



Lawsuit Reform Alliance of New York

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SUPPORT

BILL: S.7728 (HANNON) / A.11168 (Abate)
SUBJECT: Affidavit of merit and expert witness reform
DATE: June 18, 2018
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Summary:

New York continues to lead the nation in medical malpractice payouts — an amount that reached \$617,973,000 in 2017. Enacting this bill would provide necessary reforms to the civil practice rules regarding medical malpractice lawsuits to help reduce those costs.¹ First, the bill strengthens the requirement for plaintiffs’ attorneys in such actions to submit a certificate of merit. Rather than simply providing a declaration from the attorney, this bill would require an *affidavit* of merit from an appropriate medical professional detailing the applicable standard of care. Additionally, this proposal would create rules for disclosure of expert testimony as well as provide for the ability to cross examine an opposing party’s expert witnesses.

Why we support this legislation:

Deters the filing of meritless or dubious claims

- This bill would create a more effective system for examining the merits of medical liability claims. New York law requires plaintiffs in medical malpractice actions to present a certificate of merit before filing a lawsuit, but, unlike many other states, New York’s law is very permissive in that it only mandates that the plaintiff’s attorney submits a certificate that there is a “reasonable basis” for such action based on the opinion of one doctor that the attorney — not the medical community — believes to be knowledgeable.² This bill would require an affidavit of merit from a medical provider known to have expertise on the relevant issues. This will serve the important public policy goals of screening out dubious claims while encouraging settlement of those with merit.

Ends “Trial by Ambush”

- Current law provides no concrete time frame for the disclosure of expert witnesses. In practical effect, this lack of a standard time frame allows both plaintiffs and defendants to disclose their witnesses as late as 30 days prior to trial, which results in the common practice of “trial by ambush.” This unfairly disadvantages defendants because they are not afforded adequate time to prepare a defense or the ability to depose expert witnesses. The New York State Bar Association Committee on the Commercial Division has recommended that disclosure of experts take place prior to the note of issue, saying that, “trial by ambush – which 3101(d) implicitly permits – does nothing to further the pursuit of fair and efficient resolution.”³

¹Diederich Healthcare (2018). Medical Malpractice Payout Analysis.

²Behrens, M. and Silverman, C. (2017). State of Liability: New York’s costly tort laws and how to fix them. *Empire Center for Public Policy*. Albany, NY.

³NYSBA Commercial and Federal Litigation Section (2011). A Proposal for Enhanced Expert Disclosure in the New York State Commercial Division.

The Lawsuit Reform Alliance of New York is a not-for-profit association dedicated to reform of the civil justice system in order to foster a better business climate, promote job growth and address the growing cost of lawsuit abuse.