F I S C A L I M P A C T R E P O R T

SPONSOR Taylor **ORIGINAL DATE** 2/19/07 **LAST UPDATED** **HB**

SHORT TITLE Professional Medical Liability Act **SB** 944

ANALYST Wilson

Duplicates HB 970
Relates to SB16, SB 49, SB 22, SB 23, HB 956, HB 639, HB 398 and HB 14.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		$0.1			Non-Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
Corrections Department (CD)
Health Policy Commission (HPC)

No Response From
Public Regulation Commission (PRC)

SUMMARY

Synopsis of Bill

Senate Bill 944 enacts the "Professional Medical Insurance Liability Act" which will generally regulate and limit causes of action, claims and damages awards against health care providers.

The HPC provided the following synopsis:

SB 944 enacts the Professional Medical Liability Insurance Act to limit damage amounts that may be awarded against any "health care provider" and limits exemplary damages.

In SB 944, "Health care provider" is defined to be a person licensed, certified, registered or chartered by the state, and includes its officers, directors, shareholders, members, employees, independent contractors acting on the provider's behalf.

SB 944 defines "Health care professional" as a physician; a physician assistant; an osteopathic physician's assistant; a radiation therapy technologist; a nuclear medicine technologist; a radiographer; a naprapathic practitioner; a radiologic technologist; an athletic trainer; a respiratory care practitioner; a registered nurse; a licensed practical nurse; a certified nurse practitioner; a certified nurse anesthetist; a dentist; a dental hygienist; a pharmacist; a nursing home administrator; a psychologist; a nurse assistant or aide; a certified medication aide; an optometrist; a certified nurse-midwife; a physical, occupational or speech therapist or therapy assistant; a speech-language pathologist; or an audiologist.

The bill defines "economic damages" to mean compensatory damages intended to compensate a claimant for actual economic loss, including the expenses of necessary health care received before a judgment or the estimated expenses in the future for treatment of an injury. "Future damages "are defined also.

SB 944 notes that the Tort Claims Act controls if a conflict arises between the provisions of the Professional Medical Liability Insurance Act and the Tort Claims Act. It also notes that except in the case of the Tort Claims Act, a conflict arising between the Professional Medical Liability Insurance Act and another act of New Mexico law, the Professional Medical Liability Insurance Act shall control within constitutional limits; provided, however, that the Professional Medical Liability Insurance Act does apply to a claim in which the defendant is a health care provider pursuant to the current Medical Malpractice Act.

SB 944 defines "vicarious liability " to mean in a claim brought pursuant to the Act in which the claimant alleges that a health care provider was acting within the course and scope of the health care provider's employment the claim shall be brought against the employer and not against the health care provider.

The bill will limit non-economic damages awarded against one or more health care providers, including all persons or entities for which vicarious liability may apply, to an aggregate limit of $250,000. The bill does not limit economic damages. A jury may not be informed of the non-economic damages limit, and if the award exceeds that limit, the judge must reduce it accordingly.

Exemplary or punitive damages may only be brought under the act if the claimant proves by clear and convincing evidence that the harm claimed resulted from conduct that was willful, wanton, malicious or reckless. The act requires that exemplary damages be based on reason and justice, and the amount must be reasonably related to the injury and damages given as compensation. Evidence of ordinary negligence, gross negligence, bad faith or deceptive trade practices will not satisfy the requirements of the act for exemplary damages purposes.

SB 944 provides a formula for determining whether the exemplary damage amount is reasonable, requiring that it be no more than two times the amount of economic damages awarded, plus the amount of non-economic damages. The bill prohibits notifying the jury about this provision of law should it be enacted. It provides that any group making claims based on an injury to or death of one person will be treated as if they are one claimant.

If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specific circumstances or in conjunction with a specified culpable state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the

damages resulted from that circumstance or conduct.

As set out in SB 944, exemplary damages are precluded if only nominal damages are awarded. If a claimant elects to have an award increased based on a provision of law not included in the act, they may not also be awarded exemplary damages. Exemplary damages may only be awarded against a specific health care provider, or providers, and only the providers named will be liable for the amount.

The bill prohibits prejudgment interest on damages, but permits a bifurcated trial upon the motion of a defendant health care provider, finding liability for compensatory and exemplary damages plus the amount of compensatory damages in the first phase, and then determining the amount of exemplary damages to be awarded in the second phase. The bill lists factors to be considered in the award such as "the enormity and nature of the wrong," and aggravating and mitigating circumstances. Evidence that is only relevant to the amount of exemplary damages awarded will not be admissible in the first phase of a bifurcated trial.

The bill requires that upon appellate review, the court must specifically state its reason for upholding or overturning any related finding or award of exemplary damages.

SB 944 requires health care providers to show proof of professional responsibility in the amount of $250,000 for each claim up to a maximum of $500,000 in the aggregate for all claims in an insurance policy year, calendar year or fiscal year. The bill offers different means of showing proof including insurance coverage, maintenance of financial reserves, coverage from a trust, any other contract or arrangement for transferring or distributing risk. If evidence of financial responsibility is established by the time of judgment, the limitations on damages contained in the act will apply to claims filed on or after July 1, 2007.

In any claim for which the present value of the award of future damages equals or exceeds $100,000, the court must order that medical, health or custodial services be paid in periodic payments rather than a lump sum. Entry of the order for payment of future damages by periodic payments is deemed a release of the liability claim filed.

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 will be proportional to the enforcement of this law and requirements for the presentation of additional evidence, required judicial review and motions made pursuant to the Act. 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

In addition to limiting the award of certain damages against health care providers, the new act appears to regulate pleading and practice within the courts. The AGO believes several of its provisions may violate Article III Section 1 of the New Mexico Constitution as an improper intrusion by the legislative branch into the conduct of the Judicial Branch.

Article VI Section 1 of the Constitution vests the judicial power of the state in the courts. Several provisions in this bill appear to regulate and restrict that judicial power. For example, the requirements that courts provide bifurcated trials and certain jury instructions, along with prohibitions against suing employees and the standards of proof required for an award of exemplary damages are usually subjects within the purview of the courts**.**

The New Mexico Health Care Association (HCA) is supporting this bill to "hopefully reduce the number of frivolous claims being brought against the [nursing home] industry". They claim it has been two years since the State of Texas passed similar legislation and that Texas went from having zero providers of liability insurance to having now 15 providers of insurance. HCA believes that this clearly demonstrates that establishing rational parameters around subjective awards allows insurance companies to properly assess risk and provide affordable coverage.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 944 is a duplicate of HB 970, Professional Medical Liability Insurance Act. SB 944 is related to SB16, Limited Liability in Emergency Situations; SB 49, Health Care Provider Insurance Coverage; SB 22, Health Care Provider Emergency Liability; SB 23, Certain Healthcare Provider Limited Liability; HB 956, Health Care Provider Tort Immunity; HB 639, Cardiac Arrest Aid Liability; HB 398, Certain Malpractice Premiums Emergency Fund; and HB14, Certain Tort Claims Maximum Liability.

TECHNICAL ISSUES

The HPC suggests the following amendments:

On page 4, lines 17-25 and page 5, lines 1-4, there is a definition of "health care liability claim." Should there not be a provision for negligent credentialing?

On page 4, lines 5-16, there is a definition of health care institution. However, that definition does not include clinics or physician offices. It does include "emergency medical services provider" on page 4, line 8.

On page 5, lines 6-18, there is a definition of health care professional. Should that definition not as well include emergency medical technicians since they are defined as part of health care institution? Missing are medical technologists, medical laboratory technologists, registered dieticians, pharmacy technicians, podiatrists, licensed midwives, anesthesiology assistants, social workers, and behavioral health personnel such as alcohol and drug counselors?

SB 944 notes that except in the case of the Tort Claims Act, a conflict arising between the Professional Medical Liability Insurance Act and another act of New Mexico law, the Professional Medical Liability Insurance Act *shall control within constitutional limits* (page 9, lines 3-12). Under the Medical Malpractice Act, there is a cap of $600,000 except for punitive and economic damages. Under the Professional Medical Liability Insurance Act, there is a cap of $250,000 for each claim up to a maximum of $500,000 in the aggregate. Is it possible to have a constitutional limit of $250,000 under one law and $600,000 under another for damages of an exact or similar nature under both acts?

OTHER SUBSTANTIVE ISSUES

In 1975, Travelers Insurance Company, the primary writer of medical malpractice for New Mexico's doctors, exited the state after citing the state's lack of tort reform and small market size. In response, the Legislature passed the Medical Malpractice Act of 1976 with the express purpose to "promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico."

The Act contains the following benefits for qualifying health care providers:

- $600,000 cap on damages other than medical bills and punitive damages
- 3-year statute of limitations on the filing of a claim
- Mandatory review of claims by a medical/legal panel prior to the filing of lawsuits
- State participation in malpractice insurance coverage via a "patients compensation fund"

To be qualified under the Act, health care providers must either obtain base coverage from an admitted insurer on an "occurrence" policy form or else maintain a substantial cash deposit with the Superintendent of Insurance. In addition to their base coverage premium payments, qualifying health care providers must also pay an annual surcharge to the Patient's Compensation Fund.

The list of health care providers that are eligible to be covered under the Act includes physicians, chiropractors, podiatrists, nurse anesthetists, physicians' assistants, hospitals and outpatient health care facilities. Any health care practitioners or facilities not on this list, such as midwives, nurse practitioners, dentists and nursing homes, are excluded from coverage under the Act. SB944 attempts to rectify this exclusion by creating a new avenue for New Mexico's health care providers can obtain professional liability insurance.

The language of the Act requires the use of occurrence coverage. The Act's inability to predict the market dominance of the claims-made product has, over time, severely restricted the number

Current Environment for Long Term care Providers

Recent studies indicate that the general liability and professional liability costs for the long term care industry in New Mexico have been increasing above the inflation rates for the past decade. One study indicated that the annual loss cost in 1996 of $40 per bed is projected to grow to over $3510 in 2005. This pattern of increasing litigation costs is similar to that experienced in other states that were forced to eventually enact litigation reforms.

- The New Mexico study also showed that the average claim cost analyzed in the study was over $400,000.
- The study also noted that the frequency of claims per year for every 1,000 occupied skilled nursing care beds has nearly doubled from 4.5 claims per 1000 beds in 1996 to 8.5 claims per 1000 beds in 2006.
- Other conclusions from the study are that New Mexico general liability or professional liability loss costs are absorbing an increasing portion of funds available to pay for patient care. These costs are expected to absorb 7.4% of the average Medicaid

reimbursement rate for long term care providers in New Mexico, up from 1.9% in 1999.

- Also, less than half of the total amount of claims costs paid for New Mexico claims in the long term care industry goes directly to patient and /or family compensation with the remaining 55% going to litigation costs, including attorney's fees.
- The study also noted that annual commercial premiums levels have increased approximately 20% over the prior year with the number of carriers writing professional liability coverage is limited.

Current Environment for Certified Nurse Midwives

Almost a third of all babies born in New Mexico are delivered by midwives. This is by far the highest midwife-attended birthrate in the nation. Midwives, who tend to service low-income families, receive much of their revenues from Medicaid reimbursement. Approximately three-quarters of New Mexico's midwives are certified nurse midwives and the remaining quarter are licensed midwives. Certified nurse midwives usually deliver in hospitals while licensed midwives usually deliver in homes and birthing clinics.

Malpractice insurance remains available for certified nurse midwives but at premiums that have increased by approximately 30% per year for the past several years. Since malpractice insurance is not available for home births, the vast majority of licensed midwives have no malpractice coverage. Only those licensed midwives who deliver in birthing centers are able to obtain insurance, at rates that are triple those of 2004/05 and that now equal approximately half their income.

DW/csd