FISCAL IMPACT REPORT

SPONSOR STBTC **LAST UPDATED** 3/16/23
ORIGINAL DATE 3/14/23
SHORT TITLE Medical Malpractice Changes **BILL NUMBER** CS/Senate Bill 523/STBTCS/aSFl
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 Bill 465, House Bill 63, and House Bill 500 and Senate Bill 296, Senate Bill 446, and Senate Bill 447.
Relates to an appropriation in the General Appropriation Act.

Sources of Information
LFC Files

Responses Received From
Office of Superintendent of Insurance (OSI)
New Mexico Medical Society (NMMS)

SUMMARY

Synopsis of Senate Floor Amendment

The Senate floor amendment to the Senate Tax, Business and Transportation Committee substitute for Senate Bill 523 clarifies *independent* healthcare facilities' malpractice claims, settlements, and dollar amount of settlements shall be tracked and made publicly available by the Office of Superintendent of Insurance.

Synopsis of STBTC Substitute for Senate Bill 523

The Senate Tax, Business and Transportation Committee substitute for Senate Bill 523 would amend the Medical Malpractice Act to revise the patient's compensation fund (PCF) participation rules for independent outpatient health care facilities as follows:

- Differentiates between independent outpatient health care facilities and those owned/controlled by hospitals;
- Establishes a different underlying coverage limit of $500 thousand and a different claims cap of $1 million for independent outpatient health care facilities;
- Limits the protections of the Medical Malpractice Act for independent outpatient health

care facilities to three occurrences per year;
- Clarifies hospitals and hospital-controlled outpatient health care facilities will no longer participate in the PCF beginning January 1, 2027;
- Clarifies state and federally-owned and -employed health care providers are not subject to the provisions of the Medical Malpractice Act.

The Senate Tax, Business and Transportation Committee substitute for Senate Bill 523 specifically proposes the following:

Section 1: Definitions
- Page 1, line 23, creates a new definition of control to be added the Medical Malpractice Act:
  - "Control" means equity ownership in a business entity that
    (1) Represents more than 50 percent of the total voting power of the business entity; or
    (2) Has a value of more than 50 percent of that business entity;
- Page 3, line 7 creates a new definition of "independent outpatient health care facility" that defines these facilities as ambulatory surgical centers, urgent care centers, and freestanding emergency rooms that are not controlled, either directly or indirectly, by a hospital;
- Page 3, line 23 updates the definition of "independent provider;"
- Page 5, line 12 updates the definition of "outpatient health care facility;"
- Section 1 also adds tort claims language is added to the definitions.

Section 2: Qualifications
- A new section to address how independent outpatient health care facilities qualify for the patient's compensation fund (PCF).
  - The independent outpatient health care facility cap is increased to $1 million;
  - PCF will cover the lifetime medical costs for a patient who is injured.

Section 3: Recovery Limitations – Caps
- Page 9, Section B, maintains the cap for independent providers at $750 thousand.
- Page 10, Section D, places all independent outpatient health care facilities, starting January 1, 2024, under a $1 million cap with continued access to punitive damages and lifetime medical expenses.
  - Starting January 2025, there would be a consumer price index (CPI) placed on the cap using a three-year average.
- Page 11, Section E, maintains the hospital and hospital-controlled facility cap.

Section 4: Fund Reports
- Language was added to the Medical Malpractice Act to increase transparency in the patient's compensation fund related to outpatient facilities requiring there be an annual claims report filed including information on settlements and claims paid out of the PCF.

FISCAL IMPLICATIONS

House Bill 2, as adopted by the House and amended by the Senate, currently includes $32.5 million in general fund revenue to support the patient's compensation fund. The HB2 language

indicates the funding is for the elimination of the existing deficit in the patient's compensation fund and to reduce the rate impact of non-deficient-related rate increases, contingent on the Office of Superintendent of Insurance and the patient's compensation fund administrator taking action to ensure that future medical payments are paid as incurred and based on actual cost of services. The settlement amounts would be based on what has been paid by, or on behalf of, an injured patient and accepted by a health care provider.

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 health care 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 health care 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 changes in the substitute bill create different requirements and different rules for the various participants of the patient's compensation fund (PCF). This will make the administration of the PCF more cumbersome and may increase the third party administration costs and the costs of the annual actuarial study, ultimately raising the PCF surcharges for the participating medical providers.

SIGNIFICANT ISSUES

The substitute bill addresses payout caps but does not address what constitutes a "reasonable charge" and limiting payouts to the amounts actually paid by or on behalf of an injured patient and accepted by a health care provider in payment of charges.

The NMMS reports:

> The bill would establish in 2024 a $1 million cap for medical malpractice claims brought against an independent outpatient health care facility that contributes to the patient's compensation fund (PCF). Starting in 2025, the bill proposes a consumer price index adjustment be added to the cap each year. Independent outpatient health facilities would

be limited to three occurrences in one year.

The bill would change the insurance requirements for independent outpatient facilities to require each facility secure $500,000 of underlying coverage with the PCF, in addition to then covering the cost of the next $500,000 up to the $1 million cap. By making this change in underlying coverage, the independent outpatient facilities will be able to secure appropriate insurance so they are fully insured under the Medical Malpractice Act. Facilities that are protected by the state or federal Tort Claims Act will be exempted from the Medical Malpractice Act.

Patients will still have access to lifetime medical expenses that will be paid out of the fund in the event they are harmed.

The bill proposes three different classifications of health care providers for the purpose of the Medical Malpractice Act.

- Tier 1: Independent providers will keep their cap of $750,000 as outlined in the current Medical Malpractice Act.
- Tier 2: Independent outpatient health care facilities, defined as ambulatory surgical centers, urgent care centers, and free-standing emergency rooms that are not directly or indirectly controlled by a hospital – would have a $1 million cap.
- Tier 3: All hospitals and hospital-controlled outpatient facilities would keep their cap of $6 million as outlined in the Medical Malpractice Act.

ADMINISTRATIVE IMPLICATIONS

OSI reports the changes in the substitute bill will make the administration of the fund more cumbersome because it creates different sets of rules and requirements for the three types of participants, likely increasing the cost of administration.

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

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The substitute bill relates to SB296, Medical Malpractice Changes; HB88, Medical Malpractice Damages Cap, which similar to SB296 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; HB465, Medical Malpractice Changes; HB500, Medical Malpractice Premium Assistance; SB446, Medical Malpractice Definition of Occurrence; and SB447, Medical Malpractice Recovery Amounts.

TECHNICAL ISSUES

OSI notes the bill specifies the individual providers' occurrence limit shall be adjusted annually by the CPI-U, but the independent outpatient health care facilities' occurrence limit shall be adjusted by the prior three-year average CPI-U.

OSI reports the substitute bill limits the coverage for independent outpatient health care facilities to three annual occurrences. This limitation may not be reasonable, depending on the size of the facility, and in relation to the occurrence allowance for other participants. If an individual provider is allowed three occurrences per year, a facility employing multiple doctors should allow up to three times the number of employed providers' occurrences per year, since each claim typically names both the individual provider employed at the facility and the facility itself.

OTHER SUBSTANTIVE ISSUES

The Human Services Department previously reported 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

RAE/hg/ne/hg/al