

Memorandum

TO: Ms. Ann Spillane & Ms. Anna Crane of the Office of Governor JB Pritzker
FROM: Meredith A. Duncan of Polsinelli PC on behalf of HCCI
Nicolas J. Lynn of Duane Morris on behalf of IHCA
Adam Guetzow of Hinshaw and Culbertson LLP on behalf of LeadingAge Illinois
SUBJECT: Illinois General Assembly House Bill 3360 as amended by Senate Amendment 1
DATE: February 9, 2021

Dear Ms. Spillane,

On behalf of the Health Care Council of Illinois, the Illinois Health Care Association and LeadingAge Illinois, please accept the following summary and agenda for our call this afternoon.

Background

HB 3360, as currently drafted, will specifically impact upon the Illinois long-term care community because the Illinois Nursing Home Care Act (the "Act") already requires long-term care licensees to pay actual damages and costs and attorney fees to those residents who successfully establish a violation of the Act. (see 210 ILCS 45/3-602).

That is, with the passing of HB 3360, Illinois law will mandate licensees under the Act to pay actual damages, **plus** costs, **plus** attorneys' fees, **plus** prejudgment interest in any case where the plaintiff prevails at trial.

Specific Concerns

The compounding of penalties that will result with the passing of HB 3360 can and will have wide sweeping repercussions - not only on the owners and operators of licensed facilities - but also have an unintended negative impact on the residents and communities in those licensed facilities.

- The attorney fee provision found within the Act was initially passed to incentivize plaintiff attorneys to accept litigated matters against long-term care facilities to ensure adequate representation of residents and their families. This goal has long been accomplished - there is little to no shortage of nursing home litigation and eager representation. Now, the attorney fee provision is used as a tool to artificially inflate settlements in nursing home litigation, which is not a concern any other healthcare providers face. HB 3360 further compounds the penalties that long term care facilities face in litigation and will be used to further inflate long term care settlements. This "**double penalty**" impact to nursing homes lacks equity and/or parity when compared to other sectors of the healthcare industry.
- By imposing further costs and monetary penalties on licensed long term care facilities and inflating settlement values, HB 3360 will **unintentionally divert monies away from resident care** facility operations, thereby reducing the facilities ability to invest in staffing, equipment, programs, facility improvements,

and other initiatives to improve care delivery and develop quality assurance programs beyond state minimum requirements.

- Furthermore, skilled nursing facilities are facing an **insurance coverage crisis**. Prior to the pandemic the overwhelming volume of cases have caused licensed facilities to struggle to find affordable insurance. Moreover, Illinois long term care providers are confronting a new challenge because many policies contain virus exclusions. The impending threat of COVID-19 litigation cases that will be filed over the next two years will threaten the viability of many facilities; and the addition of prejudgment interest on top of existing penalties will only hasten **facility closures**.
- Because of the attorney's fee provision in the Act, licensed long term care facilities are already incentivized to engage in settlement at the earliest possible time. Thus, HB 3360 is **not necessary to facilitate early settlements** for the long term care industry.

HB 3360 is unprecedented in that it will impose one of the most unbridled methods of prejudgment interest collection in personal injury cases in the country (i.e. no method for the defendant to avoid imposition of prejudgment interest on a verdict and no limitation on the types of damages—actual or future, economic or non-economic) included in the calculation of prejudgment interest. As currently drafted, HB 3360 provides that pre-judgment interest will accrue from the date of notice of injury. Because the prejudgment accrues initially and without exception, it encourages delay in commencing suit, rewards decisions to voluntarily non-suit a case for a year and other actions that allows the case to persist and accrue interest.

This lengthier tenure, compounded with the attorney fees already awarded against long-term care owners and operators, can and likely will have drastic repercussions on the industry and Illinois residents' access to skilled nursing services.

Request

To best ensure equality and parity for the long-term care industry, the following language is proposed for HB 3360:

"...notwithstanding any other provision of law, any defendant in an action in which statutory fees are requested to be awarded on judgment shall not be liable to pay prejudgment interest in the action brought directly or indirectly against it by an injured party."