HOUSE CONSUMERS AND PUBLIC AFFAIRS COMMITTEE SUBSTITUTE FOR HOUSE BILL 629

54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

AN ACT

RELATING TO MEDICAL MALPRACTICE; AMENDING THE MEDICAL MALPRACTICE ACT TO CLARIFY THAT BUSINESS ENTITIES PROVIDING HEALTH CARE SERVICES ARE HEALTH CARE PROVIDERS UNDER THE ACT; RAISING THE RECOVERABLE LIMITS; PROHIBITING THE DISCLOSURE OF CERTAIN CONFIDENTIAL INFORMATION; CREATING AN ADVISORY COMMITTEE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 41-5-3 NMSA 1978 (being Laws 1976, Chapter 2, Section 3, as amended) is amended to read:

"41-5-3. DEFINITIONS.--As used in the Medical Malpractice Act:

A. "business entity" means a corporation, including a professional corporation, a nonprofit corporation, a limited liability company, a limited partnership or a general

underscored material = new
[bracketed material] = delete

partnership organized or formed pursuant to the laws of the state or qualified to conduct business in the state as a foreign corporation, limited liability company, limited liability partnership or limited partnership;

[~~A.~~] B. "health care provider" means:

(1) a natural person [~~corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant~~] licensed to practice medicine or otherwise provide health care services pursuant to a professional or occupational license;

(2) a hospital;

(3) an outpatient health care facility; or

(4) a business entity, other than a hospital or an outpatient health care facility, that provides health care services primarily through persons licensed to practice medicine or that otherwise provide health care services in New Mexico pursuant to a professional or occupational license;

C. "hospital" means a business entity licensed to operate a hospital by the department of health;

[~~B.~~] D. "insurer" means an insurance company engaged in writing health care provider malpractice liability insurance in this state;

underscored material = new
[~~bracketed material~~] = delete

[~~C.~~] E. "malpractice claim" includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care [~~which~~] that proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, [~~and includes but is not limited to~~] including actions based on battery or wrongful death; "malpractice claim" does not include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance;

[~~D.~~] F. "medical care and related benefits" means all reasonable medical, surgical, physical rehabilitation and custodial services and includes drugs, prosthetic devices and other similar materials reasonably necessary in the provision of such services;

G. "outpatient health care facility" means a business entity licensed to operate an outpatient health care facility by the department of health;

[~~E.~~] H. "patient" means a natural person who received or should have received health care from a licensed health care provider, under a contract, express or implied; [~~and~~]

I. "personal information" means information that identifies an individual or a business entity, including the

underscored material = new
[~~bracketed material~~] = delete

individual or business entity's name, address or telephone number;

J. "professional or occupational license" means a license to practice medicine or provide health care services pursuant to the Chiropractic Physician Practice Act; the Medical Practice Act; the Podiatry Act; or the Osteopathic Medicine Act. A professional or occupational license also includes a license to practice as a certified registered nurse anesthetist; and

[~~F.~~] K. "superintendent" means the superintendent of insurance of this state."

SECTION 2. Section 41-5-5 NMSA 1978 (being Laws 1992, Chapter 33, Section 2) is amended to read:

"41-5-5. QUALIFICATIONS.--

A. To be qualified under the provisions of the Medical Malpractice Act, a health care provider shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance issued by an authorized insurer in the amount of at least two hundred thousand dollars ($200,000) per occurrence; [~~or for an individual health care provider, excluding hospitals and outpatient health care facilities, by having continuously on deposit the sum of six hundred thousand dollars ($600,000) in cash with the superintendent or such other like deposit as~~

underscored material = new
[~~bracketed material~~] = delete

~~the superintendent may allow by rule or regulation; provided that in the absence of an additional deposit or policy as required by this subsection, the deposit or~~] provided that for an individual health care provider other than a hospital, outpatient health care facility or other business entity providing health care services, the policy shall provide coverage for not more than three separate occurrences; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 41-5-25 NMSA 1978 for the patient's compensation fund.

B. For hospitals, [~~or~~] outpatient health care facilities or other business entities electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on a risk assessment of each hospital, [~~or~~] outpatient health care facility or other business entity, each hospital's, [~~or~~] outpatient health care facility's or other business entity's base coverage [~~or deposit~~] and additional charges for the patient's compensation fund. The superintendent shall arrange for an actuarial study, as provided in Section 41-5-25 NMSA 1978. The additional charges shall be determined by the superintendent using data from New Mexico experience, if available, and based upon sound actuarial principles that take into account:

(1) the different classifications of the physicians and other health care providers of the hospital,

underscored material = new
[~~bracketed material~~] = delete

outpatient health care facility or other business entity; and

(2) the number of physicians and other health care providers practicing under such classifications of the hospital, outpatient health care facility or other business entity.

C. A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against [~~it~~] the provider."

SECTION 3. Section 41-5-6 NMSA 1978 (being Laws 1992, Chapter 33, Section 4) is amended to read:

"41-5-6. LIMITATION OF RECOVERY.--

A. Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed [~~six hundred thousand dollars ($600,000) per occurrence~~] the following amounts:

(1) for a health care provider who is a natural person:

(a) six hundred thousand dollars ($600,000) per occurrence for acts of malpractice occurring prior to January 1, 2020; and

(b) two million dollars ($2,000,000) per occurrence for acts of malpractice occurring on or after

underscored material = new
[~~bracketed material~~] = delete

January 1, 2020; and

(2) for a health care provider that is a hospital, outpatient health care facility or business entity, twenty-five million dollars ($25,000,000) per occurrence for acts of malpractice occurring on or after January 1, 2020.

B. On July 1, 2022 and on July 1 of each year thereafter, the superintendent shall adjust the maximum recoverable amounts specified in Subsection A of this section to correspond to the percentage change in the consumer price index between the end of the penultimate calendar year and the end of the immediately preceding calendar year; provided that such an adjustment shall not result in a percentage change in the maximum recoverable amount greater than three percent. As used in this subsection, "consumer price index" means the consumer price index for all urban consumers, United States city average, for all items, as published by the United States department of labor.

C. In jury cases, the jury shall not be given any instructions dealing with [~~this limitation~~] the limitations specified in Subsection A of this section.

[~~B.~~] D. The value of accrued medical care and related benefits shall not be subject to the [~~six hundred thousand dollar ($600,000) limitation~~] limitations specified in Subsection A of this section.

[~~C.~~] E. Monetary damages shall not be awarded for

underscored material = new
[~~bracketed material~~] = delete

future medical expenses in malpractice claims.

[~~D.~~] F. A health care provider's personal liability is limited to two hundred thousand dollars ($200,000) for monetary damages and medical care and related benefits as provided in Section 41-5-7 NMSA 1978. Any amount due from a judgment or settlement against a health care provider in excess of two hundred thousand dollars ($200,000) shall be paid from the patient's compensation fund, as provided in Section 41-5-25 NMSA 1978.

[~~E. For the purposes of Subsections A and B of this section, the six hundred thousand dollar ($600,000) aggregate amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall apply only to malpractice occurring on or after April 1, 1995.~~]"

SECTION 4. Section 41-5-7 NMSA 1978 (being Laws 1992, Chapter 33, Section 5, as amended by Laws 1992, Chapter 33, Section 6) is amended to read:

"41-5-7. FUTURE MEDICAL EXPENSES.--

A. In all malpractice claims where liability is established, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits. No inquiry shall be made concerning the value of future medical care and related benefits, and evidence relating to the value of future medical care shall not be

underscored material = new
[~~bracketed material~~] = delete

admissible. In actions upon malpractice claims tried to the court, where liability is found, the court's findings shall include a recitation that the patient is or is not in need of future medical care and related benefits.

B. Except as provided in Section 41-5-10 NMSA 1978, once a judgment is entered in favor of a patient who is found to be in need of future medical care and related benefits or a settlement is reached between a patient and health care provider in which the provision of medical care and related benefits is agreed upon, and continuing as long as medical or surgical attention is reasonably necessary, the patient shall be furnished with all medical care and related benefits directly or indirectly made necessary by the health care provider's malpractice, subject to a semi-private room limitation in the event of hospitalization, unless the patient refuses to allow them to be so furnished.

C. Awards of future medical care and related benefits shall not be subject to the [~~six hundred thousand dollar ($600,000) limitation imposed in~~] applicable limitations imposed in Subsection A of Section 41-5-6 NMSA 1978.

D. Payment for medical care and related benefits shall be made as expenses are incurred.

E. The health care provider shall be liable for all medical care and related benefit payments until the total payments made by or on behalf of it for monetary damages and

underscored material = new
[~~bracketed material~~] = delete

medical care and related benefits combined equals two hundred thousand dollars ($200,000), after which the payments shall be made by the patient's compensation fund.

F. This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.

G. The court in a supplemental proceeding shall estimate the value of the future medical care and related benefits reasonably due the patient on the basis of evidence presented to it. That figure shall not be included in any award or judgment but shall be included in the record as a separate court finding.

H. A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider. Punitive damages shall not be paid from the patient's compensation fund or from the proceeds of the health care provider's insurance contract unless the contract expressly provides coverage. Nothing in Section 41-5-6 NMSA 1978 precludes the award of punitive damages to a patient. Nothing in this subsection authorizes the imposition of liability for punitive damages on a derivative basis where that imposition would not be otherwise authorized by law."

SECTION 5. Section 41-5-25 NMSA 1978 (being Laws 1992,

underscored material = new
[~~bracketed material~~] = delete

Chapter 33, Section 9, as amended) is amended to read:

"41-5-25. PATIENT'S COMPENSATION FUND.--

A. There is created in the state treasury a "patient's compensation fund" to be collected and received by the superintendent for exclusive use for the purposes stated in the Medical Malpractice Act. The fund and any income from it shall be held in trust, deposited in a segregated account and invested and reinvested by the superintendent with the prior approval of the state board of finance and shall not become a part of or revert to the general fund of this state. The fund and any income from the fund shall only be expended for the purposes of and to the extent provided in the Medical Malpractice Act. The superintendent shall have the authority to use fund money to purchase insurance for the fund and its obligations. The superintendent is also authorized to use fund money to purchase reinsurance adequate to ensure the fund's ability to respond to a judgment or judgments in the amount of at least twenty-five million dollars ($25,000,000) per occurrence based on sound actuarial principles. The superintendent, as custodian of the patient's compensation fund, shall be notified by the health care provider or [~~his~~] the health care provider's insurer within thirty days of service on the health care provider of a complaint asserting a malpractice claim brought in a court in this state against the health care provider.

underscored material = new
[~~bracketed material~~] = delete

B. To create the patient's compensation fund, an annual surcharge shall be levied on all health care providers qualifying under Paragraph (1) of Subsection A of Section 41-5-5 NMSA 1978 in New Mexico. The surcharge shall be determined by the superintendent based upon sound actuarial principles, using data obtained from New Mexico experience if available. The surcharge shall be collected on the same basis as premiums by each insurer from the health care provider.

C. The surcharge with accrued interest shall be due and payable within thirty days after the premiums for malpractice liability insurance have been received by the insurer from the health care provider in New Mexico.

D. If the annual premium surcharge is collected but not paid within the time limit specified in Subsection C of this section, the certificate of authority of the insurer may be suspended until the annual premium surcharge is paid.

E. All expenses of collecting, protecting and administering the patient's compensation fund or of purchasing insurance for the fund shall be paid from the fund.

F. Claims payable pursuant to Laws 1976, Chapter 2, Section 30 shall be paid in accordance with the payment schedule constructed by the court. If the patient's compensation fund would be exhausted by payment of all claims allowed during a particular calendar year, then the amounts paid to each patient and other parties obtaining judgments

underscored material = new
[bracketed material] = delete

shall be prorated, with each such party receiving an amount equal to the percentage [~~his~~] the party's own payment schedule bears to the total of payment schedules outstanding and payable by the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following calendar years. However, payments for medical care and related benefits shall be made before any payment made under Laws 1976, Chapter 2, Section 30.

G. Upon receipt of one of the proofs of authenticity listed in this subsection, reflecting a judgment for damages rendered pursuant to the Medical Malpractice Act, the superintendent shall issue or have issued warrants in accordance with the payment schedule constructed by the court and made a part of its final judgment. The only claim against the patient's compensation fund shall be a voucher or other appropriate request by the superintendent after [~~he~~] the superintendent receives:

(1) a certified copy of a final judgment in excess of two hundred thousand dollars ($200,000) against a health care provider;

(2) a certified copy of a court-approved settlement or certification of settlement made prior to initiating suit, signed by both parties, in excess of two hundred thousand dollars ($200,000) against a health care provider; or

underscored material = new
[~~bracketed material~~] = delete

(3) a certified copy of a final judgment less than two hundred thousand dollars ($200,000) and an affidavit of a health care provider or its insurer attesting that payments made pursuant to Subsection E of Section 41-5-7 NMSA 1978, combined with the monetary recovery, exceed two hundred thousand dollars ($200,000).

H. The superintendent shall contract for an independent actuarial study of the patient's compensation fund to be performed not less than once every two years."

SECTION 6. A new section of the Medical Malpractice Act is enacted to read:

"[NEW MATERIAL] DISCLOSURE OF PERSONAL INFORMATION PROHIBITED.--It is unlawful for any employee or former employee of the state to disclose to any other person, other than an employee of the state in connection with that employee's official duties, any personal information about a health care provider that has settled a claim for malpractice covered by the Medical Malpractice Act."

SECTION 7. A new section of the Medical Malpractice Act is enacted to read:

"[NEW MATERIAL] ADVISORY COMMITTEE--MEMBERS--DUTIES.--

A. The "Medical Malpractice Act advisory committee" is created. The advisory committee shall consist of seven members as follows:

(1) three attorneys appointed by the New

underscored material = new
[bracketed material] = delete

Mexico trial lawyers association;

(2) three physicians appointed by the New Mexico medical society; and

(3) the superintendent, who shall be the chair of the committee.

B. The advisory committee shall meet at the call of the chair, but no less than semiannually.

C. The advisory committee shall review policies, administrative actions, statutes, court opinions and all other matters relating to the Medical Malpractice Act and, no later than December 1 of each year, report its findings and recommendations to the governor and the legislature.

D. Members of the advisory committee shall not receive per diem and mileage."

SECTION 8. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2019.

underscored material = new
[~~bracketed material~~] = delete