUGH, JACOBS, POWELL, EDDINGTON, KOON, GREEN, HEASTIE, GALEF, O'DONNELL, GUNTHER, BRADLEY -- Multi-Sponsored by -- M. of A. ABBATE, BING, BOYLAND, BRENNAN, CARROZZA, CHRISTENSEN, CLARK, A. COHEN, COLTON, COOK, CUSICK, CYMBROWITZ, DESTITO, R. DIAZ, DiNAPOLI, DINOWITZ, ENGLEBRIGHT, FIELDS, GIANARIS, GLICK, GREENE, HIKIND, HOOPER, HOYT, JOHN, LAFAYETTE, LAVELLE, LIFTON, LOPEZ, MAGNARELLI, MARKEY, MAYERSOHN, McENENY, McLAUGHLIN, MILLMAN, ORTIZ, PAULIN, PERALTA, PERRY, PHEFFER, REILLY, P. RIVERA, SWEENEY, TITUS, TONKO, TOWNS, WEINSTEIN -- read once and referred to the Committee on Judiciary -- recommitted to the Committee on Rules in accordance with Assembly Rule 3, sec. 2 -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules

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:

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

12 § 2. The general obligations law is amended by adding two new sections  
13 11-108 and 11-109 to read as follows:

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

LBD03244-04-6

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1 § 11-108. Accountability of health care organizations. 1. Defi-  
2 nitions. For purposes of this section and section 11-109 of this title,  
3 unless the context clearly requires otherwise:

4 (a) "Health care organization" means an entity (other than a health  
5 care provider) that approves, provides, arranges for, or pays for health  
6 care services, including but not limited to:

7 (i) a health maintenance organization licensed pursuant to article  
8 forty-three of the insurance law or certified pursuant to article  
9 forty-four of the public health law,

10 (ii) any other organization certified pursuant to article forty-four  
11 of the public health law, or

12 (iii) an insurer or corporation subject to the insurance law.

13 No entity or person shall be deemed to be a health care organization  
14 because the entity or person procures or pays for health coverage  
15 through an entity acting under the insurance law or article forty-four  
16 of the public health law.

17 (b) "Health care provider" means an entity licensed or certified under  
18 article twenty-eight or thirty-six of the public health law, a preferred  
19 provider organization, a participating entity through which a health  
20 maintenance organization offers health services under article forty-four  
21 of the public health law, an entity licensed or certified under article  
22 sixteen, thirty-one or thirty-two of the mental hygiene law, a health  
23 care practitioner licensed, registered or certified under title eight of  
24 the education law, or a provider of pharmaceutical products or services  
25 or durable medical equipment.

26 (c) "Health care service" means health care services, treatments,  
27 products or equipment provided by a health care provider.

28 2. (a) Whenever a health care organization delays, fails or refuses to  
29 approve, provide, arrange for, or pay for, in a timely manner, any  
30 health care service to a person to the extent it is contractually or  
31 legally obligated to do so, it shall be liable for any personal injury,  
32 death or damages caused by the delay, failure or refusal.

33 (b) A health care organization shall be liable under this section,  
34 under otherwise applicable rules of tort and contract liability, includ-  
35 ing but not limited to rules relating to agency, vicarious liability,  
36 and joint and several liability, for any act by an agent, contractor,  
37 participating entity, or health care provider, for which the health care  
38 organization would be liable if it were committed by the health care  
39 organization.

40 3. The failure of the person (or of any other person acting on the  
41 person's behalf) to seek an alternative provider of or to pay for the  
42 health care service shall not diminish the health care organization's  
43 liability or constitute culpable conduct for the purposes of section  
44 fourteen hundred eleven of the civil practice law and rules.

45 4. Nothing in this section shall limit any other right, remedy or  
46 cause of action that any person may otherwise have.

47 5. No contract or agreement between a health care organization and a  
48 health care provider shall:

49 (a) directly or indirectly require a health care provider to indemnify  
50 or hold harmless the health care organization for any liability result-  
51 ing from the health care organization's acts or omissions; or

52 (b) waive, limit, or delegate the liability of the health care organ-  
53 ization under this section to any health care provider.

54 6. No contract or agreement between a health care organization and any  
55 person shall waive or limit any liability of the health care organiza-  
56 tion under this section to the person.

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1 7. If the time in which a plaintiff could have commenced an action for  
2 professional malpractice for the act, error or omission complained of  
3 has expired prior to the commencement of an action brought pursuant to  
4 this section against a health care organization, the defendant in said  
5 action shall be barred from commencing a third-party action against a  
6 person not a party who is or may be liable to that defendant for all or  
7 part of the plaintiff's claim against the defendant and against whom the  
8 plaintiff cannot commence an action for professional malpractice due to  
9 the expiration of the statute of limitations prior to the commencement  
10 of the action against the defendant.

11 8. A health care organization shall exercise reasonable care: (a)  
12 when making decisions which affect the health care service of an enrol-  
13 lee; and (b) in selecting and exercising influence or control over its  
14 employees, agents, ostensible agents, or representatives who are acting  
15 on its behalf, respecting decisions which may affect the quality of the  
16 health care service provided to its enrollees.

17 9. This section shall not be construed to diminish any contractual or  
18 legal obligation of the health care organization, nor to create an obli-  
19 gation on the part of the health care organization to provide any health  
20 care service to an enrollee that is not a covered benefit.

21 § 11-109. Protection of health care providers. 1. No health care  
22 organization or health care provider shall, by contract, policy or  
23 procedure:

24 (a) prohibit or restrict any health care provider from filing a  
25 complaint;

26 (b) prohibit or restrict any health care provider from making a report  
27 or commenting to the appropriate government agency regarding the poli-  
28 cies or practices of the organization which may negatively affect the  
29 quality of or access to health care services; or

30 (c) prohibit or restrict any health care provider from disclosing or  
31 commenting on policies or practices of the organization which may nega-  
32 tively affect the quality of or access to health care services to the  
33 public.

34 This subdivision shall not be construed to permit a health care  
35 provider to disclose any information regarding a patient which would  
36 otherwise be deemed confidential or privileged, or which should not be  
37 disclosed or discussed according to law or reasonable professional stan-  
38 dards.

39 2. No health care organization or health care provider shall terminate  
40 a contract or employment of a health care provider, or refuse to renew  
41 such a contract, or penalize a health care provider or reduce or limit  
42 the compensation of a health care provider solely because a health care  
43 provider has:

44 (a) advocated for, recommended or provided a particular health care  
45 service to a patient, to which the patient was entitled by contract or  
46 law;

47 (b) taken any action under subdivision one of this section;

48 (c) appealed or assisted in appealing a decision of the health care  
49 organization; or

50 (d) requested a hearing or review to which the provider was entitled.

51 3. No health care organization or health care provider shall apply any  
52 incentive, whether monetary or otherwise, to a health care provider  
53 intended or having the effect of inducing the health care provider to  
54 delay, fail or refuse to provide any health care service to which a  
55 patient is entitled by contract or law.

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

3 14. not apply to an action against a health care organization brought  
4 pursuant to section 11-108 of the general obligations law.

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

7 1. The provision of comprehensive health services directly or indi-  
8 rectly, by a health maintenance organization through its comprehensive  
9 health services plan shall not be considered the practice of the profes-  
10 sion of medicine by such organization or plan. [~~However, each~~] Except  
11 that:

12 (a) This subdivision shall not be construed to limit any liability the  
13 health maintenance organization or its comprehensive health services  
14 plan would otherwise have relating to any professional services rendered  
15 by, on behalf of, or in connection with the organization or plan.

16 (b) Each member, employee or agent of such organization or plan shall  
17 be fully and personally liable and accountable for any negligent or  
18 wrongful act or misconduct committed by him or her or any person under  
19 his or her direct supervision and control while rendering professional  
20 services on behalf of [~~such~~] the organization or plan.

21 (c) No contract or agreement between a health maintenance organization  
22 or its comprehensive health services plan and any health care provider  
23 shall delegate the liability of the health maintenance organization to  
24 any health care provider or shall require the health care provider to  
25 indemnify or hold harmless the organization or plan for any liability  
26 the organization or plan may incur.

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

32 § 6. This act shall take effect immediately.

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**SPONSORS MEMO:**

**NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
submitted in accordance with Assembly Rule III, Sec 1(e)**

**BILL NUMBER:** A5408A

**SPONSOR:** Gottfried (MS)

**TITLE OF BILL:** 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

**PURPOSE:** To hold health care organizations (such as HMOs) legally liable for the consequences of their decisions with regard to the amount of health care provided or denied. It also prohibits health care organizations (HCOs) from retaliating against health care providers that criticize HCOs about providing inadequate medical care or providing incentives that encourage the provider to delay, fail or refuse to provide adequate care.

**SUMMARY OF PROVISIONS:**

Section 1. Legislative findings.

Section 2. Adds § 11-108 and § 11-109 to the General Obligations Law to make health care organizations (HCOs) responsible for the decisions they make in the provision or denial of care to their subscribers. An HCO, such as an HMO or sponsor of a managed care product, is any entity that approves, arranges for, or pays for health care services.

The HCO would be responsible for damages to a patient resulting from a wrongful denial of care or payment for care that it was contractually or legally obligated to provide or cover. An HCO could not require a health care provider to hold it harmless or indemnify the HCO for its share of liability under this section.

The HCO could not restrict a health care provider from filing a complaint or commenting to a government agency on the HCO's performance. The HCO or health care provider could not terminate or penalize a health care provider because he or she has taken part in filing a complaint or has offered a service the HCO refused to offer. The HCO could not offer an incentive, whether monetary or other, intended to induce a health care provider to delay, fail or refuse health care service to a patient.

Section 3. Amends ? of C.P.L.R. to include conforming amendments. 1

Section 4. Amends ? of the Public Health Law, to state that the liability imposed by this bill shall not be circumvented by the HMO's claim that its activities cannot be considered the practice of medicine.

Section 5. Severability clause.

Section 6. Effective date.

**JUSTIFICATION:** A wide variety of organizations, such as HMOs and certain insurers that operate managed care plans, are integrating the functions of providing and financing the delivery of health care. In doing this, the HMO is in fact determining what care the physician can provide to a plan subscriber. This integration is breaking down traditional distinctions that separated the providers of health care from the entity that paid for this care. Increasingly, payor determinations are governing health care and controlling decisions that in the past were the exclusive domain of health care professionals and patients. This 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 responsible for the consequences of their decisions.

Health care organizations should not be allowed to evade liability by asserting that they do not deny care, and that they merely interpret a contract, which denies payment for care. In fact, by determining what is medically necessary, the HCO is judge and jury with regard to the care a doctor can provide to a patient. Language in the Public Health Law, that HMOs are not deemed to be practicing medicine, has been cited as meaning that they may not be held liable for practitioner malpractice. This bill would reject that interpretation of the law.

**LEGISLATIVE HISTORY:**

1997-98: A.1816-a - passed Assembly  
1999-2000: A. 1400-a - passed Assembly  
2001-02: A.8318 - passed Assembly  
2003-04: A.5733 - passed Assembly

**FISCAL IMPLICATIONS:** None.

**EFFECTIVE DATE:** Immediate.

**VETO MESSAGE:**

VETO MESSAGE - No. 252

TO THE ASSEMBLY:

I am returning herewith, without my approval, the following bill:

Assembly Bill Number 5397, entitled:

"AN ACT to amend the civil service law, in relation to grounds for which injunctive relief may be granted"

NOT APPROVED

This bill would amend the Civil Service law to change the legal standard for obtaining injunctive relief in connection with the filing of an improper practice charge. Currently, injunctive relief is available when it is shown that: (1) there is reasonable cause to believe an improper practice has occurred; and (2) immediate and irreparable injury, loss or damage will result and render the resulting judgment ineffectual. This bill would eliminate the irreparable injury requirement and replace it with the much lower threshold of the maintenance of the status quo being necessary to provide meaningful relief. The bill would take effect immediately.

Weakening the standard for injunctive relief would only serve to add unnecessary delay to the Public Employment Relations Board ("PERB") process and upset the careful balance between the parties. If charging parties can readily achieve a return to the status quo through liberalized injunctive relief without public employers having an opportunity to fully present their defenses, the incentive for prompt resolution of alleged improper practices through negotiation would be diminished. Similarly, the impetus for prompt adjudication of claims that cannot be settled would equally suffer. For these reasons, PERB urges my disapproval.

The bill is disapproved.

(signed) GEORGE E. PATAKI

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