

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 03/10/11

SPONSOR SJC LAST UPDATED _____ HB _____

SHORT TITLE Amend Medical Malpractice Act SB CS/333/SJCS

ANALYST Esquibel

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Non-Rec | Fund Affected |
|-------------------|----------|----------|-------------------------|-----------------------------------|
| FY11 | FY12 | FY13 | | |
| | Moderate | Moderate | Recurring | Patient's Compensation Fund |
| N/A | N/A | N/A | N/A | General Fund |

(Parenthesis () Indicate Revenue Decreases)

SB333 relates to HB267, SB332, HB282, HB454, HB552 and HB590

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Public Regulation Commission (PRC)
 Human Services Department (HSD)
 Department of Health (DOH)
 Medical Board (MB)

SUMMARY

Synopsis of Bill

The Senate Judiciary Committee substitute for the Senate Corporations and Transportation Committee substitute for Senate Bill 333 as amended by the Senate Corporations and Transportation Committee provides for the following:

- Revises the language regarding the definition of a "corporation."
- Raises the cap on liability from \$600,000 to \$1,000,000 as of January 1, 2012.
- Establishes a cost of living adjustment (COLA) on the liability cap based on the urban consumer price index, but not to exceed 3% annually. The COLA would begin July 1, 2014 and take effect the July of each subsequent year.

- Includes a provision that all settlements and awards will remain confidential and forbids current and former state employees from disclosing this information.
- Defines health care providers as medical and osteopathic doctors, chiropractors, podiatrists, physician assistants, certified registered nurse anesthetists, hospitals and outpatient facilities.
- Establishes an advisory committee of three doctors and three lawyers with the Superintendent of Insurance serving as chair to discuss issues related to the Medical Malpractice Act.

FISCAL IMPLICATIONS

SB333/SJCS requires each hospital and medical facility, business entity or health care to pay into the Patient's Compensation Fund an annual surcharge that will be based on "sound actuarial principals."

The Patients Compensation Fund, which is the fiscal element of the Medical Malpractice Act, is funded exclusively from surcharges assessed to health care providers covered under the Act. The PRC indicates SB333/SJCS requires the Superintendent of Insurance to determine the surcharges for each hospital and medical facility, business entity or health care provider based on actuarially sound risk assessments that take into account the various physician specialties within the hospital, business entity or provider. Also, the bill eliminates the current option for a doctor or other individual health care practitioner to submit a monetary deposit in lieu of obtaining primary insurance coverage.

Personal liability for a health care practitioner remains limited at \$200,000 with the remainder covered by the Patient's Compensation Fund.

SIGNIFICANT ISSUES

The Senate Judiciary Committee (SJC) substitute for the Senate Corporations and Transportation Committee (SCORC) substitute for SB333 as amended by SCORC makes a number of changes to the Medical Malpractice Act. Most notably, it increases the liability limits for malpractice for those individuals or entities covered by the Medical Malpractice Act from the current limit of \$600,000 to \$1,000,000 per occurrence after January 1, 2012 with Consumer Price Index increases on July 1, 2014 and every year thereafter. Personal liability for a health care practitioner remains limited at \$200,000 with the remainder covered by the Patient's Compensation Fund.

The Patient's Compensation Fund is administered by the Superintendent of Insurance. SB333/SJCS states that Patient's Compensation Fund premiums are determined by the Superintendent based on actuarial principles which take into account the different classification of health care providers, preferably New Mexico health care providers. SB333/SJCS makes certain definitional changes including defining "business entity," and clarifying "health care provider," "outpatient health care facility," and "personal information." It also contains a new section which prohibits former or current state employees from the disclosure of any information related to settlement of a malpractice claim covered by the Medical Malpractice Act. And, finally, it creates an advisory committee called the Medical Malpractice Act Advisory Committee which will consist of three attorneys and three physicians, the Superintendent of Insurance (chairperson), and will meet at least semiannually. The Committee shall review

policies, administrative actions, statutes, court opinions and all other matter relating to the Medical Malpractice Act and report its findings yearly to the PRC, the Governor, and the Legislature.

ADMINISTRATIVE IMPLICATIONS

The Insurance Division will need to individually determine the surcharges for doctor corporations and other medical business entities.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The Medical Board indicates SB332 and duplicate bill HB282 amending the Medical Practice Act are unnecessary if either HB267 or SB333/SJCS pass because both of these bills would amend the Medical Malpractice Act to clarify that business entities providing health care services are health care providers under the Medical Malpractice Act.

SB333/SJCS relates to the following bills:

- HB 454 would amend the Insurance Code to prohibit risk retention groups from providing the primary layer of medical professional liability insurance required of health care providers that are covered under the Medical Malpractice Act.
- HB 552 would provide award caps for hospitals that are not in the Patient's Compensation Fund as well as provide award caps for ambulances.
- HB 590 would raise the awards cap to \$1,500,000 and would allow injured patients to sue the underlying insurer and the Patient's Compensation Fund for their alleged failure to settle claims fairly and promptly.

TECHNICAL ISSUES

The Attorney General's Office indicates there is some concern over constitutional issues anytime the government attempts to ban speech of its employees. However, a large body of case law generally supports the ability of a government to enforce such restrictions both based on simple contract law and also on balancing test between rights of employee to speak and right of government to restrict certain information. Here, medical malpractice claims are often sensitive to the health care provider and as long as restriction narrowly tailored the constitutional concerns are minimized.

One policy concern: The three attorneys on the Medical Malpractice Act Advisory Committee are selected from the Trial Lawyers Association and will be made up of only one group of lawyers, most of whom will represent plaintiffs. It may be advisable to make membership on the Committee more inclusive so that all sides are represented.

The Public Regulation Commission indicates SB333/SJCS is not clear whether business entities that are eligible to be covered under the Act as described on page 2, lines 16-20 would include nursing homes.

The Superintendent of Insurance is charged with administering the Patient’s Compensation Fund, which provides part of the insurance coverage for health care providers under the Act. However, neither the Act nor this bill provides the Superintendent with the rulemaking authority he needs to administer the Act in a clear and effective manner.

OTHER SUBSTANTIVE ISSUES

The Public Regulation Commission indicates the Medical Malpractice Act was enacted in 1976 and is in need of amendments in addition to those proposed by SB333/SJCS in order to reflect changes in the medical and insurance environment over the last 35 years. These changes include the need to:

- Expand the list of covered health care practitioners to include nurses, midwives and other key health care professionals.
- Explicitly include coverage for the employees, officers and agents of hospitals, outpatient health care facilities and business entities.
- Allow the use of “claims-made” policies that predominate in the current malpractice insurance marketplace, rather than continuing to require the somewhat obsolete “occurrence” type of policy. This will expand the number of insurers willing to provide the required primary layer of insurance.

The Public Regulation Commission writes the “following amendments were among those contained in the amendments provided by Senate Corporations and Transportation Committee and should be re-introduced:

- On page 2, line 14, after “hospital” insert “, including an officer, employee or agent of a hospital”.
- On page 2, line 15, after “facility” insert “, including an officer, employee or agent of an outpatient health care facility”.
- On page 2, line 20, after “license” insert “, including an officer, employee or agent of a business entity”.
- On page 11, line 2, strike “seven” and insert in lieu thereof “six”.
- On page 11, lines 4 through 7, strike Paragraphs (1) and (2) and insert in lieu thereof the following paragraphs:

“(1) two attorneys appointed by a statewide association that represents trial lawyers selected by the superintendent;

(2) two physicians appointed by a statewide association that represents physicians selected by the superintendent;

(3) one hospital administrator appointed by a statewide association that represents hospital administrators selected by the superintendent; and”

Re-number the succeeding paragraph accordingly.

- On page 11, between lines 19 and 20, insert the following section:

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

“**[NEW MATERIAL]** RULEMAKING AUTHORITY.—The superintendent shall promulgate such rules as are necessary to carry out the provisions of the Medical Malpractice Act.””.

Renumber the succeeding section accordingly.

Several provisions that were contained in the Senate Corporations & Transportation Committee Substitute for SB333 (.185853.1) should be re-introduced:

- Section 6 of the Senate Corporations & Transportation Committee Substitute, which amended 41-5-25 NMSA 1978. This includes the provision that “The superintendent shall have the sole authority for making a determination to settle any claim against the patient’s compensation fund.”
- Replace the definition of “professional or occupational license” contained in the Senate Judiciary Committee Substitute (on page 4, lines 3 through 9) with the definition of “professional or occupational license” contained in the Senate Corporations & Transportation Committee Substitute, which expands the list of types of health care practitioners eligible to be covered under the Act.”

POSSIBLE QUESTIONS

The Public Regulation Commission indicates a number of issues unresolved in the Medical Malpractice Act are not addressed by this bill. Some of these statutory uncertainties include:

- For hospitals that covered under the Act, are their nurses and other employees vicariously covered?
- Can a health care provider’s primary insurer settle a claim involving the Patient’s Compensation Fund without the Superintendent’s consent?
- While the primary insurer is required to provide legal defense for the health care provider, is it required to provide defense for claims that go to an appeals court?

RAE/svb:mew