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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/03/11

SPONSOR Taylor LAST UPDATED \_\_\_\_\_ HB 552

SHORT TITLE Hospital Liability Act SB \_\_\_\_\_

ANALYST Esquibel

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
N/A	N/A	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Public Regulation Commission (PRC)  
 Medical Board (MB)  
 Human Services Department (HSD)  
 Department of Health (DOH)

### SUMMARY

#### Synopsis of Bill

House Bill 552 (HB552) proposes to enact the Hospital Liability Act. This Act would limit the monetary amount that may be recovered from a hospital, any officer thereof, any person or entity that owns, operates or manages a hospital licensed in New Mexico (not including governmental entities), and vehicular and air ambulance services for a cause of action arising in New Mexico for medical treatment, lack of medical treatment, or "any other claimed departure from accepted standards of health care that proximately results in injury or death to a patient, whether the claim is based in tort law or contract law.

HB552 would place a \$500,000 limit (adjusted for the consumer price index) on all damages (not including past or future medical expenses, loss of income and earning capacity, or punitive damages) in medical malpractice cases against hospital health care providers which includes persons who operate or manage licensed ambulance services not covered under the Medical Malpractice Act.

HB552 would also cap aggregate punitive damages that may be awarded against all defendants in such cases at essentially 4 times \$500,000 (adjusted), or \$2 million.

HB552 also places various similar caps on comparative fault and vicarious liability portions of medical malpractice claims, as to both a health care providers qualified under the Medical Malpractice Act and those not qualified under the Medical Malpractice Act.

### **FISCAL IMPLICATIONS**

HB 552 carves out newly defined “hospital health care providers” from the Medical Malpractice Act and, for the most part, imposes different monetary limitations on hospitals from medical malpractice claims.

The Attorney General’s Office writes “The long term implications of damages caps and liability limitations such as those prescribed by the proposed legislation, is to retain in the newly created class of “hospital health care providers” additionally created profits while simultaneously transferring all long term costs of injuries to victims to the public health care system. Taxpayers might be required to assume the costs of the medical treatment to victims caused by the negligent or criminal acts of a hospital health care provider which prove, over time, to be in excess of the limited recovery mandated by the proposed legislation.”

### **SIGNIFICANT ISSUES**

The Attorney General’s Office indicates the scope and sweep of the exclusions from the proposed legislation creates a new class of “person:” the “hospital health care provider.”

The Attorney General’s Office indicates the proposed legislation limits liability for an unusually wide range of possible tortfeasors not heretofore deemed “health care providers” under current law. The new scope of “hospital health care provider” extends from the chairman of the board of a covered hospital to airplane mechanics of an air ambulance services. The acts “hospital health care providers” would be protected from range from bad management to hiring convicted felons who commit intentional torts. This new class of person as defined in the proposed legislation is afforded a status in society previously unseen in New Mexico law. The proliferation of litigation arising from this new status and the interface of the terms of the proposed legislation with the existing Medical Malpractice Act and Government Tort Claims Act can be anticipated to be very significant.

HB552 would establish a new class of legal persons in competition with or in parallel operation with hospitals and other health covered by the Medical Malpractice Act as well as state operated health care facilities.

The exponential expansion of law suits and the resultant case law would possibly create a Byzantine web of decisions to be reconciled in our courts over a substantial period of time.

### **PERFORMANCE IMPLICATIONS**

The Attorney General’s Office indicates by the creation of a medical malpractice liability system paralleling the Medical Malpractice Act and the Tort Claims Act, the impact of the proposed legislation may create competing opportunities for health care providers such as doctors. The

resulting competition between “hospital health care providers” under the proposed legislation and a “qualified health care provider” under the existing system would drive up the cost of labor of doctors, nurses and others. This would defeat the stated rationale of the proposed legislation.

The actual damages caused by the enormous range of people defined as a “hospital health care provider” in the proposed legislation for their negligent or intentional malpractice can be unrecoverable under this bill. Those actual damages would have to be assumed by the tax payers and/or by tax payer supported health care programs and facilities.

HB552 limits liability for an unusually wide range of behaviors not heretofore deemed malpractice. The noneconomic damages caused by the intentional hiring of an unlicensed pedophile to work in a pediatrics ward as a doctor would be limited by the proposed legislation. The noneconomic damages for the failure to supervise the grossly negligent maintenance of an air ambulance by a mechanic which then crashes proximately causing injuries or death to those in the craft and those on the ground are limited by this proposed legislation to \$500,000 for all people injured under all theories of recovery.

This raises the question as to whether the health and welfare of New Mexicans cited in Section 2 of the proposed legislation is well served by limiting the cost of gross negligence and intentional torts.

### **ADMINISTRATIVE IMPLICATIONS**

The Attorney General’s Office indicates the current Medical Malpractice Act which creates a tort recovery system for some hospitals and health care providers would be a parallel system of recovery if the proposed legislation is passed into law. By passage, New Mexico may be creating competing classes of hospitals and competing classes of health care professionals.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB552 relates to SB333/HB267 which would amend the Medical Malpractice Act to change the name to the NM Medical Professional Liability Act, to clarify that business entities providing health care services are health care providers under the Act, to raise recoverable limits, to create specific liability and recoverable limits for hospitals, to create the hospital patient's compensation fund and to prohibit the disclosure of certain confidential information.

HB552 also relates to SB332/HB282 that amends the Medical Practice Act (Act) to provide for the licensing of certain business entities.

### **TECHNICAL ISSUES**

The Attorney General’s Office indicates the first and most obvious problem in the language of the proposed legislation is the term “in the course of providing health care or health-care-related services.” This term has no end. It would conceivably extend to the linen services, the cafeteria contractors, and helicopter mechanics. When viewed by a court of review in conjunction with the expansive scope of individual actors and agents exempted from existing law and covered by this proposed legislation, the courts will be hard pressed to identify define any limits to this law. The increase in expanded litigation is directly commensurate with the breadth of the scope of the law.

The second most obvious technical error in drafting this proposed legislation is the term, "malpractice claim." This term's scope of application as defined in the proposed legislation includes negligence claims, gross negligence claims, claims arising from intentionally malicious acts, and criminal acts. Any and all such acts arising from failure to supervise others, failure to screen in the hiring process, and a multitude of causes of action never before defined in law as a "medical malpractice claim" would fall within the scope of this law in ways never before interpreted in courts. This creation of new definitions and new law in the area of medical malpractice would transform the vocabulary of the law and redefine what has been settled law for decades. The potential upheaval in the law would be a definitional case of "unintended consequences."

The courts will be challenged by terminology which is both vague and inconsistent with the plain meaning to the words used.

### **ALTERNATIVES**

The economic cost and human cost of negligently providing health care to New Mexico citizens are costs to the state and its health care delivery system. The passage of HB552 would pass through some costs for the malpractice of private hospitals, business entities, employees, officers, and their agents created as a consequence of their negligent and/or criminal conduct from those most able to foresee and pay for those costs to the state and its treasury.

By not enacting HB552, the alternative would be less litigation, lowered court expenses, lower medical costs, and less need for publicly appropriated money to subsidize public programs and hospitals which would be called upon to assume the additional burdens this proposed legislation would pass on. The public treasury would not be called upon to assume the responsibility private tortfeasors and their insurers now assume for their negligent and intentional misconduct.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The focus of the bill appears to be to shield insurers from paying damages for the negligent and/or intentional bad acts of anyone and everyone associated with a hospital by limiting the natural market forces regulating and distributing risks and rewards. As such, health care in New Mexico would be diminished. The concomitant costs of health care would be transferred from those most able to prevent or pay the costs of malpractice to the taxpayers of New Mexico by creating greater demand for and stress on public programs and facilities.

The consequence of not passing this bill is to allow the market forces and not government interference to define the responsibilities and consequences for hospitals for their negligent and/or criminal acts.

RAE/bym



## HB 552 Hospital Liability Act

**Background** The need to control the costs of health care has reached a critical stage. Health care reform is both a national and state topic. In New Mexico, a large percentage of hospital funding is provided by Medicaid. The amount of Medicaid funding has substantially decreased, and many hospitals have suffered a significant loss because of decreased funding. At the same time, as reported in the Albuquerque Journal on February 17, 2011, defensive medicine, that is, treatment ordered because health care providers are ordering treatment to avoid lawsuits, can reach 35 percent of costs in some specialties. *The purpose of this bill is to reduce the exposure to hospitals of very large and unpredictable upside exposure for claims, while at the same time preserving for the patient the ability to recover all lost wages, all past and future medical expense, and an additional recovery of up to \$500,000.*

While hospitals are named as eligible providers in the Medical Malpractice Act, they are effectively excluded by the DOI requirement for an occurrence form of insurance for underlying coverage. Therefore, hospitals are increasingly vulnerable to high judgments and settlements without any limits to liability.

Further, to meet the challenges for recruitment and retention of physicians, hospitals must turn to direct employment of physicians. Therefore, hospitals are absorbing ever increasing amounts of exposure to medical liability without any limits.

Hospitals are at a recruiting disadvantage compared to neighboring states; Texas has a more favorable climate for provider liability limits. Texas has seen an extraordinary increase of physicians relocating to Texas after passing an act limiting damages. Recent statistics also indicate a net gain in emergency doctors, including gains in 33 rural counties and 39 medically underserved counties. In addition, premium charges have decreased significantly after passage, an average of over 20% for most providers since passage of the act.

**Coordination with Existing Statute** This Act requires no change to the NM Tort Claims Act or the NM Medical Malpractice Act and references those Acts only as needed for definition and coordination purposes.

### **Rationale for \$500,000 Limit on Liability for Non-Economic Damages**

1. The cap is higher (giving more benefit to the injured patient) than our neighboring states of Texas and of California, whose caps are \$250,000, and higher than Colorado, whose cap is \$300,000.
2. The cap is higher (giving more benefit to the injured patient) than the NM Tort Claims cap which is \$750,000 for *all* damages. Under the HLA, a plaintiff could receive all lost wages and all medical bills and still receive *non-economic damages* up to \$500,000
3. The cap is higher (giving more benefit to the injured patient) than the Medical Malpractice Act which has a \$600,000 limit for everything except medical bills. Under the HLA, a plaintiff could receive all lost wages and all medical bills and still receive *non-economic damages* up to \$500,000
4. A cost of living increase is included in HLA which assures that the limit keeps pace with inflation.
5. The HLA provides a cap for hospitals and their employees that are currently at a disadvantage compared to State covered providers (Tort Claims Act) and qualified doctors (Medical Malpractice Act).

**Punitive Damages** The maximum amount recoverable for all punitive damages shall equal four times (4x) the maximum amount specified for non-economic damages.

- \$500,000 non-economic damages x 4 = \$2,000,000 punitive damages