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

SPONSOR Picraux **ORIGINAL DATE** 2-6-2006 **LAST UPDATED** **HB** 851

SHORT TITLE Medical Malpractice Joint Underwriting Act **SB**

ANALYST Dearing

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	**FY07**		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
New Mexico Health Policy Commission
Department of Health (DOH)

SUMMARY

Synopsis of Bill

House Bill 851 (HB 851) proposes a new section be added to the New Mexico Insurance Code creating the "Medical Malpractice Joint Underwriting Association Act" and the Joint Underwriting Association (JUA) to provide medical malpractice insurance on a self-supporting basis.. The JUA's membership is to be composed of all insurers authorized to write within New Mexico, on a direct basis, bodily injury liability insurance other than automobile, homeowners and farm owners liability insurance. Every insurer of this type shall remain a member of the Association as a condition of its authority to continue to transact this kind of insurance in the state.

The JUA is to be governed by a Board of Directors comprised of one representative of each of the following: the New Mexico Trial Lawyers Association, the New Mexico Medical Society, allied health care providers, the insurance industry and a private insurance company that has issued the greatest number of medical malpractice insurance policies for practitioners in New Mexico.

The JUA would have the power to issue insurance liability policies, and to appoint a service company to underwrite medial malpractice insurance, issue contracts of insurance and adjust and pay losses. The JUA would also be able cede and assume reinsurance and assess members for

funds to pay operating expenses of the Association.

During the 2005 legislative session, Senate Memorial 7 stipulated a request that the New Mexico Policy Commission and the Insurance Division of the Public Regulatory Commission convene a task force on Health Care Practitioner Liability Insurance, which was delivered in November of 2005. The SM 7 report indicated that participants in the task force agreed on the need for a Joint Underwriting Association (JUA), but were unable to reach consensus on how the JUA should operate.

The Joint Underwriting Association (JUA) proposed in HB 851 would be able to offer malpractice insurance to a wide range of eligible providers not currently covered by APCap.

HB 851 would be strengthened by clarifying the intended relationship between the JUA and APCap coverage.

The JUA could write policies for a very wide range of medical care providers and health care organizations. When the final actuarial analysis for group is completed, there may be a very high reserve requirement needed to keep the JUA financially viable. Capitalizing this reserve requirement may not be feasible based entirely upon unsubsidized premium payments.

FISCAL IMPLICATIONS

No significant costs are associated with this enactment. Specifically page 12, line 19, section D.; stipulates that the costs and operational expenses of the JUA, including any obligations or legal encumbrances are solely the responsibility of the association, and do not revert to the State.

SIGNIFICANT ISSUES

HB851 creates a five person, staggered two year term Board for the JUA. The Board composition consists of one representative appointed by the New Mexico trial lawyers association, one by the New Mexico Medical society, one appointed by the governor representing the allied health care providers; one appointed by the governor representing the insurance industry, and one appointed by the private insurance company that has issued the greatest number of medical malpractice insurance policies for practitioners in New Mexico during the prior calendar year. The superintendent of insurance is an ex-officio board member. The board makes the determination of whether insurance is unavailable or not obtainable at a reasonable cost for one of its provider classes.

In general, physicians, chiropractors, podiatrists, nurse anesthetists, physicians' assistants, hospitals and outpatient health care facilities are currently covered under the New Mexico Medical Malpractice Act, under which damage caps, minimized statutes of limitations, pre-litigation reviews, and a state's "patient compensation fund" have helped to increase these groups' access to affordable coverage, and subsequently, the ability to practice within the state.

Unfortunately, the New Mexico Medical Malpractice Act, Section 41-5-1 NMSA 1978, while protecting the previously mentioned groups, does not address the insurance affordability needs of midwives, nurse practitioners, dentists, and nursing home care-givers.

With legislative enactment, the JUA becomes operational immediately and "shall be utilized in

the event of the unavailability of medical malpractice liability insurance or of medical malpractice liability insurance on a reasonable basis through normal channels."

HB851 proposes that the JUA has the authority to issue policies including incidental coverage and premises or operations liability coverage on the premises where services are rendered, all subject to minimum limits of liability of one million dollars for each claim and three million dollars in aggregate for all claimants under one policy in a policy year. The minimum limits increase annually by the consumer price index for medical expenses.

Under HB851 all policies are to be issued on a claims-made basis. The JUA will appoint a service company to be located in New Mexico and will underwrite medical malpractice insurance, issue contracts of insurance, as well as adjust and pay losses. The company can also procure reinsurance and assess members for funds to pay its operation and obligations.

HB851 requires the JUA to have a plan of operation including a preliminary assessment to all members for initial commencement operating expenses, underwriting standards, and an assessment of the members to defray losses and expenses. The plan of operation becomes effective forty-five days after a public hearing.

HB851 spells out the application process and the requirements for the Insurance Superintendent to obtain statistical data regarding medical malpractice losses costs. The superintendent will develop a statistical plan required for the purpose of gathering actuarial data referring to loss and loss adjustment expense experience. The bill also establishes the rate filing process, policy form, (whether on a claims-made or occurrence basis), rate structure and the process for rate increases to maintain an actuarially sound JUA.

HB851 notes the obligation of terminating members of the JUA and the non-responsibility of the state for the JUA's activities and obligations. It also has an April 1 reporting requirement to the Insurance Division with information about its transactions, condition, operations and affairs during the preceding year. The bill has a non-severability clause with respect to any part or application of it being held invalid, the remainder or its application to other situations is not impacted. The effective date of the act is July 1, 2006.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 851 relates to the following:

- HM 7 - which asks that the New Mexico Congressional Delegation be requested to support the President of the United States' Medical Malpractice Reform.

- SJM 23 – requesting that the NM Health Policy Commission appoint a task force to continue to study possible legislative solutions to the malpractice insurance crisis facing healthcare practitioners and providers.

TECHNICAL ISSUES

HB 851 includes some contradictory language. On Page 5, line 16, HB 851 calls for the JUA to issue policies on a claims-made basis. On Page 9, line 6, HB 851 permits either claims-made or occurrence based policies.

OTHER SUBSTANTIVE ISSUES

Generally, HB 851 contains no statutory cap on medical malpractice claims. *Physicians in New Mexico are currently protected by a $600.000 per incident cap*. Without a similar cap, premiums for non-physician providers under the JUA could rise to prohibitively high levels. Furthermore, the disparate treatment of physicians and non-physicians could possibly lead to legal challenges of the statutory protection of physicians.

The American Medical Association has listed New Mexico as one of only six states that, from the viewpoint of physicians, are not in crisis status regarding medical malpractice claims and litigation. This is largely due to physicians' access to the Medical Malpractice Act, which is widely viewed as the main stabilizing influence on their malpractice premiums. However, for non-physicians, the environment is different. Non-physician health care professionals play an integral role in New Mexico's health care delivery system. Compared to much of the nation, New Mexico is large, rural, poor and thinly populated. All but three of the state's 33 counties have far fewer doctors per capita than the national average. Consequently the need for non-physician providers is crucial. Access to health care via non-physicians is the source of care for many New Mexicans.

Most non-physician practitioners cannot find occurrence based liability coverage and can obtain only claims-made policies. There are only two insurers writing a few non-physician practitioners on occurrence forms. The vast majority of non-physician practitioners, even those on the Medical Malpractice Act's qualifying list, have no access to the Act. 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.

The 2005 SM7 task force heard testimony that licensed midwives may curtail practice due to the combined effect of the unavailability or affordability of malpractice insurance coupled with the restrictions on Medicaid reimbursement. There was also testimony that some of the state's nursing homes may face insolvency due to the high self-insured retentions now required under their policies.

The entire task force was favorably inclined toward the creation of a state-sponsored insurance vehicle called a Joint Underwriting Association (JUA) that would provide malpractice coverage to classes of health care providers that cannot find coverage elsewhere. All agreed that such a JUA should be self-supporting with rates that are actuarially sound, should exercise normal underwriting authority, including the right to deny coverage to health care providers who have an adverse claims history, and should adjust individual policyholders' premiums to reflect their claim experience.

Divisions arose regarding whether the JUA should have award caps and whether it should be open to providers who are not "in crisis." Opponents of the JUA wanted additional data before they could fully endorse the concept. The majority supported a JUA that would be open to all classes of providers, that would offer both occurrence and claims-made products, that would qualify as a base coverage insurer under the Act, and that would have relatively high caps on non-economic damages for providers not under the Act.

The provision for caps was opposed by the New Mexico Trial Lawyers Association. The Medi-

cal Society and the Trial Bar oppose the creation of a JUA that would insure providers who can find coverage elsewhere and thereby to compete with the medical society's insurance program.

Other states that are facing malpractice crisis have enacted new laws primarily centered around establishing a cap on the awards made to plaintiffs. There are no recovery caps in HB851 as written.

Twenty-seven states have laws that cap payments for non-economic damages in malpractice cases. In a study in *Health Affairs* (May 2005), the authors examined whether these laws have increased the supply of physicians, using county-level data from all fifty states from 1985 to 2000. The results showed that counties in states with a cap had 2.2 percent more physicians per capita because of the cap, and rural counties in states with a cap had 3.2 percent more physicians per capita. Rural counties in states with a $250,000 cap had 5.4 percent more obstetrician-gynecologists and 5.5 percent more surgical specialists per capita than did rural counties in states with a cap above $250,000.

Their conclusion was that "there is much evidence indicating that a state's legal environment influences the frequency and size of malpractice awards and consequently the supply of physicians."

Studies have also found a relationship between direct tort reforms that include non-economic damage caps and lower rates of growth in premiums.

For example, in a recent analysis of malpractice premiums in states with and without certain medical malpractice tort limitations, the Congressional Budget Office (CBO) "estimated that certain caps on damage awards in combination with other elements of proposed federal tort reform legislation would effectively reduce malpractice premiums on average by 25 to 30 percent over the 10-year period from 2004 through 2013. A 1997 study that assessed physician-reported malpractice premiums from 1984 through 1993 found that direct reforms, including caps on damage awards, lowered the growth in malpractice premiums within 3 years of their enactment by approximately 8 percent. Average per capita payments for claims against all physicians tended to be lower on average in states with non-economic damage caps than in states with limited reforms. From 1996 through 2002, the average per capita payments were $10 for states with these damage caps compared with $17 for states with limited reforms. Within these averages, however, were wide variations among states. For example, in 2002 the per capita claims payments among states with these caps ranged from $4 to $16, compared with $3 to $33 among states with limited reforms. In addition, two states among those with limited reforms had consistently higher average claims payments, raising the overall average among this group of states."

A new study projects medical liability premiums increasing 12%-15% in Wisconsin following the loss of the state's cap on non-economic damages, while premiums paid to the state's supplementary medical liability fund could double. The state Supreme Court ruled the cap unconstitutional in July, 2005. Over the last six years, when Wisconsin had a cap of about $450,000 on non-economic damages, the average annual increase in premiums was just 5%.

Without a cap, the reserve requirement needed to keep the JUA actuarially sound may very high and require premiums that really do not solve this problem.

ALTERNATIVES

Amendments, as proposed by New Mexico Health Policy Commission:

Provide a definition for "Allied Health Providers" noted on page 4, line 11.Allied health Providers is a very broad classification of health care personnel from EMTs to acupuncturists. Should this not include nursed midwives, CRNAs, and others that have this insurance issue now?

Provide a definition for "reasonable" on page 3, line 22 and page 7, line 21. The definition of "crisis" and "reasonable" were major issues of disagreement in the SM7 Task Force.

Provide a definition for "licensed health care provider" on page 2, line 11-13 that excludes certified organizations unless they provide medical care through their employed personnel. It was not the intention of SM7 to cover every licensed or certified provider. The definition as written would allow state certified providers of developmental disability services to possibly be eligible.

Provide a definition for "malpractice claim." Suggest language from the current Medical Malpractice Act which "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 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 actions based on battery or wrongful death; "malpractice claim" does not include a cause of action arising out of the driving, flying or non medical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance."

Provide a definition for consumer price index for medical expenses on page 5, line15-16. Suggest utilizing the Bureau of Labor statistics metric.

Provide language for recovery caps that mirrors the Medical Malpractice Act (MMA). Without caps in this bill should it become law, the current MMA would be legally weakened with two separate values placed upon recovery depending upon which law that an action was brought under. A physician insured under the Medical Malpractice Act would have caps while a physician insured under the JUA would not as HB851 is now written. The equity of the MMA versus HB851 could be questioned with unlimited recovery in one instance and a capped recovery under the MMA. Suggest "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. In jury cases, the jury shall not be given any instructions dealing with this limitation. The value of accrued medical care and related benefits shall not be subject to the six hundred thousand dollar ($600,000) limitation. Monetary damages shall not be awarded for future medical expenses in malpractice claims. 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." This language is from the current Medical Malpractice Act.

Provide for another representative other than the Medical Society on the JUA Board. In 1994, the State Insurance Department determined that New Mexico Physicians Mutual Liability Company (the independent mutual insurer formed by the Medical Society in 1976) was nearly insolvent. Rather than close, it was decided to merge with Michigan Physicians Mutual Liability

Company. Michigan Physicians changed its name several times to the present American Physicians Assurance Corporation (American Physicians) which is exclusively endorsed as the medical liability provider of choice for the Medical Society members. With the exclusive endorsement of American Physicans, it would be difficult to have the Medical Society have a fiduciary duty to the JUA.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The consequences of not enacting this legislation will cause continuing negative trends in health care practitioners' liability

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