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FISCAL IMPACT REPORT

ORIGINAL DATE 2/1/16
LAST UPDATED 2/17/16 **HB** 270/aHJC/aHHC/aSJC

SPONSOR McMillan

SHORT TITLE Out-of-State Health Care Provider Access **SB** _____

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal Impact	Minimal Impact	Minimal Impact	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 121

Relates to HB 54, HB 103, HB 191, SB 25, SB 26, SB 217, SM 28 and SM 52

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Department of Health (DOH)
 Regulation and Licensing Department (RLD)

Information Also Received From

New Mexico Medical Society (NMMS)

SUMMARY

Synopsis of Senate Judiciary Committee Amendment

This amendment strikes much of the language of the initial portion of the bill, replacing it with a paragraph that requires that courts in New Mexico must enforce exclusive forum selection and choice of law provisions regarding suits alleging malpractice. The effect of this language may be that physicians in other states treating patients from New Mexico would ask those patients to sign a statement indicating that the patient, if s/he is felt to have suffered injury from the physician’s misdeeds, will seek remedy for that in that other state.

With regard to the material presented in “Significant Issues,” below, if the Texas physician caring for the New Mexico patient had asked the patient to sign a statement accepting

jurisdiction of Texas courts in case of a dispute (and if this occurred after this law’s effective date of July 1, 2016), then New Mexico courts would have to enforce the patient’s expressed choice of a Texas court’s jurisdiction, and would not be allowed to seek action in a New Mexico court.

Synopsis of House Health Committee Amendment

Adds several words to specify that, where an action for civil damages is brought against one or more health care providers from another state, and the action could have been brought in that other state, then the action cannot be brought in New Mexico.

Synopsis of House Judiciary Committee Amendment

Inserts words to indicate that New Mexicans sometimes “decide” to obtain care across state lines, even if they don’t strictly “need” to do so, and they will continue to require access to those services.

Synopsis of Original Bill

HB 270 states the following requirements:

- New Mexicans accessing medical care across state lines, if they believe they have been harmed by that care, must seek civil redress in the state in which that care was delivered
- New Mexico courts must not accept malpractice cases for care occurring in other states as long as
 - The health care provider involved is not licensed or otherwise authorized to provide care in New Mexico,
 - The care occurred in the other state, and
 - A malpractice action could have been brought in that other state.

These requirements would apply to out-of-state individual providers, groups, hospitals, outpatient facilities (etc.), and their employees, directors and other personnel, and would become applicable July 1, 2016.

FISCAL IMPLICATIONS

Enactment of this bill would likely lead to a slight decrease in the workload of New Mexico courts, as actions regarding care given in surrounding states would not be brought in New Mexico courts. However, AOC states that “

“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 commenced prosecutions. 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

Thirty-two of New Mexico’s 33 counties are entirely or in part health care provider shortage areas. New Mexicans must attempt to find care, including both primary and specialty care, wherever they can; the problem is especially acute in the rural and frontier portions of New Mexico.

NMMS indicates that “Reliance on Texas hospitals, to say nothing of primary care, is the cornerstone of medical access for more than one-third of New Mexico counties. Based on 2013 data from the New Mexico and Texas Departments of Health, 13 counties in southern and eastern New Mexico send more than 22% of their hospitalized patients to Texas for care.” The percentage ranges from 9% in Luna County to 38% in Union County. NMMS does not provide data on care given to New Mexicans in other surrounding states, although many New Mexicans from the Four Corners area seek care in Colorado and a smaller number of New Mexicans near the borders with Arizona and Oklahoma seek care in those states.

Especially with respect to Texas providers, refusal of out-of-state medical providers to see New Mexicans due to concerns about duplicate malpractice risks is likely to have an adverse effect on health care for New Mexicans.

The Administrative Office of the Courts provides background as to the legal cases that led to SB 121 and HB 270 being put forward:

Gallegos v. Frezza, MD, 2015-NMCA-101 (cert. denied), wherein a medical malpractice suit was filed in New Mexico by New Mexico residents against a medical doctor who is a resident of Texas for services that were performed in Texas. Plaintiffs were both State of New Mexico employees, and in the same legal action they sued Presbyterian Health Plan for breach of contract and negligent referral to the Texas health care provider. The New Mexico Court of Appeals ruled that there were insufficient contacts to establish general jurisdiction, and remanded the case for further proceedings to address whether personal jurisdiction exists.

Montano v. Frezza, MD, 2015-NMCA-069 (cert. granted), a case with a similar fact pattern to *Gallegos v. Frezza, above*. A New Mexico resident received care in Texas over a period of approximately six years from a Texas health care provider to which she was referred by Lovelace Insurance Co. The New Mexico resident filed suit against Lovelace and the Texas doctor in New Mexico. At issue in the case is whether Dr. Frezza is entitled to immunity granted by the Texas Tort Claims Act when he is sued by a New Mexico resident in a New Mexico court. The secondary issue of whether New Mexico courts can assert personal jurisdiction is pending.

The Court of Appeals determined that the doctor is entitled to immunity consistent only with the New Mexico Tort Claims Act. In reaching its decision, the Court considered whether the Texas Tort Claims Act should apply, taking into consideration New Mexico’s own public policies. The Court compared the Texas Tort Claims Act to the New Mexico Tort Claims Act and found some stark differences in their provisions. A close examination of the differences let the Court to conclude that New Mexico’s public policy would be violated if the Texas Act were to apply because the Texas Act provided a narrower waiver of immunity, prohibited suits against individuals, and imposed more restrictive notice requirements. The Court remanded the issue of whether other provisions of the Texas Act would still apply. The case is now pending before the Supreme Court on appeal.

An amicus brief was filed in the Supreme Court case (No. 35,297, consolidated with No. 35,214), by a wide range of medical societies and hospital groups, including the New Mexico Medical Society, the New Mexico Hospital Association, the Texas Medical Association and the Texas Hospital Association. The brief emphasizes that New Mexico

has a long standing public policy of expanding access for New Mexico’s citizens. The primary concern raised in the brief is that Texas health care providers will be less willing to provide care to New Mexicans if they are subjected to suits in New Mexico and not afforded immunity under the Texas Tort Claims Act. They note that Eastern New Mexico depends on the health care of neighboring Texas providers. In the cases discussed, above, neither Lovelace nor Presbyterian could offer the necessary bariatric care from an in-network provider, and for that reason the plaintiffs were referred to providers in Texas. The brief submits that Texas providers will be less willing to provide care to New Mexicans because of the increased “litigation risk”, which includes more frequent lawsuits, and increased awards and settlements due in part to higher caps on awards and more lenient statutes of limitations. If providers are subject to higher risks, their insurance premiums are likely to be higher, and they may be unwilling to provide elective care and even trauma care to New Mexicans. The brief submits that the Court’s analysis and ruling of the case is incorrect. The brief warns that the holding is a slippery slope, and that it may have additional implications for both personal injury cases and commercial claims. The New Mexico Supreme Court is still considering the issues.

PERFORMANCE IMPLICATIONS

AOC states that “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.”

DUPLICATES SB 121.

RELATES to HB 54, HB 103, HB 191, SB 25, SB 26, SB 217, SM 28 and SM 52, all of which deal with aspects of New Mexico’s health care provider shortages.

TECHNICAL ISSUES

RLD and the AGO both indicate that interstate telemedicine providers might test this statute, and that definition of in which jurisdiction care is being provided by telehealth providers might be useful.

ALTERNATIVES

Determination of jurisdiction in these matters could be left to the New Mexico courts.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Providers in nearby states might see increases in malpractice insurance to cover possible liability in New Mexico for the New Mexico patients they see or they may begin to refuse to see New Mexicans seeking care outside this state. New Mexicans living near the borders, especially with Texas and Colorado, might have severely restricted care options.

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