

LFC Requester:	Esquibel, RubyAnn
-----------------------	--------------------------

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO

AgencyAnalysis.nmlegis.gov and email to billanalysis@dfa.nm.gov

(Analysis must be uploaded as a PDF)

SECTION I: GENERAL INFORMATION

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

Date Prepared: 2/23/25 *Check all that apply:*
Bill Number: SB 449 Original Correction
 Amendment Substitute

Sponsor: Sen. Larry R. Scott **Agency Name and Code** AOC
Short Title: Medical Malpractice Changes **Number:** 218
Title: _____ **Person Writing** Kathleen Sabo
Phone: 505-470-3214 **Email** aoccaj@nmcourts.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		
None	None	Rec.	General

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		
Unknown	Unknown	Unknown	Rec.	General

(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	Unknown	Unknown	Unknown	Unknown	Rec.	General

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: Conflicts with HB 374 and HB 378 (also amending Section 41-5-3 NMSA 1978). Conflicts with HB 378 (also amending Section 41-5-6 NMSA 1978). Conflicts with HB 378, HB 379, SB 176 and SB 444 (also amending Section 41-5-7 NMSA 1978). Conflicts with SB 121 (also amending Section 41-5-25).

Duplicates/Relates to Appropriation in the General Appropriation Act: None.

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 449 amends and enacts statutory sections within the Medical Malpractice Act, Section 41-5-1 NMSA 1978, et. seq., as follows:

SB 449 amends Section 41-5-3 NMSA 1978 to change the definition of “occurrence” to mean all claims for damages from all persons arising from harm to a single patient, no matter how many health care providers, errors or omissions contributed to the harm.

SB 449 amends Section 41-5-4 NMSA 1978 to permit a demand for a jury trial when a complaint is filed for a malpractice claim and venue is proper. The amendment provides that venue is proper when the claim is filed in the county in which the patient received the medical treatment that is the basis for the malpractice claim.

SB 449 enacts a new statutory section to create the Patient Safety Improvement Fund (PSIF) in the state treasury and administered by the Department of Health (DOH). Under SB 449, money in the PSIF is subject to appropriation by the legislature to the DOH for the purposes of improving patient safety and health care outcomes. Any unexpended or unencumbered balance remaining in the PSIF at the end of a fiscal year is prohibited from reverting and is required to remain to the credit of the PSIF.

SB 449 amends Section 41-5-7 NMSA 1978, governing medical expenses and punitive damages within the Medical Malpractice Act, to prohibit payment of awards of past or future medical and related benefits from being paid from the fund unless the amount of the award was actually paid by or on behalf of an injured person and accepted by a health care provider as payment for services rendered, and to require payments made from the Patient's Compensation Fund for future medical care and related benefits as expenses are incurred. The SB 449 amendment prohibits such payments from being paid in a lump-sum payment. The SB 449 amendment to Section 41-5-7 NMSA 1978 also requires the court, in a malpractice claim in which punitive damages are awarded, to divide the punitive damage award and enter judgment as follows: 1) 25% of the punitive damage award shall be awarded to the prevailing party; and 2) 75% of the punitive damage award shall be awarded to the state, with all amounts remitted to the state treasurer to be deposited into the PSIF. Under the SB 449 amendment, punitive damages may only be awarded if the prevailing party provides clear and convincing evidence demonstrating that the acts of the health care provider were made with deliberate disregard for the rights or safety of others. Additionally, the SB 449 amendment caps a punitive damage award at three times the compensatory award.

SB 449 amends Section 41-5-6 NMSA 1978, governing limitation of recovery within the Medical Malpractice Act, to provide that an annual adjustment to the per occurrence limit on recovery based on the prior three-year average consumer price index for all urban consumers,

shall not result in a percentage increase in the per occurrence limit greater than three percent. The SB 449 amendment defines “consumer price index” as used in this section.

SB 449 amends Section 41-5-25 NMSA 1978 to require the superintendent, as custodian of the Patient’s Compensation Fund, or the superintendent’s designee, to evaluate and approve a proposed settlement if any amount of the proposed settlement is to be paid from the fund.

SB 449 also enacts a new statutory section limiting attorney fees by prohibiting and attorney from contracting for or collecting a contingency fee for representing a person seeking damages in a malpractice claim in an amount that exceeds:

A. twenty-five percent of the dollar amount recovered, if the recovery is pursuant to a settlement agreement and release of all claims executed by all parties prior to the start of a trial or an arbitration proceeding; or

B. thirty-three percent of the dollar amount recovered, if the recovery is pursuant to settlement, arbitration or judgment that occurs after a trial or arbitration proceeding begins.

Finally, SB 449 amends Section 38-3-1 NMSA 1978 to provide the following:

- **Subsection H:** In a claim asserted by a personal representative pursuant to Section 41-2-3 NMSA 1978, a conservator, guardian or guardian ad litem appointed pursuant to Chapter 45, Article 5 NMSA 1978 or a third person acting in any representative capacity, the residence of the person bringing the claim shall not be considered in determining venue in any civil action.
- **Subsection I:** Subject to the provisions of Subsection H of this section, venue in a claim asserting medical malpractice shall be limited to the county in which the patient received the medical treatment that is the basis for the medical malpractice lawsuit. The amendment defines “medical malpractice lawsuit” and “patient”.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and any increase or decrease in the number of commenced medical malpractice actions and appeals of damage awards, any increase or decrease in court resources devoted to medical malpractice actions as a result of the SB 449 amendments and enactments, as well as constitutional challenges to the law. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

- 1) For a 2024 chart detailing state laws presenting medical malpractice liability reforms, including limiting attorney fees, see State Laws Chart I: Liability Reforms, Advocacy Resource Center, American Medical Association, 2024, <https://www.ama-assn.org/system/files/mlr-state-laws-chart-I.pdf>
- 2) In 2021, the MMA, Section 41-5-3 NMSA 1978, was amended to define “occurrence” to mean all injuries to a patient caused by health care providers’ successive acts or omissions that combined concurrently to create a malpractice claim.

The SB 449 amendment to Section 41-5-3 NMSA 1978 defines “occurrence” to mean all

claims for damages from all persons arising from harm to a single patient, no matter how many health care providers, errors or omissions contributed to the harm.

On December 31, 2020, prior to the 2021 legislative session where the amendment to the MMA occurred, the Office of the Superintendent of Insurance for the State of New Mexico published a report titled, Medical Malpractice Act/Patient's Compensation Fund Modification Report, in which the superintendent recommended that the terms "malpractice claim" and "occurrence" be synonymously defined in such a way that a single, individual injury event be treated as a single malpractice claim or occurrence, regardless of the number of contributing providers or acts. The superintendent noted that the lack of a clear definition of "occurrence" – prior to the 2021 amendment – creates a significant debate in mediation and was the subject of litigation, and that many were suggesting that clarity is needed. See pp.4, 12 and 13, https://www.osi.state.nm.us/wp-content/uploads/2021/01/12-31-2020_MMA-Report_FINAL.pdf.

There is the potential that the SB 449 amendment to Section 41-5-3 NMSA 1978 would bring sufficient clarity and a change in the law so as to make medical malpractice actions move more expeditiously and/or efficiently, decreasing the need for court resources.

- 3) It can be anticipated that there will be challenges by attorneys to the constitutionality of the SB 449 limitations on attorney fees in medical malpractice actions, based on due process and equal protection claims.) See *Constitutionality of Limitations on Attorneys' Fees in Medical Malpractice Actions. Roa v. Lodi Medical Group, Inc.*, 695 P.2d 164 (Cal.), Washington University Law Review, 1986, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2145&context=law_lawreview. See also *Siebert v. Okun*, 485 P.3d 1265 (2021), where the NM Supreme Court held that the nonmedical, nonpunitive damages cap in the Medical Malpractice Act did not violate the Art. II, Section 12 right to trial by jury. <https://statecourtreport.org/sites/default/files/fastcase/converted/Siebert%20v.%20%20Okun%2C%20N.M.%20NO.%20S-1-SC-37231.pdf>
- 4) There is a question as to whether the SB 449 limitations on attorney fees in medical malpractice actions violates the Separation of Powers Clause in the New Mexico Constitution, Art. III, Section 1. In *Roa v. Lodi Medical Group, Inc.*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985), plaintiffs argued that the legislature's regulation and limitation on attorney fees encroached on a matter left solely to the judiciary. The court rejected the plaintiffs' argument, noting that regulation of attorney fees has never been within the sole province of the judiciary and that the legislature has regulated attorney fees throughout history. https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2145&context=law_lawreview.
- 5) There is also a question as to whether the SB 449 amendment to Section 41-5-7 NMSA 1978, requiring court division of a punitive damage award and entering judgement such that 25% is awarded to the prevailing party and 75% is awarded to the state, with all amounts deposited in the PSIF, is a violation of the Supremacy Clause, Art. III, Section 1 and the Art. II, Section 12 right to trial by jury, as well as violating due process and equal protection, and constituting an unjust taking.

Some states have enacted a split-recovery statute in which a portion of the punitive

damages goes to the state, not the plaintiff. See *Split Recovery Statutes*, The Sedona Conference, (2011), https://thesedonaconference.org/sites/default/files/commentary_drafts/Sub%2520team%25206%2520%2520Distribution%2520Split%2520Recovery%2520Statutes%252009072011.pdf . See also *Uncle Sam and the Partitioning Punitive Problem: A Federal Split-Recovery Statute or a Federal Tax*, Pepperdine Law Review, (2013), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2135&context=plr> , re: state court cases challenging the constitutionality of split-recovery statutes and a listing of split-recovery statutes by state, *I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shard with the State*, Missouri Law Review, (2003), <https://scholarship.law.missouri.edu/mlr/vol68/iss3/1/> , and *The Constitutionality of Split-Recovery Punitive Damage Statutes: Good Policy but Bad Law*, 2008 Utah L. Rev. 333 (2008).

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

See “Fiscal Implications,” above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS