Maine Trial Lawyers Association

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TESTIMONY OF CHRIS BOOTS, CO-CHAIR OF THE LEGISLATIVE COMMITTEE OF THE MAINE TRAIL LAWYERS ASSOCIATION, IN OPPOSITION TO SECTIONS OF LD2151

Senator Baldacci, Representative Meyer, and Honorable Members of the Committee on Health and Human Services:

My name is Chris Boots. I live in South Portland. I practice law at Berman & Simmons, a state-wide firm that represents victims in personal injury and medical malpractice cases. I am also a co-chair of the Legislative Committee of the Maine Trial Lawyers Association. The MTLA is an association of attorneys who work primarily in the civil justice system, advocating for individual plaintiffs harmed by the fault of others. I am here to speak today on behalf of the MTLA, which opposes the parts of LD 2151 that allow medical providers and their outside vendors to increase what they charge for access to a patient's medical records.

Simply put, this bill would markedly increase the costs to Mainers of accessing their own medical records. This kind of cost increase is unjust in and of itself, yet also poses a significant barrier to the pursuit of personal injury and medical malpractice claims.

It may help, here, to describe how medical records come into play when Mainers injured by the negligence of others pursue a claim for damages against those responsible. If a person hurt in, say, a motor vehicle collision, retains an attorney to pursue a claim against the at-fault driver, their attorney will request the relevant medical records documenting the injuries that person sustained in the crash. This record collection is a necessary part of personal injury legal practice, as insurers generally refuse to credit a person for any injury or treatment without seeing documentation and refuse to make settlement offers without complete records.

The reason attorneys collect records on behalf of clients, rather than having clients do it themselves, is simple – many of our clients are seriously injured, facing mental and physical challenges and the stresses of rebuilding a life after injury. This type of chore is simply too overwhelming for the bulk of those we represent.

When attorneys request records, the medical provider or its vendor (often a large national corporation) assesses charges pursuant to 22 M.R.S.A. § 1711 as currently enacted. The attorney pays these charges up front. When a personal injury case resolves, however, these charges are passed on to a client as part of the costs of a case, like court filing fees.

This last point bears emphasis. The costs at issue come directly out of the pockets of patients themselves. A trial lawyer's fee or bottom line is not affected if the costs of obtaining medical records increase. If these costs increase, the result will be that persons injured by the negligence of others recover less, because they have to pay to access their own medical history in order to provide that to an insurance company.

Current law allows a provider to charge $5 for the initial page of medical records. LD 2151 would quadruple that initial page charge to $20. These numbers may seem small. But they add up. In practice, an injured person may see a dozen or more providers as part of their recovery – from an ambulance and emergency room to their primary care provider, specialists, and occupational or physical therapists. Insurers also typically demand five or ten years of prior medical history from a personal injury claimant, which increases the number of providers whose records must be requested and paid for. The volume of records necessary also increases

when a claimant has an unrelated but complicated health issue – say, cancer – and an insurer demands to review these records, as well.

This bill also allows providers to assess a $20 fee when records are not found – a practice not allowed under current law. In our work, we frequently hear from providers that they could not find records, only to hear back later that the records were ultimately located. LD 2151 would seemingly allow a provider to double-charge in that scenario. All of this means that LD 2151 could add hundreds of dollars to the costs of pursuing any kind of personal injury case.

In a case involving catastrophic injury, the costs of pursuing a case may represent a minor fraction of the damages recovered, and the impact of medical record costs may be marginal.

However, in more common personal injury cases that MTLA's members see every day – rear-end collisions resulting in whiplash, for example – recoveries can be modest. Medical record costs can ultimately take up a significant percentage of an injured person's recovery. If an injured person needs to pay $1,000 in medical record fees alone to achieve a $10,000 settlement, returns diminish and the incentives to pursue such a case decline. This is even more pronounced considering that a client's net recovery in any case is smaller than the total settlement, after paying for attorney's fees and non-medical record costs.

Increased medical records fees accordingly become an obstacle to accessing justice.

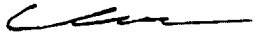
I should note that increased medical records fees would not only reduce an injured person's own recovery – they would also reduce the available funds necessary to repay MaineCare and Medicare in cases where one of those providers has paid for medical treatment related to a person's injury, and is due reimbursement out of the settlement.

Of course, there is some burden on medical providers in collecting and producing this information. But thanks to electronic records management, it seems that these burdens are decreasing, not increasing. Gone are the days when providers needed to photocopy by hand a patient's medical history. We now find that records are frequently provided simply as links to already-existing electronic databases where the records can be downloaded. If the ease of producing records has increased, costs should go down, not up.

Moreover, we find that the majority of medical providers in Maine are now using out-of-state, for-profit vendors to charge for record collection.[1] The fees assessed by this statute, in practice, are not going to the pockets of Maine medical providers but to these large corporations. MTLA does welcome the clarification in LD 2151 applying 22 M.R.S.A. § 1711 to providers "or their vendors," as we routinely have disputes when these out-of-state vendors attempt to argue that §1711 as currently enacted does not apply to them. This revision could be improved further by clarifying that the statute applies to all vendors providing records management services to Maine hospitals, no matter where they are located.

In short, the practical impact of the fee increases in this bill would be to take money from the pockets of injured Mainers trying to access their own medical histories, and put it into the pockets of providers or, more often than not, the large out-of-state corporations retained by providers for records management. This injustice could be avoided by declining to increase allowable medical records fees altogether, or by revising LD 2151 as proposed to exempt a patient's authorized representative, such as their own attorney, from its terms.

Sincerely,



Christopher C. Boots

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[1]Essentially all of Maine's large medical providers, in our recent experience, now use large out-of-state vendors. MaineHealth and Northern Light Health use Sharecare. Central Maine Healthcare, St. Joseph Healthcare, and St. Mary's Health System use Ciox.