

Should New Mexico increase the medical malpractice cap?

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**A REVIEW OF RECENT LEGISLATION
• • •
LIKELY EFFECTS OF A CAP INCREASE**

**PRESENTATION TO THE
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Overview of presentation

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- **New Mexico's system** of medical malpractice insurance
- Proposed legislation: what **HB 267*** would have done
- The **debate and issues** around increasing the damage cap
- **Challenges** involved in identifying the likely effects of an increased cap
- **Approach** in finding the likely effects
- **Findings:** the likely effects of a cap increase

*2011, regular session; introduced by Representative Jim R. Trujillo

Types of damages in medical malpractice suits

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Economic damages

Include compensation for:

- past and future *medical expenses*; and
- past and future *lost wages*

Non-economic damages

Include costs assessed:

- for *pain and suffering*; and
- to redress a physician's recklessness, malice or deceit, or for *punitive damages*

N.M.'s physician insurance: a two-tier system

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Private insurance

- **Primary** layer of coverage
- Cap of \$200,000 on all damages but punitive

Patient Compensation Fund

- **Secondary** layer of coverage
- Covers the remainder of all non-economic damages up to the \$600,000 cap + all remaining economic damages
- Surcharges are levied against member physicians
- Administered by the Public Regulation Commission (PRC)

Background of HB 267

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- The \$600,000 cap, established by the Medical Malpractice Act, was **passed in 1992, 19 years ago.**
- It took effect in 1995.
- Among the reasons for increasing the cap in 2011: **victims** of medical malpractice are **compensated in 1995 dollars.**

FOR EXAMPLE: It would take \$860,181 in 2009 to buy what \$600,000 could have bought in 1995.

Background of HB 267

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Doctors (the New Mexico Medical Society and the Am. Med. Ass'n) **and trial attorneys** (the N.M. Trial Lawyers Ass'n) **came together** to negotiate a deal and amend the Medical Malpractice Act.

They agreed that the following measures should be taken:

- raise the non-economic damage cap from \$600,000 to \$1 million beginning in 2012; and
- tie the cap to the Consumer Price Index, adjusting the limit up to 3% each year beginning in 2014.

HHGAC Substitute for HB 267

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In relevant part, HB 267 proposed an initial increase in the medical malpractice cap: from \$600,000 to \$1 million.

Passed by a 41-
vote margin in
the house



Passed by a 31-
vote margin in
the senate



Vetoed by the
governor

Reasons given for governor's veto

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HB 267 could:

- **reduce the number of doctors** practicing in the state;
- lead to an **increase in frivolous lawsuits**;
- **increase insurance rates** and other costs, discouraging doctors from coming to the state; and
- continue to **deter doctors** from practicing in the state **because of continuous cap increases.**

--From House Executive Message No. 22

Research on malpractice caps' effects in N.M.

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- address some of the issues raised by the governor.
- answer these questions:

had HB 267 been enacted:

1. **how much** more **would N.M. physicians pay** in malpractice insurance premiums?
2. **would** practicing **physicians leave** the state **and others be deterred from coming** to practice in the state?
3. **would** the number of **lawsuits increase**?
4. **would** the practice of “**defensive medicine**” **grow**?
5. **would** the average **claim payout increase**?

Challenges in finding answers

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Question presented

In *New Mexico*, where there is a *two-tier system* of physician malpractice insurance, what would be the effects of *raising* the cap *from \$600,000 to \$1 million*?

Question answered by most researchers

In *states with a one-tier system* of physician malpractice and *no caps previously in place*, what are the effects of caps and other tort reforms?

Other challenges

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Unreliable sources	Unreliable methods
<p>Many reports are produced by special interest groups that have a stake in the findings.</p>	<p>Because of the complex nature of the task, many reports are based on weak study and analysis.</p> <ul style="list-style-type: none"> • States have different demographics. • States have varying degrees of tort reform in place. • Many variables affect outcomes and influence trends.

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Robert Wood Johnson Foundation

Synthesis Project – reports and updates







Available at:
<http://www.rwjf.org/pr/synthesis.jsp>

Source primarily used in research memo

The Synthesis Project is an initiative of the Robert Wood Johnson Foundation to produce user-friendly briefs and reports that synthesize research findings on perennial health policy questions. These products give policy-makers reliable information and new insights to inform complex policy decisions.

--Excerpt from web site

SYNTHESIS DEVELOPMENT PROCESS

Audience Suggests Topic	Scan Findings	Weigh Evidence	Synthesize Results	Distill for Policy-makers	Expert Review
					
1	2	3	4	5	6

A closer look at HB 267

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- No change to the primary layer limit
- Private insurers still subject to a \$200,000 liability cap on economic and non-economic damages
- Cap increase would have directly affected only the Patient's Compensation Fund surcharge

FINDINGS – Increase in premiums

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- The **PRC** estimated that if the cap rose from \$600,000 to \$1 million, the average physician would pay **3% more in annual premiums.**
- The premium increase would stem solely from the **Patient's Compensation Fund surcharge**, not private insurance premiums.
- At present, a physician pays — on average — \$19,953 per year in premiums.
- If the PRC estimates are accurate, the cap increase would raise the average cost of premiums to \$20,557.
- The **net increase** per year would be **\$604.**

FINDINGS – Physician supply

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- A “small but statistically significant” relationship between caps and physician supply exists.
 - In states imposing initial caps, the overall physician supply increased by 3% in 3 years.
 - Michelle M. Mello, The Robert Wood Johnson Foundation, *Medical Malpractice: Impact of the Crisis and the Effect of State Tort Reforms*, Research Synthesis Report No. 10, May 2006 at 11, available at <http://www.rwjf/files/research/15168.medmalpracticeimpact.report.pdf>.
- Few physicians choose geographic practice area based on insulation from liability.
 - Id. at 25.
- Tort reform is associated with a modest increase in physician supply.
 - Id. at 11.
- ◆ *In New Mexico*, it is unlikely that physicians would leave or be deterred from practicing in the state because of a cap increase like that proposed by HB 267.

FINDINGS – Lawsuits

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- No strong relationship exists between caps and the frequency of malpractice lawsuit filing.
- The number of filings remained relatively constant from 1986 (when many states adopted sweeping tort reforms) to 2002.
 - Perry Beider & Stuart Hagen, Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice*, January 8, 2004 at 4, available at <http://www.cbo.gov/ftpdocs/49xx/doc4968/01-08-MedicalMalpractice.pdf>.
 - On average, 15 malpractice lawsuits are filed for every 100 physicians annually; 30% of those result in an insurance payment.
 - Id.
 - ◆ *In New Mexico*, it is unlikely that malpractice lawsuit filing would increase because of a cap increase like that proposed by HB 267.

FINDINGS – Defensive medicine

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- “Good, but not uniform” evidence suggests that caps reduce defensive medicine.

Michelle M. Mello, Allen Kachalia & Sarah Goodell, Robert Wood Johnson Foundation, *Medical Malpractice—Update*, April 2011 at 3, available at <http://www.rwjf.org/files/research/72097.medmal.update.pdf>.

- Strong evidence links a modest decrease in defensive medicine with states imposing initial caps.

Id. at 2, Table 1.

- ◆ *In New Mexico*, there *might* be a small rise in the practice of defensive medicine because of a cap increase like that proposed by HB 267.

FINDINGS – Claims payouts

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- In states with no cap in place, imposing caps “substantially” reduces the average size of malpractice awards by between 29% and 30%.

Michelle M. Mello, Allen Kachalia & Sarah Goodell, Robert Wood Johnson Foundation, *Medical Malpractice—Update*, April 2011 at 2, available at <http://www.rwjf.org/files/research/72097.medmal.update.pdf>.

- Analysts observe that statutorily limited award sizes disproportionately burden the most severely injured patients.

Michelle M. Mello, The Robert Wood Johnson Foundation, *Medical Malpractice: Impact of the Crisis and the Effect of State Tort Reforms*, Research Synthesis Report No. 10, May 2006 at 15, available at <http://www.rwjf.org/files/research/68.medmalpracticeimpact.report.pdf>.

- ◆ *In New Mexico*, the average award would likely grow because of a cap increase like that proposed by HB 267.
- ◆ *In New Mexico*, the most severely injured victims of medical malpractice would suffer a less disproportionate burden because of a cap increase like that proposed by HB 267.

Conclusion

HB 267's PROPOSED AMENDMENTS TO THE MMA – PROBABLE EFFECTS ON THE MALPRACTICE LANDSCAPE

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- **A typical physician's premiums would grow by about 3%, or \$604.**
- **The number of practicing physicians in the state would not change.**
- **The number of malpractice lawsuits filed would not change.**
- **The practice of defensive medicine would not grow significantly.**
- **The average malpractice award would increase.**
- **The most severely injured victims of medical malpractice would be compensated more proportionately to their suffering.**