

SENATE TAX, BUSINESS AND TRANSPORTATION
COMMITTEE SUBSTITUTE FOR
SENATE BILL 523

56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023

AN ACT

RELATING TO THE PUBLIC PEACE, HEALTH, SAFETY AND WELFARE;
AMENDING THE MEDICAL MALPRACTICE ACT TO CHANGE THE LIMITATION
OF RECOVERY FOR CERTAIN CLAIMS AGAINST FACILITIES THAT ARE NOT
HOSPITAL-CONTROLLED; UPDATING REPORTING REQUIREMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 41-5-3 NMSA 1978 (being Laws 1976,
Chapter 2, Section 3, as amended) is amended to read:

"41-5-3. DEFINITIONS.--As used in the Medical Malpractice
Act:

A. "advisory board" means the patient's
compensation fund advisory board;

B. "control" means equity ownership in a business
entity that:

(1) represents more than fifty percent of the

1 total voting power of the business entity; or

2 (2) has a value of more than fifty percent of
3 that business entity;

4 [~~B.~~] C. "fund" means the patient's compensation
5 fund;

6 [~~C.~~] D. "health care provider" means a person,
7 corporation, organization, facility or institution licensed or
8 certified by this state to provide health care or professional
9 services as a doctor of medicine, hospital, outpatient health
10 care facility, doctor of osteopathy, chiropractor, podiatrist,
11 nurse anesthetist, physician's assistant, certified nurse
12 practitioner, clinical nurse specialist or certified nurse-
13 midwife or a business entity that is organized, incorporated or
14 formed pursuant to the laws of New Mexico that provides health
15 care services primarily through natural persons identified in
16 this subsection. "Health care provider" does not mean a person
17 or entity protected pursuant to the Tort Claims Act or the
18 Federal Tort Claims Act;

19 [~~D.~~] E. "hospital" means a facility licensed as a
20 hospital in this state that offers in-patient services, nursing
21 or overnight care on a twenty-four-hour basis for diagnosing,
22 treating and providing medical, psychological or surgical care
23 for three or more separate persons who have a physical or
24 mental illness, disease, injury or rehabilitative condition or
25 are pregnant and may offer emergency services. "Hospital"

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1 includes a hospital's parent corporation, subsidiary
2 corporations or affiliates if incorporated or registered in New
3 Mexico; employees and locum tenens providing services at the
4 hospital; and agency nurses providing services at the hospital.
5 "Hospital" does not mean a person or entity protected pursuant
6 to the Tort Claims Act or the Federal Tort Claims Act;

7 F. "independent outpatient health care facility"
8 means a health care facility that is an ambulatory surgical
9 center, urgent care facility or free-standing emergency room
10 that is not, directly or indirectly through one or more
11 intermediaries, controlled or under common control with a
12 hospital. "Independent outpatient health care facility"
13 includes a facility's employees, locum tenens providers and
14 agency nurses providing services at the facility. "Independent
15 outpatient health care facility" does not mean a person or
16 entity protected pursuant to the Tort Claims Act or the Federal
17 Tort Claims Act;

18 [~~E.~~] G. "independent provider" means a doctor of
19 medicine, doctor of osteopathy, chiropractor, podiatrist, nurse
20 anesthetist, physician's assistant, certified nurse
21 practitioner, clinical nurse specialist or certified nurse-
22 midwife who is not an employee of a hospital or outpatient
23 health care facility. "Independent provider" does not mean a
24 person or entity protected pursuant to the Tort Claims Act or
25 the Federal Tort Claims Act. "Independent provider" includes:

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1 (1) a health care facility that is:

2 (a) licensed pursuant to the Public
3 Health Act as an outpatient facility;

4 (b) not an ambulatory surgical center,
5 urgent care facility or free-standing emergency room; and

6 (c) not hospital-controlled; and

7 (2) a business entity that is not a hospital
8 or outpatient health care facility that employs or consists of
9 members who are licensed or certified as doctors of medicine,
10 doctors of osteopathy, chiropractors, podiatrists, nurse
11 anesthetists, physician's assistants, certified nurse
12 practitioners, clinical nurse specialists or certified nurse-
13 midwives and the business entity's employees;

14 ~~[F.]~~ H. "insurer" means an insurance company
15 engaged in writing health care provider malpractice liability
16 insurance in this state;

17 ~~[G.]~~ I. "malpractice claim" includes any cause of
18 action arising in this state against a health care provider for
19 medical treatment, lack of medical treatment or other claimed
20 departure from accepted standards of health care that
21 proximately results in injury to the patient, whether the
22 patient's claim or cause of action sounds in tort or contract,
23 and includes but is not limited to actions based on battery or
24 wrongful death; "malpractice claim" does not include a cause of
25 action arising out of the driving, flying or nonmedical acts

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1 involved in the operation, use or maintenance of a vehicular or
2 aircraft ambulance;

3 ~~[H.]~~ J. "medical care and related benefits" means
4 all reasonable medical, surgical, physical rehabilitation and
5 custodial services and includes drugs, prosthetic devices and
6 other similar materials reasonably necessary in the provision
7 of such services;

8 ~~[I.]~~ K. "occurrence" means all injuries to a
9 patient caused by health care providers' successive acts or
10 omissions that combined concurrently to create a malpractice
11 claim;

12 ~~[J.]~~ L. "outpatient health care facility" means an
13 entity that is hospital-controlled and is licensed pursuant to
14 the Public Health Act as an outpatient facility, including
15 ambulatory surgical centers, free-standing emergency rooms,
16 urgent care clinics, acute care centers and intermediate care
17 facilities and includes a facility's employees, locum tenens
18 providers and agency nurses providing services at the facility.

19 "Outpatient health care facility" does not include:

- 20 (1) independent providers;
- 21 (2) independent outpatient health care
22 facilities; or
- 23 (3) individuals or entities protected pursuant
24 to the Tort Claims Act or the Federal Tort Claims Act;

25 ~~[K.]~~ M. "patient" means a natural person who

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1 received or should have received health care from a health care
2 provider, under a contract, express or implied; and

3 ~~[E-]~~ N. "superintendent" means the superintendent
4 of insurance."

5 SECTION 2. Section 41-5-5 NMSA 1978 (being Laws 1992,
6 Chapter 33, Section 2, as amended) is amended to read:

7 "41-5-5. QUALIFICATIONS.--

8 A. To be qualified under the provisions of the
9 Medical Malpractice Act, a health care provider, except an
10 independent outpatient health care facility, shall:

11 (1) establish its financial responsibility by
12 filing proof with the superintendent that the health care
13 provider is insured by a policy of malpractice liability
14 insurance issued by an authorized insurer in the amount of at
15 least two hundred fifty thousand dollars (\$250,000) per
16 occurrence or by having continuously on deposit the sum of
17 seven hundred fifty thousand dollars (\$750,000) in cash with
18 the superintendent or such other like deposit as the
19 superintendent may allow by rule; provided that hospitals and
20 hospital-controlled outpatient health care facilities that
21 establish financial responsibility through a policy of
22 malpractice liability insurance may use any form of malpractice
23 insurance; and provided further that for independent providers,
24 in the absence of an additional deposit or policy as required
25 by this subsection, the deposit or policy shall provide

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1 coverage for not more than three separate occurrences; and

2 (2) pay the surcharge assessed on health care
3 providers by the superintendent pursuant to Section 41-5-25
4 NMSA 1978.

5 B. To be qualified under the provisions of the
6 Medical Malpractice Act, an independent outpatient health care
7 facility shall:

8 (1) establish its financial responsibility by
9 filing proof with the superintendent that the health care
10 provider is insured by a policy of malpractice liability
11 insurance issued by an authorized insurer in the amount of at
12 least five hundred thousand dollars (\$500,000) per occurrence
13 or by having continuously on deposit the sum of one million
14 five hundred thousand dollars (\$1,500,000) in cash with the
15 superintendent or other like deposit as the superintendent may
16 allow by rule; provided that for independent outpatient health
17 care facilities, in the absence of an additional deposit or
18 policy as required by this subsection, the deposit or policy
19 shall provide coverage for not more than three separate
20 occurrences; and

21 (2) pay the surcharge assessed on independent
22 outpatient health care facilities by the superintendent
23 pursuant to Section 41-5-25 NMSA 1978.

24 ~~[B.]~~ C. For hospitals or hospital-controlled
25 outpatient health care facilities electing to be covered under

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1 the Medical Malpractice Act, the superintendent shall
2 determine, based on a risk assessment of each hospital or
3 hospital-controlled outpatient health care facility, each
4 hospital's or hospital-controlled outpatient health care
5 facility's base coverage or deposit and additional charges for
6 the fund. The superintendent shall arrange for an actuarial
7 study before determining base coverage or deposit and
8 surcharges.

9 ~~[G-]~~ D. A health care provider not qualifying under
10 this section shall not have the benefit of any of the
11 provisions of the Medical Malpractice Act in the event of a
12 malpractice claim against it; provided that beginning July 1,
13 2021, hospitals and hospital-controlled outpatient health care
14 facilities shall not participate in the medical review process,
15 and beginning January 1, 2027, hospitals and hospital-
16 controlled outpatient health care facilities shall have the
17 benefits of the other provisions of the Medical Malpractice Act
18 except participation in the fund."

19 **SECTION 3.** Section 41-5-6 NMSA 1978 (being Laws 1992,
20 Chapter 33, Section 4, as amended) is amended to read:

21 "41-5-6. LIMITATION OF RECOVERY.--

22 A. Except for punitive damages and past and future
23 medical care and related benefits, the aggregate dollar amount
24 recoverable by all persons for or arising from any injury or
25 death to a patient as a result of malpractice shall not exceed

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1 six hundred thousand dollars (\$600,000) per occurrence for
 2 malpractice claims brought against health care providers if the
 3 injury or death occurred prior to January 1, 2022. In jury
 4 cases, the jury shall not be given any instructions dealing
 5 with this limitation.

6 B. Except for punitive damages and past and future
 7 medical care and related benefits, the aggregate dollar amount
 8 recoverable by all persons for or arising from any injury or
 9 death to a patient as a result of malpractice shall not exceed
 10 seven hundred fifty thousand dollars (\$750,000) per occurrence
 11 for malpractice claims against independent providers; provided
 12 that, beginning January 1, 2023, the per occurrence limit on
 13 recovery shall be adjusted annually by the consumer price index
 14 for all urban consumers.

15 C. [~~In calendar year 2022 and subsequent calendar~~
 16 ~~years]~~ The aggregate dollar amount recoverable by all persons
 17 for or arising from any injury or death to a patient as a
 18 result of malpractice, except for punitive damages and past and
 19 future medical care and related benefits, shall not exceed [~~the~~
 20 ~~following amounts]~~ seven hundred fifty thousand dollars
 21 (\$750,000) for claims brought against an independent outpatient
 22 health care facility [~~that is not majority-owned and~~
 23 ~~-controlled by a hospital-~~

24 ~~(1)]~~ for an injury or death that occurred in
 25 calendar years 2022 and 2023 [~~seven hundred fifty thousand~~

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1 ~~dollars (\$750,000) per occurrence;~~

2 ~~(2) for an injury or death that occurred in~~
3 ~~calendar year 2024, five million dollars (\$5,000,000) per~~
4 ~~occurrence;~~

5 ~~(3) for an injury or death that occurred in~~
6 ~~calendar year 2025, five million five hundred thousand dollars~~
7 ~~(\$5,500,000) per occurrence;~~

8 ~~(4) for an injury or death that occurred in~~
9 ~~calendar year 2026, six million dollars (\$6,000,000) per~~
10 ~~occurrence; and~~

11 ~~(5) for an injury or death that occurred in~~
12 ~~calendar year 2027 and each calendar year thereafter, the~~
13 ~~amount provided in Paragraph (4) of this subsection, adjusted~~
14 ~~annually by the consumer price index for all urban consumers,~~
15 ~~per occurrence].~~

16 D. In calendar year 2024 and subsequent years, the
17 aggregate dollar amount recoverable by all persons for or
18 arising from an injury or death to a patient as a result of
19 malpractice, except for punitive damages and past and future
20 medical care and related benefits, shall not exceed the
21 following amounts for claims brought against an independent
22 outpatient health care facility:

23 (1) for an injury or death that occurred in
24 calendar year 2024, one million dollars (\$1,000,000) per
25 occurrence; and

1 (2) for an injury or death that occurred in
2 calendar year 2025 and thereafter, the amount provided in
3 Paragraph (1) of this subsection, adjusted annually by the
4 prior three-year average consumer price index for all urban
5 consumers, per occurrence.

6 [~~D.~~] E. In calendar year 2022 and subsequent
7 calendar years, the aggregate dollar amount recoverable by all
8 persons for or arising from any injury or death to a patient as
9 a result of malpractice, except for punitive damages and past
10 and future medical care and related benefits, shall not exceed
11 the following amounts for claims brought against a hospital or
12 [~~an~~] a hospital-controlled outpatient health care facility
13 [~~that is majority-owned and -controlled by a hospital~~]:

14 (1) for an injury or death that occurred in
15 calendar year 2022, four million dollars (\$4,000,000) per
16 occurrence;

17 (2) for an injury or death that occurred in
18 calendar year 2023, four million five hundred thousand dollars
19 (\$4,500,000) per occurrence;

20 (3) for an injury or death that occurred in
21 calendar year 2024, five million dollars (\$5,000,000) per
22 occurrence;

23 (4) for an injury or death that occurred in
24 calendar year 2025, five million five hundred thousand dollars
25 (\$5,500,000) per occurrence;

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1 (5) for an injury or death that occurred in
2 calendar year 2026, six million dollars (\$6,000,000) per
3 occurrence; and

4 (6) for an injury or death that occurred in
5 calendar year 2027 and each calendar year thereafter, the
6 amount provided in Paragraph (5) of this subsection, adjusted
7 annually by the consumer price index for all urban consumers,
8 per occurrence.

9 ~~[E.]~~ F. The aggregate dollar amounts provided in
10 Subsections B through ~~[D]~~ E of this section include payment to
11 any person for any number of loss of consortium claims or other
12 claims per occurrence that arise solely because of the injuries
13 or death of the patient.

14 ~~[F.]~~ G. In jury cases, the jury shall not be given
15 any instructions dealing with the limitations provided in this
16 section.

17 ~~[G.]~~ H. The value of accrued medical care and
18 related benefits shall not be subject to any limitation.

19 ~~[H.]~~ I. Except for an independent outpatient health
20 care facility, a health care provider's personal liability is
21 limited to two hundred fifty thousand dollars (\$250,000) for
22 monetary damages and medical care and related benefits as
23 provided in Section 41-5-7 NMSA 1978. Any amount due from a
24 judgment or settlement in excess of two hundred fifty thousand
25 dollars (\$250,000) shall be paid from the fund, except as

1 provided in [~~Subsection I~~] Subsections J and K of this section.

2 J. An independent outpatient health care facility's
3 personal liability is limited to five hundred thousand dollars
4 (\$500,000) for monetary damages and medical care and related
5 benefits as provided in Section 41-5-7 NMSA 1978. Any amount
6 due from a judgment or settlement in excess of five hundred
7 thousand dollars (\$500,000) shall be paid from the fund.

8 [~~F.~~] K. Until January 1, 2027, amounts due from a
9 judgment or settlement against a hospital or hospital-
10 controlled outpatient health care facility in excess of seven
11 hundred fifty thousand dollars (\$750,000), excluding past and
12 future medical expenses, shall be paid by the hospital or
13 hospital-controlled outpatient health care facility and not by
14 the fund. Beginning January 1, 2027, amounts due from a
15 judgment or settlement against a hospital or hospital-
16 controlled outpatient health care facility shall not be paid
17 from the fund.

18 [~~J.~~] L. The term "occurrence" shall not be
19 construed in such a way as to limit recovery to only one
20 maximum statutory payment if separate acts or omissions cause
21 additional or enhanced injury or harm as a result of the
22 separate acts or omissions. A patient who suffers two or more
23 distinct injuries as a result of two or more different acts or
24 omissions that occur at different times by one or more health
25 care providers is entitled to up to the maximum statutory

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1 recovery for each injury."

2 SECTION 4. Section 41-5-29 NMSA 1978 (being Laws 1992,
3 Chapter 33, Section 10, as amended) is amended to read:

4 "41-5-29. FUND REPORTS.--

5 A. On January 31 of each year, the superintendent
6 shall, upon request, provide a written report to all interested
7 persons of the following information:

8 [A-] (1) the beginning and ending calendar
9 year balances in the fund;

10 [B-] (2) an itemized accounting of the total
11 amount of contributions to the fund;

12 [C-] (3) all information regarding closed
13 claims files, including an itemized accounting of all payments
14 paid out; and

15 [D-] (4) any other information regarding the
16 fund that the superintendent or the legislature considers to be
17 important.

18 B. The superintendent or the superintendent's
19 designee shall track and make publicly available the following
20 information regarding outpatient health care facilities:

21 (1) the total number of claims filed against
22 outpatient health care facilities by year;

23 (2) the total number of settlements paid out
24 on behalf of outpatient health care facilities by year; and

25 (3) the dollar amounts of settlements paid out

1 by the fund on behalf of outpatient health care facilities by
2 year."

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