

LFC Requester:

Julisa Rodriguez

**AGENCY BILL ANALYSIS - 2025 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO

[AgencyAnalysis.nmlegis.gov](http://AgencyAnalysis.nmlegis.gov) and email to [billanalysis@dfa.nm.gov](mailto: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: 2/4/2023

Check all that apply:

Bill Number: SB224Original  Correction Amendment  Substitute Sponsor: Senator Linda M. TrujilloShort Title: SUPER. OF INSURANCE &MED. MALPRACTICEAgency Name  
and Code

Number:

Person Writing

Phone: (505) 690-0651Office of Superintendent of  
Insurance - 440Timothy VigilEmail Timothy.Vigil@osi.n**SECTION II: FISCAL IMPACT****APPROPRIATION (dollars in thousands)**

| Appropriation |      | Recurring<br>or Nonrecurring | Fund<br>Affected |
|---------------|------|------------------------------|------------------|
| FY25          | FY26 |                              |                  |
| \$0           | \$0  | N/A                          | N/A              |

(Parenthesis ( ) indicate expenditure decreases)

**REVENUE (dollars in thousands)**

| Estimated Revenue |      |      | Recurring<br>or<br>Nonrecurring | Fund<br>Affected |
|-------------------|------|------|---------------------------------|------------------|
| FY25              | FY26 | FY27 |                                 |                  |
| \$0               | \$0  | \$0  | N/A                             | N/A              |

(Parenthesis ( ) indicate revenue decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

|              | FY25 | FY26 | FY27 | 3 Year<br>Total Cost | Recurring or<br>Nonrecurring | Fund<br>Affected |
|--------------|------|------|------|----------------------|------------------------------|------------------|
| <b>Total</b> | \$0  | \$0  | \$0  | \$0                  | N/A                          | N/A              |

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE****BILL SUMMARY**Synopsis:

The Patient's Compensation Fund ("PCF" or the "Fund") is a non-reverting fund created by the

Medical Malpractice Act (“MMA”). It is used to pay for past medical care and ongoing treatment for patients harmed by acts of medical malpractice that fall under the MMA when the cost of care exceeds the statutory maximum payable by a qualified healthcare provider. The PCF is administered by a third-party administrator (“TPA”) who is overseen by the New Mexico Superintendent of Insurance (“Superintendent”), who is the Custodian of the Fund.

Senate Bill 224 (“SB224”) adds a new section to the Medical Malpractice Act specifically affirming the longstanding practice of the Superintendent/TPA participating in mediations for medical malpractice claims on behalf of the PCF, protecting the confidentiality of certain records related to medical malpractice claims, and clarifying that the Superintendent may intervene in a judicial hearing to approve any settlement that involves the PCF prior to the district court approving or disallowing a settlement.

### **FISCAL IMPLICATIONS**

None

### **SIGNIFICANT ISSUES**

None

### **PERFORMANCE IMPLICATIONS**

None

### **ADMINISTRATIVE IMPLICATIONS**

None

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None

### **TECHNICAL ISSUES**

None

### **OTHER SUBSTANTIVE ISSUES**

SB224 seeks to ensure the Superintendent has the ability to properly oversee the PCF and to present issues before the district court when a proposed settlement is contrary to the MMA or otherwise problematic. The bill’s three subsections address the following:

SB224 Subsection A: Currently, the Superintendent, through the TPA, participates in the settlement discussions in almost every case involving the PCF. This is necessary in part to ensure that the Superintendent is aware of pending litigation which may impact the Fund in the future. The Superintendent’s participation likewise facilitates her oversight responsibilities, ensuring that claims against the PCF are not unreasonable or contrary to the MMA. The Superintendent’s continued participation in mediations and settlement discussions is necessary to ensure that the long-term viability of the Fund is not threatened.

During mediations, the TPA may make offers on behalf of the PCF or oppose demanded amounts. The Superintendent may, for example, direct the TPA to object if the information provided shows that expenses are not related to the underlying incident of malpractice, if the requested expenses

are unreasonable, or if liability is disputed. The Superintendent must also account for whether providers that are not covered by the MMA are partially at fault and, if so, how expenses should be apportioned between qualified and non-qualified providers. The PCF is prohibited from providing benefits to non-qualified providers. NMSA 1978, § 41-5-5(D).

Subsection A of SB224 seeks to protect this existing practice by solidifying the Superintendent's role in any mediation that may result in payment from the PCF. Absent the Superintendent's participation, an unreasonable stipulation by the parties may require payments to be made from the PCF that are unreasonable or even prohibited by the MMA.

SB224 Subsection B: This portion seeks to ensure that the Superintendent receives accurate information in order to assess a malpractice claim which may result in payments being made from the Fund. Typically, the parties to a medical malpractice action keep the Superintendent informed throughout the case by providing the TPA with information such as medical records, medical bills, expert reports, and case summaries. This information usually is primarily provided by defense counsel, though the TPA strives to have open communication with plaintiff's attorneys as well.

Recently, there has been growing concern that the information shared with the TPA and Superintendent are not adequately protected, which has led to hesitation or refusal to share crucial information impacting the PCF. Sensitive information, such as medical records, expert reports, and attorney summaries held by the PCF in its claims file should be protected from disclosure and only permitted to be used for purposes of consistent with the MMA. Encouraging open communications with the PCF Custodian is vital to the continued operation of the Fund. The language of Subsection B closely mirrors language already contained in the MMA concerning the maintenance of records by the director of the medical review commission. *See* NMSA 1978, Section 41-5-24.

SB 224 Subsection C: The MMA already requires that any settlement requiring payment from the PCF first be approved by the district court. While intervention as a matter of right is consistent with the Superintendent's role as Custodian of the fund, it is not expressly provided for in existing statute. District courts have taken varying positions as to the ability of the Superintendent to intervene on behalf of the Fund.

Providing for intervention is an important safeguard to ensure that the interests of the PCF are considered by the court, and to provide a suitable check on unreasonable settlements. In a medical malpractice suit, the plaintiff's motivation to procure as much money as possible and the defendant's motivation to limit its own personal liability are not necessarily consistent with assuring reasonable settlement terms or amounts. This is due to the nature of the PCF which acts as an excess layer of professional liability coverage for the medical provider but is not a party to the lawsuit.

In the event a qualified healthcare provider goes to trial, that provider is exposed to the possibility of an unlimited punitive damages award against it. On the contrary, if it is able to settle with the plaintiff prior to trial, punitive damages liability can be mitigated. Regardless of whether a case proceeds to trial or settles before trial, the liability of a provider for compensatory damages is capped, and the PCF will incur the expense of medical costs for all amounts above the statutory

cap. This scenario provides a unique motivation for the parties to settle under terms that are particularly favorable to the plaintiff, but which impose a high financial burden on the PCF. SB224 ensures that there is someone who is reasonably informed that can advocate for the fairness of a proposed settlement from the perspective of all PCF stakeholders. Such a position is necessary in order to protect the long-term viability of the fund.

In the event that the parties agree to an unreasonable settlement, such as one that is inconsistent with the medical evidence or incompatible with the MMA, the Superintendent should be permitted to intervene as a matter of right. The district court, after having been informed of such issues by the Superintendent, would then be able to rule on the request to approve the settlement as is already standard practice.

### **ALTERNATIVES**

None

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

If SB224 is not enacted, the PCF will be exposed to the potential of forced settlements that are not in the best interests of patients. Courts will likewise be required to make rulings on proposed settlements without the benefit of a party acting as a check concerning the amount or the terms once the financial liability has reached a certain point.

Additionally, the effective management of the Fund will be severely hindered due to increased resistance to sharing information from attorneys representing parties. This crucial malpractice data is necessary for the PCF Custodian, not only for the evaluation of individual claims, but also for the comprehensive administration of the Fund as a whole.

### **AMENDMENTS**

None