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FISCAL IMPACT REPORT

SPONSOR Hochman-Vigil/ Gallegos ORIGINAL DATE 12/11/21 LAST UPDATED 12/16/21 HB 11/ec/aHFl#1/aSJC

SHORT TITLE Medical Malpractice Changes SB _____

ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Possible Reduced Costs, See Fiscal Implications				Recurring	Patients' Compensation Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Medical Board (NMMB)
 Department of Health (DOH)
 Human Services Department (HSD)
 Attorney General's Office (NMAG)
 Administrative Office of the Courts (AOC)
 Office of Superintendent of Insurance (OSI)
 New Mexico Hospital Association (NMHA)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendments to House Bill 11 as amended by the House Floor strike the House Floor amendment and repeal Sections 1, Definitions, and Section 3, Limitation of Recovery, of Laws 2021, Chapter 16, the Medical Malpractice Act.

The Senate Judiciary Committee (SJC) amendments structure the act differently from House Bill 11 and Laws 2021, Chapter 16, but retain the substantive provisions of the Medical Malpractice Act and House Bill 11 (HB11).

As in the original HB11 and HB11/aHFl#1, the SJC amendments' definition of an independent health care provider specify that independent health care providers may be an agent, but not an employee, of a hospital or outpatient health care facility.

The SJC amendments address the technical concerns raised by the Office of Superintendent of Insurance and clarify the limitations of recovery are based on calendar years and remove the July 1 dates included in HB11/aHF1#1.

Specifically, the SJC amendments specify for an outpatient health care facility that *is not* majority-owned and majority-controlled by a hospital, for an injury or death that occurred in calendar years 2022 and 2023, the malpractice cap is \$750 thousand per occurrence. Laws 2021, Chapter 16, the Medical Malpractice Act, set these amounts at \$4 million for 2022 and \$4.5 million for 2023. House Bill 11/aHF1#1 had the same dollar cap of \$750 thousand as the SJC amendments, but the time period extended from January 1, 2022 through July 1, 2024. The SJC amendments specify for calendar year 2024, the malpractice cap per occurrence is \$5 million. This cap, and the ensuing cap of \$5.5 million for 2025 and \$6 million for 2026, are the same amounts as Laws 2021, Chapter 16, the Medical Malpractice Act.

The SJC amendments specify for a hospital or an outpatient health care facility that *is* majority-owned and majority-controlled by a hospital, for an injury or death that occurred in calendar year 2022, the malpractice cap is \$4 million; and for an injury or death that occurred in calendar year 2023, the malpractice cap is \$4.5 million. These amounts are the same as those included in Laws 2021, Chapter 16, the Medical Malpractice Act. The malpractice cap for 2024 is \$5 million, the cap for 2025 is \$5.5 million, and the cap for 2026 is \$6 million. All of these amounts are the same as Laws 2021, Chapter 16, the Medical Malpractice Act.

The SJC amendments to HB11/aHF1#1 specify the effective date of the provisions of the act is January 1, 2022.

The SJC amendments retain the emergency clause contained in HB11.

Synopsis of HF1#1 Amendment

The House floor amendment to House Bill 11 limits the applicability from January 1, 2022 through July 1, 2024, of the Medical Malpractice Act's dollar recoveries for outpatient health care facilities. The amendment also specifies that on and after July 1, 2024, the current provisions of the Medical Malpractice Act pertaining to outpatient health care facilities shall be in effect.

Synopsis of Original Bill

House Bill 11 proposes to modify the Medical Malpractice Act's definition of an independent health care provider to specify that independent health care providers may be an agent, but not an employee, of a hospital or outpatient health care facility.

The bill also proposes limiting the applicability from January 1, 2022, through July 1, 2023, of the Medical Malpractice Act's dollar recoveries for outpatient health care facilities. The bill proposes that, except for punitive damages and past and future medical care and related benefits, the aggregate dollar amount as a result of malpractice shall not exceed \$750 thousand per occurrence for claims brought against an outpatient health care facility, excluding outpatient health care facilities majority-owned and majority-controlled by a hospital, if the injury occurred during January 1, 2022 to July 1, 2023.

The bill specifies the aggregate dollar amount includes payment to a person for any number of loss of consortium claims or other claims per occurrence that arise solely because of the injuries or death of the patient. In jury cases, the jury shall not be given any instruction dealing with this limitation.

The bill proposes that on and after July 1, 2023, the current provisions of the Medical Malpractice Act pertaining to outpatient health care facilities shall be in effect.

HB11 contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

The bill proposes limits to medical malpractice exposure for independent health care providers who are agents of a hospital or outpatient health care facility, and would limit from January 1, 2022 to December 31, 2023 the applicability of the Medical Malpractice Act regarding certain outpatient health care facilities. The provisions of the bill could result in reductions in the overall monetary damages associated with malpractice claims deducted from the patients' compensation fund through January 1, 2027.

Section 41-5-25 of the Medical Practice Act provides that the patients' compensation fund (PCF) is created in the state treasury and administered by the Superintendent of Insurance. The PCF is funded with annual premium surcharges imposed on qualified healthcare providers. Amounts from the PCF are used to pay the amount of monetary damages in a malpractice claim. The PCF currently has a deficit of over \$30 million.

The Human Services Department (HSD) reports HB11 will not result in increased costs to Medicaid and may decrease costs but HSD is unable to quantify potential savings at this time.

SIGNIFICANT ISSUES

The bill is proposing to limit the exposure and potential liability under the provisions of the Medical Malpractice Act of independent health care providers that are agents of a hospital or outpatient health care facility.

The SJC amendments to the bill also proposes imposing a temporary two-year aggregate damages limit of \$750 thousand for outpatient health care facilities. The bill proposes that the aggregate dollar amount as a result of malpractice shall not exceed \$750 thousand per occurrence for claims brought against an outpatient health care facility, excluding outpatient health care facilities majority-owned and majority-controlled by a hospital, if the injury occurred during January 1, 2022 to December 31, 2023. In the current Medical Malpractice Act, dollar recoveries for outpatient health care facilities are capped at \$4 million in calendar year 2022, and \$4.5 million in calendar year 2023.

TECHNICAL ISSUES

The Office of Superintendent of Insurance (OSI) reports medical malpractice liability insurance carriers providing coverage to patients' compensation fund participants make their coverage and underwriting decisions at the beginning of the calendar year. However, in HB11 the \$4 million

liability risk will resume mid-year 2023, resulting in insurers perhaps choosing not to offer primary coverage for the 2023 policy year.

Therefore, OSI recommends changing the sunset date for the modification in Section 2 from July 1, 2023 to December 31, 2023; and also in Section 3, changing the applicability date from July 1, 2023 to December 31, 2023.

OTHER SUBSTANTIVE ISSUES

The Administrative Office of the Court (AOC) reports HB11 represents an agreement reached among a coalition of trial lawyers, patients, physicians, and hospitals to modify the Medical Malpractice Act (MMA) in an effort to address concerns raised by independent physicians that, as a result of interpretations of MMA, expected to close their offices or cease operations December 31, 2021 because of an inability to get malpractice insurance.

New Mexico continues to struggle with maintaining access to health care providers, particularly in rural areas of the state. By limiting medical malpractice exposure for independent health care providers and outpatient health care facilities, the bill could result in lower medical malpractice insurance costs for these providers resulting in them staying in business and continuing to offer access to health care services.

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