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FISCAL IMPACT REPORT

SPONSOR Townsend/Pettigrew/Lane/Rehm/Montoya LAST UPDATED _____
ORIGINAL DATE 2/17/23
SHORT TITLE Medical Malpractice Damages Cap BILL NUMBER House Bill 88
ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		Indeterminate but substantial	Indeterminate but substantial	Indeterminate but substantial	Recurring	Patient's Compensation Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Relates to HB465, HB63, SB296, HB500, SB446, SB447

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (NMAG)

Human Services Department (HSD)

NM Medical Society (NMMS)

Office of the Superintendent of Insurance (OSI)

SUMMARY

Synopsis of House Bill 88

House Bill 88 (HB88) would amend the Medical Malpractice Act to impose a limit of \$750 thousand per occurrence for claims for injury and death against outpatient facilities that are not majority-owned and -controlled by a hospital, subject to a cost-of-living adjustment beginning January 1, 2023.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

The LFC annual recommendation to the Legislature, *Legislating for Results: Appropriation Recommendations* notes:

The patient’s compensation fund (PCF) pays malpractice settlements for member physicians and hospitals. Established under the New Mexico Medical Malpractice Act, the program provides affordable malpractice coverage that caps the amount of damages awarded against the member healthcare providers. The fund’s solvency has been a concern in recent years as Laws 2021, Chapter 16, amended the Medical Malpractice Act to include new providers eligible for participation in the PCF, raised the required underlying coverage limit from \$200 thousand to \$250 thousand, and increased the cap on nonmedical damages for independent providers from \$600 thousand to \$750 thousand in 2022, with an inflation adjustment annually thereafter.

Laws 2021, Chapter 16, also required the PCF deficit be eliminated by January 1, 2027. The fund has a projected deficit of almost \$69 million despite a \$30 million infusion of state funds during the 2022 regular legislative session. According to a September 2022 actuarial report, OSI would need to issue a 32 percent surcharge increase to meet solvency requirements, which could potentially push physicians out of the PCF or, worse, out of the state. Instead, the superintendent issued a 10 percent surcharge increase on physician contributions to the PCF coupled with proposed changes to the Medical Malpractice Act that would result in cost-savings to the fund. Suggested statutory changes included limiting “medical care and related benefits” only to amounts actually paid by or on behalf of an injured patient and accepted by a healthcare provider in payment of charges, clarifying what constitutes a “reasonable charge,” and permitting examinations to determine the necessity of future medical care.

The Office of Superintendent of Insurance reports the PCF is a self-funded program. It can be difficult for the PCF administrator to confirm whether a hospital has majority ownership or control over a hospital because of how complex the legal ownership systems can be.

SIGNIFICANT ISSUES

The Office of Superintendent of Insurance reports HB88 would amend the Medical Malpractice Act to permanently institute a \$750 thousand claim cap on non-hospital-owned facilities, adjusted annually by the consumer price index, instead of the \$5 million cap provided for by the initial version of HB75 passed in 2021 and the temporary cap of \$750 thousand imposed for calendar years 2022 and 2023 by the later amendment. The changes have the effect of grouping non-hospital-owned facilities with the independent providers rather than with the hospitals for purposes of the claims limitation.

The Attorney General’s Office notes HB88 relates to the limitations on recovery for medical malpractice claims by amending the Medical Malpractice Act to change the limitation of recovery for certain claims against facilities that are not majority-owned and -controlled by a hospital. The bill could have the effect of reducing the aggregate dollar amount recoverable from outpatient healthcare facilities that are not majority-owned and -controlled by a hospital.

The Human Services Department reports lowering the financial penalties on providers may attract more providers to the state or help keep more providers within the state, especially providers who work in specialties with large rates of malpractice such as obstetricians. A 2022 American Medical Association report notes the number of doctors working in specialties with a

high-risk of lawsuit were 7 percent higher in states with caps on non-economic damages. <https://www.ama-assn.org/system/files/mlr-now.pdf>

ADMINISTRATIVE IMPLICATIONS

The New Mexico Medical Society notes there are over 450 licensed outpatient healthcare facilities in New Mexico, which includes government-run, hospital-owned, and independently owned facilities. Independent outpatient healthcare facilities are considered nonhospitals by the federal Centers for Medicare and Medicaid Services and receive less reimbursement than hospitals.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB88 relates to HB63, Medical Malpractice Changes, which proposes a cap of \$600 thousand on malpractice claims. HB88 also relates to HB465, Medical Malpractice Changes; SB296, Medical Malpractice Changes; HB500, Medical Malpractice Premium Assistance; SB446, Medical Malpractice Definition of Occurrence; and SB447, Medical Malpractice Recovery Amounts.

TECHNICAL ISSUES

The New Mexico Medical Society suggests changes to the definitions of “independent provider” and “outpatient healthcare facility.”

OTHER SUBSTANTIVE ISSUES

The Administrative Office of the Courts reports Section 41-5-3(J) NMSA 1978 defines “outpatient healthcare facility” to mean an entity licensed pursuant to the Public Health Act as an outpatient facility, including ambulatory surgical centers, free-standing emergency rooms, urgent care clinics, acute care centers, and intermediate care facilities and includes a facility’s employees, locum tenens providers, and agency nurses providing services at the facility. Amendments to the act enacted in 2021 placed outpatient healthcare facilities under the same cap as hospitals, subjecting them to an escalating cap. Providers and their advocates were concerned the escalation in the cap would cause certain sectors of healthcare to see increases in judicial awards and would have ramification for medical liability in the state resulting in fewer outpatient healthcare facilities, and higher cost outpatient healthcare facility costs. The HB88 amendment to Section 41-5-6 NMSA 1978 may serve as an antidote, at least for those facilities not majority-owned and -controlled by a hospital.

RAE/al/mg