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Nevada State Legislature
Senate Committee on Judiciary
401 S. Carson Street
Carson City, NV 89701-4747

March 25, 2015

Sent via electronic transmission to committee at:
SenJUD@sen.state.nv.us

RE: SB 291, Medical Damages - NAMIC's Letter *in Support* of Proposed Legislation

Dear Senator Brower, Chair; Senator Harris, Vice-Chair, and members of the Senate Committee on Judiciary:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to your committee for the March 26, 2015, public hearing. Unfortunately, I will not be able to attend the public hearing, because of a previously scheduled professional obligation.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,300 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than \$208 billion in annual premiums, accounting for 48 percent of the automobile/homeowners market and 33 percent of the business insurance market. NAMIC has 139 members who write property/casualty and workers' compensation insurance in the State of Nevada, which represents 40% of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC companies and the consumers we serve. Our educational programs enable us to become better leaders in our companies and the insurance industry for the benefit of our policyholders.

On behalf of NAMIC's members, I respectfully submit the following comments *in support* of the proposed legislation:

- 1) SB 291 will promote and facilitate fair and equitable economic damages awards and settlements.**

NAMIC's members appreciate and value the legal and societal importance of making sure that tort settlements are fair and appropriate for *both* claimants and defendants. In light of this reasonable public policy objective, NAMIC supports SB 291, as being a well-reasoned and well-balanced legislative measure designed to promote fair and equitable settlements for all parties.

Specifically, SB 291 would require that medical expense economic damages claims be restricted to only "actual" medical expense economic damages incurred by or on behalf of the claimant, and would disallow the awarding of over-stated, fictitious medical expenses economic damages claims, what many legal scholars refer to as "phantom economic damages" or "un-experienced medical expenses economic damages" claims. The bill does not change the definition of, or the assessment of non-economic damages that may be awarded to a claimant.

NAMIC believes that claimants should be fully and appropriately compensated for the sum total of their "actual" economic and non-economic damages. However, over-compensation of a claimant based upon un-experience or un-realized medical expenses economic damages by the claimant, is no more appropriate than under-compensation of the claimant. The goal of tort law should simply be . . . the fair and appropriate *compensation* of the claimant for their "actual damages". "Compensatory damages" is defined as to put an injured person in a position as nearly as possible equivalent to his position prior to the tort. (Restatement (Second) of Torts § 901, comment a (1979).

SB 291 will restore common-sense and logical integrity to the tort damages calculation process by preventing claimants from recovering medical expenses economic damages that are legally "illusory", because they were never actually experienced nor incurred by the claimant.

Just as we all know that the "sticker price" on an automobile at a car dealership is not the actual price to be "paid", so too do we all know that the "billed" amount of medical services provided is not the amount to be actually paid, because the medical services are re-priced to take into consideration accounting "write-offs" and to conform to the terms of the business relationship between the provider and medical services payor. Therefore, the amount to be "paid" is really the agreed upon statement by the parties of the *reasonable value* of the medical services provided and the fair and appropriate measure for the medical expenses economic damages.

2) The proposed legislation will prevent "windfall recoveries" that encourage and reward the filing of frivolous economic damages claims.

Generally speaking, if one is allowed to recover more than he/she actually lost, the amount recovered in excess of the amount actually lost would be considered an "economic windfall", because it is not commensurate with the amount of the actual loss. Ergo, if a claimant is allowed to recover claimed medical expenses economic damages that exceed his/her actual economic losses, the claimant has received a "windfall recovery."

From a public policy standpoint, the at-fault party should not be required to provide the claimant with a "windfall recovery", because the at-fault party is only legally required to make sure that the claimant is financially restored to his/her pre-tort claims position, i.e. to be "made-whole" again. Providing the claimant with a "windfall recovery" does not *restore* the claimant to his/her

pre-tort claims position, it *improves* the claimant's position, which is legally inappropriate and conceptually unfair.

For example, if a Defendant, in addition to paying \$100,000 in non-economic damages to the claimant, is required to pay the "billed" amount of medical services in a case (\$37,600) even though the claimant was only obligated to pay to the medical provider (\$13,400) of the billed (\$37,600) in medical provider charges, the claimant would recover from the defendant an "economic windfall" of \$24,200. How is this fair?

A recent California Supreme Court ruling addressed the "phantom damages" issue and found that allowing plaintiffs to recover all medical costs billed, including a vast majority that are not paid, results in a windfall to plaintiffs. In *Howell v. Hamilton Meats & Provisions Inc.*, the California Supreme Court found that because the lesser amount was accepted by the medical provider as payment-in-full, the injured plaintiff did not suffer any economic loss for the billed amount. *Howell v. Hamilton Meats & Provisions Inc.*, 52 Cal.4th 541, 257 P.3d 81 (2011).

3) HB 1106 is a pro-business, pro-insurance consumer, pro-taxpayer bill that will make it more difficult for unscrupulous claimants to "game the legal system" and burden society with the economic cost of settlement abuse.

It is an inescapable economic reality that the many pay for the abuses of the few, via higher costs of goods and services. Consequently, it is incumbent upon policymakers to protect the common good and pass legislation like SB 291 that will prevent individuals from recovering fictitious medical expenses economic damages that adversely impact the general welfare of the entire society.

"Phantom damages" are unnecessary insurance rate cost-drivers that adversely impact affordability of insurance for individuals and small businesses, and congests court trial dockets with frivolous damages claims that delay the adjudication of meritorious lawsuits.

For the aforementioned reasons, NAMIC respectfully requests that the Senate Committee on Judiciary **VOTE YES on SB 291**, and restore balance and fairness to the tort economic damages law.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC's written testimony.

Respectfully,



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