FISCAL IMPACT REPORT

SPONSOR Moores/Hickey **LAST UPDATED** 2/23/23 **ORIGINAL DATE** 2/22/23

SHORT TITLE Medical Malpractice Changes **BILL NUMBER** Senate Bill 296

ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	Patient's Compensation Fund

Parentheses ( ) indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Relates to House Bills 465, 63 and 500 and Senate Bills 296, 446 and 447

Sources of Information

LFC Files

Responses Received From
Board of Nursing
Medical Board
Office of Superintendent of Insurance (OSI)
Human Services Department (HSD)

SUMMARY

Synopsis of Senate Bill 296

Senate Bill 296 (SB296) proposes to amend the Medical Malpractice Act to limit the recovery for claims against outpatient healthcare facilities that are not majority-owned or -controlled by a hospital at $750 thousand per occurrence, with annual consumer price index (CPI) adjustments. SB296 includes in the definition of "independent provider" a licensed outpatient facility that is not majority-owned or -controlled by a hospital and defines an "outpatient health care facility" as majority-owned and -controlled by a hospital.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

The LFC annual recommendation to the Legislature, *Legislating for Results: Appropriation Recommendations*, notes:

> The patient's compensation fund (PCF) pays malpractice settlements for member physicians and hospitals. Established under the New Mexico Medical Malpractice Act, the program provides affordable malpractice coverage that caps the amount of damages awarded against the member healthcare providers. The fund's solvency has been a concern in recent years as Laws 2021, Chapter 16, amended the Medical Malpractice Act to include new providers eligible for participation in the PCF, raised the required underlying coverage limit from $200 thousand to $250 thousand, and increased the cap on nonmedical damages for independent providers from $600 thousand to $750 thousand in 2022, with an inflation adjustment annually thereafter.
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> Laws 2021, Chapter 16, also required the PCF deficit be eliminated by January 1, 2027. The fund has a projected deficit of almost $69 million despite a $30 million infusion of state funds during the 2022 regular legislative session. According to a September 2022 actuarial report, OSI would need to issue a 32 percent surcharge increase to meet solvency requirements, which could potentially push physicians out of the PCF or, worse, out of the state. Instead, the superintendent issued a 10 percent surcharge increase on physician contributions to the PCF coupled with proposed changes to the Medical Malpractice Act that would result in cost-savings to the fund. Suggested statutory changes included limiting "medical care and related benefits" only to amounts actually paid by or on behalf of an injured patient and accepted by a healthcare provider in payment of charges, clarifying what constitutes a "reasonable charge," and permitting examinations to determine the necessity of future medical care.

The Office of Superintendent of Insurance reports the PCF is a self-funded program. It can be difficult for the PCF administrator to confirm whether a hospital has majority ownership or control over a facility because of how complex the legal ownership systems can be.

SIGNIFICANT ISSUES

The Office of Superintendent of Insurance reports the bill would amend the Medical Malpractice Act to permanently institute a $750 thousand claim cap on non-hospital-owned facilities, adjusted annually by the consumer price index, instead of the $5 million cap provided for by the initial version of HB75 passed in 2021 and the temporary cap of $750 thousand imposed for calendar years 2022 and 2023 by later amendment. The changes have the effect of grouping non-hospital-owned healthcare facilities with the independent providers rather than with the hospitals for purposes of the claims limitation. Some healthcare facilities have indicated they anticipate they would go out of business in 2024 if the $5 million liability caps apply. Treating the healthcare facilities the same as independent providers significantly reduces the malpractice liability cap to $750 thousand.

The Human Services Department reports lowering the financial penalties on providers may attract more providers to the state or help keep more providers within the state, especially providers who work in specialties with large rates of malpractice, such as obstetricians. A 2022 American Medical Association report notes the number of doctors working in specialties with a high-risk of lawsuit were 7 percent higher in states with caps on noneconomic damages. https://www.ama-assn.org/system/files/mlr-now.pdf

ADMINISTRATIVE IMPLICATIONS

The New Mexico Medical Society notes there are over 450 licensed outpatient healthcare facilities in New Mexico, which includes government-run, hospital-owned, and independently owned facilities. Independent outpatient healthcare facilities are considered nonhospitals by the federal Centers for Medicare and Medicaid Services and receive less reimbursement than hospitals.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB296 relates to HB88, Medical Malpractice Damages Cap, which similarly limits the cap on non-hospital owned facilities to $750 thousand; HB63, Medical Malpractice Changes, which proposes a cap of $600 thousand on malpractice claims. SB296 also relates to HB465, Medical Malpractice Changes; HB500, Medical Malpractice Premium Assistance; SB446, Medical Malpractice Definition of Occurrence; and SB447, Medical Malpractice Recovery Amounts.

TECHNICAL ISSUES

OSI reports regrouping of the independent healthcare facilities with "independent providers" may add a layer of complexity to the actuarial rate making because independent healthcare facilities must be rated separately.

OTHER SUBSTANTIVE ISSUES

The Medical Board notes current law provides for an increasing scale of damage limitations on outpatient facilities not majority-owned and -controlled by a hospital, beginning at $750 thousand in 2023 and rising to $6 million in 2026, with CPI adjustments thereafter. These provisions are removed in the bill. By including this type of outpatient facility in the category of independent provider, damages are, therefore, limited to $750 thousand per occurrence, with annual CPI adjustments beginning in 2023.

The Administrative Office of the Courts notes amendments to the act enacted in 2021 placed outpatient healthcare facilities under the same cap as hospitals, subjecting them to an escalating cap. Providers and their advocates are concerned the escalation in the cap would cause certain sectors of healthcare to see increases in judicial awards and would have ramification for medical liability in the state resulting in fewer outpatient healthcare facilities, and higher outpatient healthcare facility costs.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The Office of Superintendent of Insurance notes if this bill is not enacted, healthcare facilities will become subject to the higher medical malpractice cap of $5 million as of January 1, 2024, and rising up to $6 million plus inflation by January 1, 2027, and thereafter.

RAE/mg/hg/al/hg