

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR  
2 SENATE BILL 333

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11 **50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

12 AN ACT

13 RELATING TO MEDICAL MALPRACTICE; AMENDING THE MEDICAL  
14 MALPRACTICE ACT TO CLARIFY THAT BUSINESS ENTITIES PROVIDING  
15 HEALTH CARE SERVICES ARE HEALTH CARE PROVIDERS UNDER THE ACT,  
16 TO RAISE THE RECOVERABLE LIMITS AND TO PROHIBIT THE DISCLOSURE  
17 OF CERTAIN CONFIDENTIAL INFORMATION.

18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

19 SECTION 1. Section 41-5-2 NMSA 1978 (being Laws 1976,  
20 Chapter 2, Section 2) is amended to read:

21 "41-5-2. PURPOSE OF ACT--PURPOSE OF AMENDMENT.--

22 A. The purpose of the Medical Malpractice Act is to  
23 promote the health and welfare of the people of New Mexico by  
24 making available professional liability insurance for health  
25 care providers in New Mexico.

B. The purpose of the 2011 amendment to the

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1 definition of "health care provider" in Section 41-5-3 NMSA  
2 1978 is not intended to expand or alter the definition but is  
3 intended to clarify that "health care provider" includes  
4 business entities that provide health care services."

5 SECTION 2. Section 41-5-3 NMSA 1978 (being Laws 1976,  
6 Chapter 2, Section 3, as amended) is amended to read:

7 "41-5-3. DEFINITIONS.--As used in the Medical Malpractice  
8 Act:

9 A. "business entity" means a corporation,  
10 including a professional corporation and a nonprofit  
11 corporation, a limited liability company, a limited liability  
12 partnership, a limited partnership or a general partnership  
13 organized or formed under the laws of New Mexico or qualified  
14 to conduct business in New Mexico as a foreign corporation,  
15 limited liability company, limited liability partnership or  
16 limited partnership;

17 [~~A.~~] B. "health care provider" means:

18 (1) a natural person [~~corporation,~~  
19 ~~organization, facility or institution licensed or certified by~~  
20 ~~this state to provide health care or professional services as a~~  
21 ~~doctor of medicine, hospital, outpatient health care facility,~~  
22 ~~doctor of osteopathy, chiropractor, podiatrist, nurse~~  
23 ~~anesthetist or physician's assistant] licensed to practice  
24 medicine or otherwise provide health care services pursuant to  
25 a professional or occupational license;~~

1                   (2) a hospital;

2                   (3) an outpatient health care facility; or

3                   (4) a business entity, other than a hospital  
 4 or an outpatient health care facility, that provides health  
 5 care services primarily through persons licensed to practice  
 6 medicine or that otherwise provide health care services in New  
 7 Mexico pursuant to a professional or occupational license;

8                   C. "hospital" means a business entity licensed to  
 9 operate a hospital by the department of health;

10                  ~~[B.]~~ D. "insurer" means an insurance company  
 11 engaged in writing health care provider malpractice liability  
 12 insurance in this state;

13                  ~~[G.]~~ E. "malpractice claim" includes any cause of  
 14 action arising in this state against a health care provider for  
 15 medical treatment, lack of medical treatment or other claimed  
 16 departure from accepted standards of health care ~~[which]~~ that  
 17 proximately results in injury to the patient, whether the  
 18 patient's claim or cause of action sounds in tort or contract,  
 19 and includes but is not limited to actions based on battery or  
 20 wrongful death; "malpractice claim" does not include a cause of  
 21 action arising out of the driving, flying or nonmedical acts  
 22 involved in the operation, use or maintenance of a vehicular or  
 23 aircraft ambulance;

24                  ~~[D.]~~ F. "medical care and related benefits" means  
 25 all reasonable medical, surgical, physical rehabilitation and

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1 custodial services and includes drugs, prosthetic devices and  
2 other similar materials reasonably necessary in the provision  
3 of such services;

4 G. "outpatient health care facility" means a  
5 business entity licensed to operate an outpatient health care  
6 facility by the department of health;

7 [~~E.~~] H. "patient" means a natural person who  
8 received or should have received health care from a licensed  
9 health care provider, under a contract, express or implied;  
10 [and]

11 I. "personal information" means information that  
12 identifies an individual or a business entity, including the  
13 individual or business entity's name, address or telephone  
14 number;

15 J. "professional or occupational license" means a  
16 license to practice medicine or provide health care services  
17 pursuant to the Optometry Act; the Nursing Practice Act; the  
18 Chiropractic Physician Practice Act; the Medical Practice Act;  
19 the Podiatry Act; the Pharmacy Act; the Respiratory Care Act;  
20 the Professional Psychologist Act; Chapter 61, Article 10 NMSA  
21 1978; the Osteopathic Physicians' Assistants Act; the  
22 Occupational Therapy Act; the Physical Therapy Act; or the  
23 Dental Health Care Act. A professional or occupational license  
24 also includes a license to practice midwifery as a certified  
25 nurse-midwife; and

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1           [F-] K. "superintendent" means the superintendent  
 2 of insurance of this state."

3           **SECTION 3.** Section 41-5-5 NMSA 1978 (being Laws 1992,  
 4 Chapter 33, Section 2) is amended to read:

5           "41-5-5. QUALIFICATIONS.--

6           A. To be qualified under the provisions of the  
 7 Medical Malpractice Act, a health care provider shall:

- 8                         (1) establish its financial responsibility by  
 9 filing proof with the superintendent that the health care  
 10 provider is insured by a policy of malpractice liability  
 11 insurance issued by an authorized insurer in the amount of at  
 12 least two hundred thousand dollars (\$200,000) per occurrence;  
 13 ~~[or for an individual health care provider, excluding hospitals~~  
 14 ~~and outpatient health care facilities, by having continuously~~  
 15 ~~on deposit the sum of six hundred thousand dollars (\$600,000)~~  
 16 ~~in cash with the superintendent or such other like deposit as~~  
 17 ~~the superintendent may allow by rule or regulation; provided~~  
 18 ~~that in the absence of an additional deposit or policy as~~  
 19 ~~required by this subsection, the deposit or]~~ provided that for  
 20 an individual health care provider other than a hospital,  
 21 outpatient health care facility or other business entity  
 22 providing health care services, the policy shall provide  
 23 coverage for not more than three separate occurrences; and  
 24                         (2) pay the surcharge assessed on health care  
 25 providers by the superintendent pursuant to Section 41-5-25

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1 NMSA 1978 for the patient's compensation fund.

2 B. For hospitals, [~~or~~] outpatient health care  
3 facilities or other business entities electing to be covered  
4 under the Medical Malpractice Act, the superintendent shall  
5 determine, based on a risk assessment of each hospital, [~~or~~]  
6 outpatient health care facility or other business entity, each  
7 hospital's, [~~or~~] outpatient health care facility's or other  
8 business entity's base coverage [~~or deposit~~] and additional  
9 charges for the patient's compensation fund. The  
10 superintendent shall arrange for an actuarial study, as  
11 provided in Section 41-5-25 NMSA 1978. The additional charge  
12 shall be determined by the superintendent based upon sound  
13 actuarial principles that take into account the different  
14 classifications of the physicians and other health care  
15 providers of the hospital, outpatient care facility or other  
16 business entity and that use data obtained from New Mexico  
17 experience, if available.

18 C. A health care provider not qualifying under this  
19 section shall not have the benefit of any of the provisions of  
20 the Medical Malpractice Act in the event of a malpractice claim  
21 against [~~it~~] that provider."

22 SECTION 4. Section 41-5-6 NMSA 1978 (being Laws 1992,  
23 Chapter 33, Section 4) is amended to read:

24 "41-5-6. LIMITATION OF RECOVERY.--

25 A. Except for punitive damages and medical care and

1 related benefits, the aggregate dollar amount recoverable by  
 2 all persons for or arising from any injury or death to a  
 3 patient as a result of malpractice shall not exceed [~~six~~  
 4 ~~hundred thousand dollars (\$600,000) per occurrence]~~ the  
 5 following amounts:

6 (1) six hundred thousand dollars (\$600,000)  
 7 per occurrence for acts of malpractice occurring prior to  
 8 January 1, 2012;

9 (2) seven hundred thousand dollars (\$700,000)  
 10 per occurrence for acts of malpractice occurring on or after  
 11 January 1, 2012 and prior to January 1, 2014;

12 (3) eight hundred thousand dollars (\$800,000)  
 13 per occurrence for acts of malpractice occurring on or after  
 14 January 1, 2014 and prior to January 1, 2016; and

15 (4) nine hundred thousand dollars (\$900,000)  
 16 per occurrence for acts of malpractice occurring on or after  
 17 January 1, 2016.

18 B. In jury cases, the jury shall not be given any  
 19 instructions dealing with [~~this limitation]~~ limitations  
 20 specified in Subsection A of this section.

21 [~~B.~~] C. The value of accrued medical care and  
 22 related benefits shall not be subject to the [~~six hundred~~  
 23 ~~thousand dollar (\$600,000) limitation]~~ limitations specified in  
 24 Subsection A of this section.

25 [~~C.~~] D. Monetary damages shall not be awarded for

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1 future medical expenses in malpractice claims.

2 [D-] E. A health care provider's personal liability  
3 is limited to two hundred thousand dollars (\$200,000) for  
4 monetary damages and medical care and related benefits as  
5 provided in Section 41-5-7 NMSA 1978. Any amount due from a  
6 judgment or settlement against a health care provider in excess  
7 of two hundred thousand dollars (\$200,000) shall be paid from  
8 the patient's compensation fund, as provided in Section 41-5-25  
9 NMSA 1978.

10 [~~E. For the purposes of Subsections A and B of this~~  
11 ~~section, the six hundred thousand dollar (\$600,000) aggregate~~  
12 ~~amount recoverable by all persons for or arising from any~~  
13 ~~injury or death to a patient as a result of malpractice shall~~  
14 ~~apply only to malpractice occurring on or after April 1,~~  
15 ~~1995.]"~~

16 SECTION 5. Section 41-5-7 NMSA 1978 (being Laws 1992,  
17 Chapter 33, Section 5, as amended) is amended to read:

18 "41-5-7. FUTURE MEDICAL EXPENSES.--

19 A. In all malpractice claims where liability is  
20 established, the jury shall be given a special interrogatory  
21 asking if the patient is in need of future medical care and  
22 related benefits. No inquiry shall be made concerning the  
23 value of future medical care and related benefits, and evidence  
24 relating to the value of future medical care shall not be  
25 admissible. In actions upon malpractice claims tried to the

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1 court, where liability is found, the court's findings shall  
 2 include a recitation that the patient is or is not in need of  
 3 future medical care and related benefits.

4 B. Except as provided in Section 41-5-10 NMSA 1978,  
 5 once a judgment is entered in favor of a patient who is found  
 6 to be in need of future medical care and related benefits or a  
 7 settlement is reached between a patient and health care  
 8 provider in which the provision of medical care and related  
 9 benefits is agreed upon, and continuing as long as medical or  
 10 surgical attention is reasonably necessary, the patient shall  
 11 be furnished with all medical care and related benefits  
 12 directly or indirectly made necessary by the health care  
 13 provider's malpractice, subject to a semi-private room  
 14 limitation in the event of hospitalization, unless the patient  
 15 refuses to allow them to be so furnished.

16 C. Awards of future medical care and related  
 17 benefits shall not be subject to the [~~six hundred thousand~~  
 18 ~~dollar (\$600,000) limitation imposed in Section 41-5-6 NMSA~~  
 19 ~~1978] applicable limitation imposed in Subsection A of Section  
 20 41-5-6 NMSA 1978.~~

21 D. Payment for medical care and related benefits  
 22 shall be made as expenses are incurred.

23 E. The health care provider shall be liable for all  
 24 medical care and related benefit payments until the total  
 25 payments made by or on behalf of [~~it~~] the health care provider

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1 for monetary damages and medical care and related benefits  
2 combined equals two hundred thousand dollars (\$200,000), after  
3 which the payments shall be made by the patient's compensation  
4 fund.

5 F. This section shall not be construed to prevent a  
6 patient and a health care provider from entering into a  
7 settlement agreement whereby medical care and related benefits  
8 shall be provided for a limited period of time only or to a  
9 limited degree.

10 G. The court in a supplemental proceeding shall  
11 estimate the value of the future medical care and related  
12 benefits reasonably due the patient on the basis of evidence  
13 presented to it. That figure shall not be included in any  
14 award or judgment but shall be included in the record as a  
15 separate court finding.

16 H. A judgment of punitive damages against a health  
17 care provider shall be the personal liability of the health  
18 care provider. Punitive damages shall not be paid from the  
19 patient's compensation fund or from the proceeds of the health  
20 care provider's insurance contract unless the contract  
21 expressly provides coverage. Nothing in Section 41-5-6 NMSA  
22 1978 precludes the award of punitive damages to a patient.  
23 Nothing in this subsection authorizes the imposition of  
24 liability for punitive damages on a derivative basis where that  
25 imposition would not be otherwise authorized by law."

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1           SECTION 6. Section 41-5-25 NMSA 1978 (being Laws 1992,  
2 Chapter 33, Section 9, as amended) is amended to read:

3           "41-5-25. PATIENT'S COMPENSATION FUND.--

4           A. There is created in the state treasury a  
5 "patient's compensation fund" to be [~~collected and received~~]  
6 administered by the superintendent for exclusive use for the  
7 purposes stated in the Medical Malpractice Act. The fund and  
8 any income from it shall be held in trust, deposited in a  
9 segregated account and invested and reinvested by the  
10 superintendent with the prior approval of the state board of  
11 finance and shall not become a part of or revert to the general  
12 fund of this state. The fund and any income from the fund  
13 shall only be expended for the purposes of and to the extent  
14 provided in the Medical Malpractice Act. The superintendent  
15 shall have the authority to use fund money to purchase  
16 insurance for the fund and its obligations. The  
17 superintendent, as custodian of the patient's compensation  
18 fund, shall be notified by the health care provider or [~~his~~]  
19 the health care provider's insurer within thirty days of  
20 service on the health care provider of a complaint asserting a  
21 malpractice claim brought in a court in this state against the  
22 health care provider. The superintendent shall have the sole  
23 authority for making a determination to settle any claim  
24 against the patient's compensation fund.

25           B. To [~~create~~] finance the patient's compensation

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1 fund, an annual surcharge shall be levied on all health care  
2 providers qualifying under [~~Paragraph (1) of~~] Subsection A of  
3 Section 41-5-5 NMSA 1978 [~~in New Mexico~~]. The surcharge shall  
4 be determined by the superintendent based upon sound actuarial  
5 principles, using data obtained from New Mexico experience if  
6 available. The surcharge shall be collected on the same basis  
7 as premiums by each insurer from the health care provider.

8 C. The surcharge with accrued interest shall be due  
9 and payable within thirty days after the premiums for  
10 malpractice liability insurance have been received by the  
11 insurer from the health care provider in New Mexico.

12 D. If the annual premium surcharge is collected but  
13 not paid within the time limit specified in Subsection C of  
14 this section, the certificate of authority of the insurer may  
15 be suspended until the annual premium surcharge is paid.

16 E. All expenses of collecting, protecting and  
17 administering the patient's compensation fund or of purchasing  
18 insurance for the fund shall be paid from the fund.

19 F. Claims payable pursuant to Laws 1976, Chapter 2,  
20 Section 30 shall be paid in accordance with the payment  
21 schedule constructed by the court. If the patient's  
22 compensation fund would be exhausted by payment of all claims  
23 allowed during a particular calendar year, then the amounts  
24 paid to each patient and other parties obtaining judgments  
25 shall be prorated, with each such party receiving an amount

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1 equal to the percentage [~~his~~] the party's own payment schedule  
2 bears to the total of payment schedules outstanding and payable  
3 by the fund. Any amounts due and unpaid as a result of such  
4 proration shall be paid in the following calendar years.  
5 However, payments for medical care and related benefits shall  
6 be made before any payment made under Laws 1976, Chapter 2,  
7 Section 30.

8 G. Upon receipt of one of the proofs of  
9 authenticity listed in this subsection, reflecting a judgment  
10 for damages rendered pursuant to the Medical Malpractice Act,  
11 the superintendent shall issue or have issued warrants in  
12 accordance with the payment schedule constructed by the court  
13 and made a part of its final judgment. The only claim against  
14 the patient's compensation fund shall be a voucher or other  
15 appropriate request by the superintendent after [~~he~~] the  
16 superintendent receives:

17 (1) a certified copy of a final judgment in  
18 excess of two hundred thousand dollars (\$200,000) against [~~a~~]  
19 the health care provider;

20 (2) a certified copy of a court-approved  
21 settlement or certification of settlement made prior to  
22 initiating suit, signed by [~~both~~] all parties, including the  
23 superintendent, in excess of two hundred thousand dollars  
24 (\$200,000) against [~~a~~] the health care provider; or

25 (3) a certified copy of a final judgment less

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1 than two hundred thousand dollars (\$200,000) and an affidavit  
2 of [⌘] the health care provider or its insurer attesting that  
3 payments made pursuant to Subsection E of Section 41-5-7 NMSA  
4 1978, combined with the monetary recovery, exceed two hundred  
5 thousand dollars (\$200,000).

6 H. The superintendent shall contract for an  
7 independent actuarial study of the patient's compensation fund  
8 to be performed not less than once every two years."

9 SECTION 7. A new section of the Medical Malpractice Act  
10 is enacted to read:

11 "[NEW MATERIAL] DISCLOSURE OF PERSONAL INFORMATION  
12 PROHIBITED.--It is unlawful for any employee or former employee  
13 of the state to disclose to any other person, other than an  
14 employee of the state in connection with that employee's  
15 official duties, any personal information about a health care  
16 provider that has settled a claim for malpractice covered by  
17 the Medical Malpractice Act."

18 SECTION 8. A new section of the Medical Malpractice Act  
19 is enacted to read:

20 "[NEW MATERIAL] ADVISORY COMMITTEE--MEMBERS--DUTIES.--

21 A. The "Medical Malpractice Act advisory committee"  
22 is created. The committee shall consist of seven members as  
23 follows:

24 (1) three attorneys appointed by the New  
25 Mexico trial lawyers association;

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1 (2) three physicians appointed by the New  
2 Mexico medical society; and

3 (3) the superintendent, who shall be the chair  
4 of the committee.

5 B. The advisory committee shall meet at the call of  
6 the chair, but no less than semiannually.

7 C. The advisory committee shall review policies,  
8 administrative actions, statutes, court opinions and all other  
9 matters relating to the Medical Malpractice Act and, no later  
10 than December 1 of each year, report its findings and  
11 recommendations to the public regulation commission, the  
12 governor and the legislature.

13 D. Members of the committee shall not receive per  
14 diem and mileage."

15 SECTION 9. EFFECTIVE DATE.--The effective date of the  
16 provisions of this act is July 1, 2011.

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[bracketed material] = delete