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FISCAL IMPACT REPORT

ORIGINAL DATE 2/26/19
 LAST UPDATED 3/01/19 HB 629/HCPACS

SPONSOR HCPAC

SHORT TITLE Medical Malpractice Changes SB _____

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Uncalculable*	Uncalculable*	Uncalculable*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases) *See Fiscal Implications

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Superintendent of Insurance (OSI)
 New Mexico Medical Board (MB)

SUMMARY

Synopsis of Bill

The House Consumer and Public Affairs Committee Substitute for House Bill 629 makes multiple changes to the Medical Malpractice Act (Section 41-5 NMSA 1978), the effect of which are to increase the recoverable limits patients can request under the Medical Malpractice Act (MMA), which has limited recovery since 1995. It redefines a “business entity” to include partnerships and corporations, and institutes a much higher cap on damages that can be assessed on those entities than on individual practitioners. These new limits would take effect with malpractice events occurring on or after July 1, 2020, and annual adjustments based on the increase in consumer price index would be made each year beginning in 2022. The bill would establish an advisory committee to be composed of physicians and attorneys and chaired by the superintendent of insurance to review all matters having to do with the Medical Practice Act and to relate the findings to the governor and the legislature on a yearly basis. OSI would also determine the premium surcharge to be assessed on each medical care provider, hospital and other entity, “based on sound actuarial standards,” in order to continue to adequately fund the Patient’s Compensation Fund (PCF), which would continue to pay any amount between the individual provider’s cap, set at \$200,000, and the award.

Provisions of the bill by section are detailed in the table under “Significant Issues,” below.

FISCAL IMPLICATIONS

There is no appropriation. As the state is a purchaser of health care (through the General Services Department, the Public School Insurance Authority, the Retiree Health Care Authority, etc.), it is likely that large increases in chiropractor, physician, podiatrist, and nurse anesthetist fees to cover the increased price of insurance coverage or surcharges would result from the much higher malpractice caps leading to a marked increase in the cost of care covered by these agencies.

SIGNIFICANT ISSUES

Provisions of the bill related to each section of it:

Section of HB 629	Section in Statutes NMSA 1978	Provisions/Changes
1	41-5-3	Definitions, among them: “business entity” includes corporations, limited liability partnerships, and nonprofit corporations doing business in NM. “Health care provider” includes persons, hospitals, clinics and business entities providing health care. Professional or occupational license” means a license under the Chiropractic Practice Act, the Medical Practice Act, the Osteopathic Medicine Act, the Podiatry Act and also licenses as certified registered nurse anesthetists.
2	41-5-5	Health care providers, to be covered by the act, would still be required to show they had insurance in the amount of \$200,000 per event/\$600,000 for multiple events. OSI would assess each business entity (as defined in Section 1 of the bill) additional charges based on an assessment of risk for that entity.
3	41-5-6	As of January 1, 2020, the aggregate amount that could be claimed in a malpractice case would go up from the present \$600,000 to \$2,000,000 for individual health care providers, and from \$600,000 to \$25,000,000 for business entities, including hospitals and clinics. The cap would be increased yearly beginning in 2022 on the basis of change in the consumer price index.
4	41-5-7	There would continue to be no limitation on awards for future medical care, and juries would be given an interrogatory about future medical care in each case.
5	41-5-25	OSI would be permitted to purchase reinsurance to be certain awards of \$25,000,000.
6	New	No state employee or former state employee could disclose information about a health care provider’s settlement of a case.
7	New	Establishes an advisory committee, to be made up of three attorneys, appointed by the NM trial lawyers’ association and three physicians, appointed by the NM Medical Society, and chaired by the Superintendent of Insurance. It would meet at least twice per year and deal with all matters related to the Medical

		Malpractice Act.
8	New	The act would become effective July 1, 2019.

The current malpractice act went into effect with malpractice claims starting April 1, 1995. The cap on malpractice awards instituted at that time was \$600,000, and it has remained at that level since then. The first \$200,000 of liability was and is the responsibility of the individual medical care provider (and/or his/her insurance carrier); the remaining \$400,000 was and is to be paid through the Patient’s Compensation Fund, which was as a non-reverting fund, to be invested by the Office of the Superintendent of Insurance. The income to the fund is made up of surcharges on health care providers’ medical malpractice insurance and paid by those providers, in an amount determined by OSI to be fiscally prudent. According to the website usinflationcalculator.com, \$600,000 in 1995 dollars translates into \$990,992 in 2019 dollars.

The Medical Board comments on effects it would expect if HB 629 is passed:

Given that New Mexico is a large, rural State, issues like schooling, jobs, recompense and liability are identified as key elements to attract and to retain good practitioners in New Mexico. The limits of Medical Malpractice Act liability, at \$200,000 per occurrence, \$600,000 annual were and remain an important factor in attracting and keeping MDs in NM.

Notably, the net effect of such a significant liability change will have far reaching effect. One such change is likely the reorganization of medical entities to avoid these increased caps. Clinics and other groups have already been discussing the possibility that they may dissolve their practice entities to become independent practitioners not subject to these caps. Such reorganizations by their very nature impact patient care while the entity is reorganizing and is highly concerning to the NMMB. A second change could be increasing cost for medical services thereby straining an already strained medical care system. It is unknown what the increases would be but they are likely to be significant. Third, physicians and other practitioners could simply leave NM, especially in those less profitable markets, which are largely rural communities who can ill afford to lose even one health care provider.

OSI comments on what it considers would “single-handedly erase all progress made since 1976, and will significantly contribute to the current critical situation with healthcare by creating a shortage of doctors and increasing the cost of healthcare even further than it already is.” OSI continues,

The purpose of the MMA, when it was established in 1976, was to resolve a medical malpractice insurance crisis due to rates being unaffordable, and resulting in a shortage of doctors providing healthcare in New Mexico. If passed, this bill will single-handedly erase all progress made since 1976, and will significantly contribute to the current critical situation with healthcare by creating a shortage of doctors and increasing the cost of healthcare even further than it already is...

According to the latest actuarial study completed for the PCF (as of 12/31/2017), for individual doctors, increasing the PCF coverage cap from \$600K to \$2M, and assuming a minimal increase in claims frequency of 2%, the estimated impact on surcharges will be between 18% and 35%. A more significant increase in claims

frequency of 10% will result in an estimated impact between 28% and 45%.

OSI does not have any data or analysis estimating the impact of raising the PCF limits to \$25M for business entities, as such an extreme increase has never been considered. But reflecting on the impact described above of increasing limits from \$600K to \$2M, the impact of increasing limits from the current \$600K to \$25M, will be unimaginably large. Because the definition of business entities includes small doctor and even individual practices (limited liability companies and partnerships), PCF coverage with the proposed limits will be simply unaffordable to such healthcare providers.

Such increases in PCF surcharges will either entirely drive doctors out of New Mexico, creating a healthcare crisis due to a shortage of healthcare professionals, or it will increase the cost of providing medical services and therefore the cost of healthcare for most New Mexico consumers beyond affordability.

The Legislature should also consider the impact of raising caps to \$25M for rural hospitals and other rural medical practices, who may not be able to afford the PCF surcharges that would be required. Available and affordable health care could possibly only be available to urban residents, if those medical practices are forced to close.

At least one medical insurer has indicated in a public letter that it would leave the business in New Mexico and the nine hospitals and 682 health care providers it covers, if the provisions in this act become law. In addition, LFC analysts have received a copy of a letter from a large insurance broker, indicating the opinion that enactment of such high caps would prompt insurers to refuse to ensure New Mexico business entities, which, according to the bill's definition, includes partnerships, limited liability corporations and other small and large businesses.

PERFORMANCE IMPLICATIONS

According to OMI, "As noted above, increasing the PCF coverage cap from \$600K to \$2M, and assuming a minimal increase in claims frequency of 2%, the estimated impact on surcharges will be between 18 percent and 35 percent for doctors, and no study has been done that addresses the increase in raising the cap to \$25M for hospitals or small practitioner offices. Nor has a study indicated how many health care providers would go out of business as a result of surcharges they could not pay.

"Raising limits and increasing the cost of PCF coverage will reduce fund participation by medical providers. In accordance with the law of large numbers, this will result in more volatility in the fund, thus jeopardizing the health of the PCF."

TECHNICAL ISSUES

As noted by OSI, "One of [the] requirements [of the act] is the completion of an actuarial study to determine the PCF surcharge for each entity seeking admission into the PCF. Such a requirement would be entirely meaningless and imprudent. Small practices lack the volume required to complete a credible and meaningful study, and the considerable expense associated with obtaining an actuarial study will be a wasteful and cumbersome burden on small doctor practices."

ALTERNATIVES

The malpractice limits could be increased in line with the inflation index.

MB suggests that “the Medical Malpractice Act not be amended until the current case of *McAneny v. Franchini* is concluded, a new more thorough and appropriate actuarial study can be done, and a blue-ribbon panel of experts can study the Medical Malpractice Act in depth. What is proposed in HB629 appears to have little support from practitioners working in New Mexico.” [*McAneny v. Franchini* involved four physicians suing the Superintendent of Insurance over OSI’s allowing hospitals to buy into the Patient’s Compensation Fund, with their being concerned that the action would dilute the PCF’s effects. The plaintiffs were concerned that this might lead to the PCF not being able to pay the difference between physicians’ personal liability of \$200,000 and a verdict or settlement of up to \$600,000, the current cap. The court ruled on January 31, 2019 in favor of the plaintiffs. Among the remedies granted by Judge David Thomson was “The Superintendent shall have rules promulgated under the APA [Administrative Practices Act] and in place within ninety days of the effective date of this Judgement.” NO. D-101-CV-2017-021-40.]

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