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HOUSE BILL 629

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

INTRODUCED BY

Daymon Ely

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

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

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

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

14 (2) a hospital;

15 (3) an outpatient health care facility; or

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

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

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

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

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

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

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

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

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

3 J. "professional or occupational license" means a
4 license to practice medicine or provide health care services
5 pursuant to the Optometry Act; the Nursing Practice Act; the
6 Chiropractic Physician Practice Act; the Medical Practice Act;
7 the Podiatry Act; the Professional Psychologist Act; the
8 Osteopathic Medicine Act; the Occupational Therapy Act; the
9 Physical Therapy Act; or the Dental Health Care Act; and

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

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

14 "41-5-5. QUALIFICATIONS.--

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

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

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

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

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

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

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

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

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

12 "41-5-6. LIMITATION OF RECOVERY.--

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

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

21 (a) six hundred thousand dollars
22 (\$600,000) per occurrence for acts of malpractice occurring
23 prior to January 1, 2020; and

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

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1 January 1, 2020; and

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

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

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

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

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

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1 future medical expenses in malpractice claims.

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

10 [~~E. For the purposes of Subsections A and B of this~~
11 ~~section, the six hundred thousand dollar (\$600,000) aggregate~~
12 ~~amount recoverable by all persons for or arising from any~~
13 ~~injury or death to a patient as a result of malpractice shall~~
14 ~~apply only to malpractice occurring on or after April 1,~~
15 ~~1995.]"~~

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

19 "41-5-7. FUTURE MEDICAL EXPENSES.--

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

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

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

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

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

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

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

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

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

15 H. A judgment of punitive damages against a health
16 care provider shall be the personal liability of the health
17 care provider. Punitive damages shall not be paid from the
18 patient's compensation fund or from the proceeds of the health
19 care provider's insurance contract unless the contract
20 expressly provides coverage. Nothing in Section 41-5-6 NMSA
21 1978 precludes the award of punitive damages to a patient.
22 Nothing in this subsection authorizes the imposition of
23 liability for punitive damages on a derivative basis where that
24 imposition would not be otherwise authorized by law."

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

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

2 "41-5-25. PATIENT'S COMPENSATION FUND.--

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

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1 B. To create the patient's compensation fund, an
2 annual surcharge shall be levied on all health care providers
3 qualifying under Paragraph (1) of Subsection A of Section
4 41-5-5 NMSA 1978 in New Mexico. The surcharge shall be
5 determined by the superintendent based upon sound actuarial
6 principles, using data obtained from New Mexico experience if
7 available. The surcharge shall be collected on the same basis
8 as premiums by each insurer from the health care provider.

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

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

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

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

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1 shall be prorated, with each such party receiving an amount
2 equal to the percentage [~~his~~] the party's own payment schedule
3 bears to the total of payment schedules outstanding and payable
4 by the fund. Any amounts due and unpaid as a result of such
5 proration shall be paid in the following calendar years.

6 However, payments for medical care and related benefits shall
7 be made before any payment made under Laws 1976, Chapter 2,
8 Section 30.

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

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

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

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

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

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

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

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

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

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

25 (1) three attorneys appointed by the New

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1 Mexico trial lawyers association;

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

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

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

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

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

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

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