Should New Mexico increase the medical malpractice cap?

A REVIEW OF RECENT LEGISLATION

LIKELY EFFECTS OF A CAP INCREASE

PRESENTATION TO THE
LEGISLATIVE HEALTH AND HUMAN SERVICES COMMITTEE
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Overview of presentation

- **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

<table>
<thead>
<tr>
<th>Economic damages</th>
<th>Non-economic damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Include compensation for:</td>
<td>Include costs assessed:</td>
</tr>
<tr>
<td>• past and future <em>medical expenses</em>; and</td>
<td>• for <em>pain and suffering</em>; and</td>
</tr>
<tr>
<td>• past and future <em>lost wages</em></td>
<td>• to redress a physician’s recklessness, malice or deceit, or for <em>punitive damages</em></td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Private insurance</th>
<th>Patient Compensation Fund</th>
</tr>
</thead>
<tbody>
<tr>
<td>• <strong>Primary</strong> layer of coverage</td>
<td>• <strong>Secondary</strong> layer of coverage</td>
</tr>
<tr>
<td>• Cap of $200,000 on all damages but punitive</td>
<td>• Covers the remainder of all non-economic damages up to the $600,000 cap + all remaining economic damages</td>
</tr>
<tr>
<td></td>
<td>• Surcharges are levied against member physicians</td>
</tr>
<tr>
<td></td>
<td>• Administered by the Public Regulation Commission (PRC)</td>
</tr>
</tbody>
</table>
Background of HB 267

- 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.

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

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

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.

- 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

<table>
<thead>
<tr>
<th>Question presented</th>
<th>Question answered by most researchers</th>
</tr>
</thead>
<tbody>
<tr>
<td>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?</td>
<td>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?</td>
</tr>
</tbody>
</table>
Other challenges

<table>
<thead>
<tr>
<th>Unreliable sources</th>
<th>Unreliable methods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Many reports are produced by special interest groups that have a stake in the findings.</td>
<td>Because of the complex nature of the task, many reports are based on weak study and analysis.</td>
</tr>
<tr>
<td>- States have different demographics.</td>
<td>- States have varying degrees of tort reform in place.</td>
</tr>
<tr>
<td>- States have different demographics.</td>
<td>- Many variables affect outcomes and influence trends.</td>
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</table>

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
A closer look at HB 267

- 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

- 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

• 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.
  

• 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

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.
  

○ 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

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

• 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

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

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

- 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.