LFC Requester:	Ruby Ann Esquibel

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: 2/13/2025

Bill Number: HB 374

Check all that apply:

Original X Correction ___

Amendment ___ Substitute ___

Sponsor: Rep. Gail Armstrong, Rep. Mark Duncan, and Rep. Harlan Vincent

Short Title: Amending the Definition of "Occurrence" in the Medical Malpractice Act

Agency Name and Code Number: 305 – New Mexico Department of Justice

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis: HB 374 seeks to amend the New Mexico Medical Malpractice Act (MMA), NMSA §§ 41-5-1 to -29 (1976, as amended through 2023), to change the statutory definition of "occurrence" in Section 41-5-3(K), as follows (struck language appears with a line through it, while proposed language is underlined):

"Occurrence" means all [injuries to a patient caused by health care providers' successive acts or omissions that combined concurrently to create a malpractice claim] claims for damages for all persons arising from harm to a single patient, no matter how many health care providers, errors or omissions contributed to the harm.

The meaning and potential effects of this proposed change are addressed in Performance Implications, below.

HB 374 also seeks to amend the definition of "healthcare provider" in Section 41-5-3(D), but only with respect to identification of podiatrists. Specifically, HB 374 would change the word "podiatrist" to "podiatric physician."

FISCAL IMPLICATIONS

N/A

SIGNIFICANT ISSUES

See Performance Implications. Otherwise, N/A.

PERFORMANCE IMPLICATIONS

Currently, the MMA's definition of "occurrence" allows plaintiffs suing qualifying healthcare providers under the MMA to recover up to the MMA's damage cap for each respective "occurrence" of medical negligence. Under the current definitional language, the word "concurrently" suggests that if health care providers' acts or omissions did not take place in a successive and concurrent manner, that the plaintiff may be able to recover as many MMA caps as there are non-successive or concurrent instances of medical negligence. However, in practice, the factual line of where "concurrent" acts or omissions begin and end can be difficult to draw. Thus, whether certain acts or omissions of healthcare providers are concurrent or not, for the

purpose of assessing the number of caps which a plaintiff could recover in a medical negligence claim subject to the MMA, is often a question of fact that may preclude summary judgment in medical negligence cases and is often difficult to accurately predict. It follows that, because the number of caps is often subject to dispute and is therefore less predictable, it may at times be difficult for insurers to underwrite risk and coverage for qualifying healthcare providers, as factors such as the potential number of available caps and whether that issue must be litigated through trial can naturally result in increased litigation, settlement, and judgment costs for insurers, which are then passed onto healthcare providers in the form of increased premiums.

Against this contextual backdrop, and because HB 374 eliminates the language separating occurrences based on whether the acts or omissions of health care providers are "concurrent," it is possible that HB 374 could have the effect of reducing the number of factual disputes concerning the number of "occurrences," and thereby may more often result in a plaintiff's recovery being limited to fewer MMA caps than before, as it may more often result in the issue of "occurrence" being resolved at the summary judgment stage. We read the proposed definition of "occurrence" as leaving little or no room for argument that certain acts or omissions were or were not "concurrent," and thus HB 374 could possibly have the effect of helping make risk underwriting more predictable and thereby could potentially result in less expensive premiums for qualifying healthcare providers. This reflects and potentially furthers the Legislative intent of the MMA. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 16 (explaining that the intent of the MMA, at the time of its passage, was to address a perceived insurance crisis for healthcare providers and incentivize medical providers to do business in New Mexico).

However, we caution that SB 374 would not necessarily result in limiting recovery to a single MMA cap in all cases, nor would it necessarily result in lower risk or predictably for insurers, because it does not seek to strike or amend Section 41-5-6(L), which provides:

"[t]he term 'occurrence' shall not be construed in such a way as to limit recovery to only one maximum statutory payment if separate acts or omissions cause additional or enhanced injury or harm as a result of the separate acts or omissions. A patient who suffers two or more distinct injuries as a result of two or more different acts or omissions that occur at different times by one or more health care providers is entitled to up to the maximum statutory recovery for each injury."

Thus, even if the definition of "occurrence" was changed as proposed by HB 374, there would likely still be some cases where the question of fact regarding the number of caps would need to be decided by a jury, or alternatively, cases where that issue would at least be necessary to explore in discovery and at the summary judgment stage. However, the factual and temporal line of "additional or enhanced injury[…] at different times[,]" as referenced in Section 41-5-6(L), may be easier to discern for a court weighing summary judgment, or for juries to discern, than the factual and temporal line of whether certain acts or omissions happened "concurrently" as vaguely referenced in the current definition of "occurrence." In simpler terms, Section 41-5-6(L) could work in harmony with HB 374 to ensure that plaintiffs can still recover more than one cap for injuries when those injuries are truly distinct and separate in time and effect, while potentially assisting in making the calculus for "occurrences" less malleable or difficult to assess for courts and triers of fact.

In conclusion, HB 374 could potentially result in less frequent disputes regarding the number of "occurrences," or the number of potential MMA caps, and thereby could potentially result in more predictable underwriting risk for insurers of qualifying healthcare providers. However,

considering that Section 41-5-6(L) still requires courts or triers of fact to determine whether additional or enhanced injury occurred, it is likely difficult to tell, at this juncture, if the proposed changes would truly make the risk of multiple cap awards predictable enough to meaningfully lower premium costs for healthcare providers—which we presume to be the goal of HB 374. *See Baker*, 2013-NMSC-043, ¶ 16.

With respect to the proposed amendment changing the word "podiatrist" to "podiatric physician[,]" please see Technical Issues for further discussion on technical issues that may lead to performance implications.

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 374 is duplicative of HB 378, which proposes the exact same changes to the definition of "occurrence." However, HB 378 goes further than HB 374 in seeking to amend other section of the MMA, including the damages cap itself and relevant jury instructions on damages in Section 41-5-6.

Both of these bills may have some interaction with SB 176, which seeks to amend Section 41-5-7 to change the time at which continued medical care and related benefits are paid from the Patient Compensation Fund, and SB 176 also seeks to have 75% of any punitive damages award under the MMA awarded to the State of New Mexico to fund the creation and maintenance of a Patient Safety Improvement Fund.

HB 374 may have some relationship, albeit indirectly, with HB 379, which seeks to amend Section 41-5-7(E) to require a heightened burden of proof (clear and convincing evidence) for recovery of punitive damages in a lawsuit against a qualifying healthcare provider. The "clear and convincing" burden is more difficult to meet than the "preponderance of evidence" burden typically employed in civil cases but is easier to meet than the "beyond a reasonable doubt" burden employed in criminal cases.

Generally, HB 374, HB 378, SB 176, and HB 379 could potentially function to reduce or make more predictable underwriting risk for insurers of qualifying healthcare providers.

TECHNICAL ISSUES

If the intent of HB 374 is to limit MMA plaintiffs to a single cap regardless of circumstance (as suggested by the amended definition of "occurrence), it could further the intent of HB 374 to also address or amend Section 41-5-6(L) accordingly, so as to alleviate the concerns in the Performance Implications above. In contrast, if the Sponsors' intent is to have the proposed definition of "occurrence" harmonize with Section 41-5-6(L) by making multiple caps more difficult to obtain, but still be allowed under circumstances in Section 41-5-6(L), then Section 41-5-6(L) need not be addressed in HB 374. In that instance, however, it might still help with clarity to incorporate into the proposed definition of "occurrence" language from Section 41-5-6(L) addressing "two or more distinct injuries as a result of two or more different acts or omissions that occur at different times[.]" Alternatively, the definition of occurrence could reference Section 41-5-6(L) expressly.

With respect to the proposed change of "podiatrist" to "podiatric physician[,]" we note that a DPM (Doctor of Podiatric Medicine) is a different credential than an MD (Medical Doctor), and that the term "physician" typically refers to an individual who either holds an MD or a DO (Doctor of Osteopathy) credential. Thus, to the extent "podiatric physician" is intended by the Sponsors to refer only to healthcare providers specializing in foot and ankle care who also hold an MD, then the proposed change could have substantive impact on MMA coverage for healthcare providers which do not have an MD credential but nevertheless provide foot and ankle care. If a "podiatric physician" is different from a "podiatrist[,]" then the proposed change could be construed as the Legislature not intending for "podiatrists" to be qualifying healthcare providers under the MMA. *But see Baker*, 2013-NMSC-043, ¶¶ 22-31 (generally reasoning that ambiguity as to what a "healthcare provider" is under the MMA should be resolved in favor of MMA qualification, to effectuate the Legislature's intent in passing the MMA). Thus, the proposed amendment could lead to the unintended consequence (assuming it is indeed unintended) of opening the door to arguments that only "podiatric physicians[,]" or those who hold an MD, rather than all "podiatrists[,]" or those who hold a DPM but not an MD, are entitled to MMA protections. Thus, the proposed change and the distinction between "podiatrist" and "podiatric physician" should be reviewed for its potential substantive effect on MMA coverage for podiatrists who may not hold an MD.

If there is no intended substantive difference between "podiatrist" and "podiatric physician[,]" then the proposed change is likely unnecessary, as podiatrists are already included in the definition of "healthcare provider." Alternatively, the proposed change could keep the word "podiatrist" and instead add the language "or podiatric physician" to broadly encompass DPMs, MDs, and DOs who provide foot and ankle care.

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

HB 378 is an alternative to HB 374, but, as mentioned above, goes far beyond HB 374 in its changes to the MMA.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

N/A