

1 SENATE BILL 445

2 **56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023**

3 INTRODUCED BY

4 Gay G. Kernan

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10 AN ACT

11 RELATING TO TORTS; AMENDING THE MEDICAL MALPRACTICE ACT;
12 REQUIRING THE SUPERINTENDENT OF INSURANCE TO APPROVE PROPOSED
13 SETTLEMENTS PAID FROM THE PATIENT'S COMPENSATION FUND; LIMITING
14 RECOVERY OF PAST AND FUTURE MEDICAL CARE AND RELATED BENEFITS
15 FROM THE FUND; REMOVING A REQUIREMENT FOR SURCHARGES TO BE SET
16 WITH THE INTENT OF BRINGING THE FUND TO SOLVENCY.

17
18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

19 SECTION 1. Section 41-5-7 NMSA 1978 (being Laws 1992,
20 Chapter 33, Section 5, as amended) is amended to read:

21 "41-5-7. MEDICAL EXPENSES AND PUNITIVE DAMAGES.--

22 A. Awards of past and future medical care and
23 related benefits shall not be subject to the limitations of
24 recovery imposed in Section 41-5-6 NMSA 1978.

25 B. The health care provider shall be liable for all

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1 medical care and related benefit payments until the total
2 payments made by or on behalf of it for monetary damages and
3 medical care and related benefits combined equals the health
4 care provider's personal liability limit as provided in
5 Subsection I of Section 41-5-6 NMSA 1978, after which the
6 payments shall be made by the fund.

7 C. Awards of past or future medical care and
8 related benefits shall not be paid from the fund unless the
9 amount of the award was actually paid by or on behalf of an
10 injured person and accepted by a health care provider as
11 payment for services rendered.

12 D. Awards of future medical care and related
13 benefits shall only be paid from the fund as the expenses are
14 incurred. Payments from the fund for future medical care and
15 related benefits shall not be paid in a lump-sum payment.

16 ~~[E.]~~ E. Beginning January 1, 2027, any amounts due
17 from a judgment or settlement against a hospital or outpatient
18 health care facility shall not be paid from the fund if the
19 injury or death occurred after December 31, 2026.

20 ~~[D.]~~ F. This section shall not be construed to
21 prevent a patient and a health care provider from entering into
22 a settlement agreement whereby medical care and related
23 benefits shall be provided for a limited period of time only or
24 to a limited degree.

25 ~~[E.]~~ G. A judgment of punitive damages against a

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1 health care provider shall be the personal liability of the
2 health care provider. Punitive damages shall not be paid from
3 the fund or from the proceeds of the health care provider's
4 insurance contract unless the contract expressly provides
5 coverage. Nothing in Section 41-5-6 NMSA 1978 precludes the
6 award of punitive damages to a patient. Nothing in this
7 subsection authorizes the imposition of liability for punitive
8 damages where that imposition would not be otherwise authorized
9 by law."

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

12 "41-5-25. PATIENT'S COMPENSATION FUND--THIRD-PARTY
13 ADMINISTRATOR--ACTUARIAL STUDIES--SURCHARGES--CLAIMS--
14 PRORATION--PROOFS OF AUTHENTICITY.--

15 A. The "patient's compensation fund" is created as
16 a nonreverting fund in the state treasury. The fund consists
17 of money from surcharges, income from investment of the fund
18 and any other money deposited to the credit of the fund. The
19 fund shall be held in trust, deposited in a segregated account
20 in the state treasury and invested by the state investment
21 office and shall not become a part of or revert to the general
22 fund or any other fund of the state. Money from the fund shall
23 be expended only for the purposes of and to the extent provided
24 in the Medical Malpractice Act. All approved expenses of
25 collecting, protecting and administering the fund, including

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1 purchasing insurance for the fund, shall be paid from the fund.

2 B. The superintendent shall contract for the
3 administration and operation of the fund with a qualified,
4 licensed third-party administrator, selected in consultation
5 with the advisory board, no later than January 1, 2022. The
6 third-party administrator shall provide an annual audit of the
7 fund to the superintendent.

8 C. The superintendent, as custodian of the fund,
9 and the third-party administrator shall be notified by the
10 health care provider or the health care provider's insurer
11 within thirty days of service on the health care provider of a
12 complaint asserting a malpractice claim brought in a court in
13 this state against the health care provider.

14 D. The superintendent, as custodian of the fund, or
15 the superintendent's designee, shall evaluate and approve a
16 proposed settlement if any amount of the proposed settlement is
17 to be paid from the fund.

18 ~~[D.]~~ E. The superintendent shall levy an annual
19 surcharge on all New Mexico health care providers qualifying
20 under Section 41-5-5 NMSA 1978. The surcharge shall be
21 determined by the superintendent with the advice of the
22 advisory board and based on the annual independent actuarial
23 study of the fund. The surcharges for health care providers,
24 including hospitals and outpatient health care facilities whose
25 qualifications for the fund end on January 1, 2027, shall be

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1 based on sound actuarial principles, using data obtained from
2 New Mexico claims and loss experience. A hospital or
3 outpatient health care facility seeking participation in the
4 fund during the remaining qualifying years shall provide, at a
5 minimum, the hospital's or outpatient health care facility's
6 direct and indirect cost information as reported to the federal
7 centers for medicare and medicaid services for all self-insured
8 malpractice claims, including claims and paid loss detail, and
9 the claims and paid loss detail from any professional liability
10 insurance carriers for each hospital or outpatient health care
11 facility and each employed health care provider for the past
12 eight years to the third-party actuary. The same information
13 shall be available to the advisory board for review, including
14 financial information and data, and excluding individually
15 identifying case information, which information shall not be
16 subject to the Inspection of Public Records Act. The
17 superintendent, the third-party actuary or the advisory board
18 shall not use or disclose the information for any purpose other
19 than to fulfill the duties pursuant to this subsection.

20 ~~[E.]~~ F. The surcharge shall be collected on the
21 same basis as premiums by each insurer from the health care
22 provider. The surcharge shall be due and payable within thirty
23 days after the premiums for malpractice liability insurance
24 have been received by the insurer from the health care provider
25 in New Mexico. If the surcharge is collected but not paid

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1 timely, the superintendent may suspend the certificate of
2 authority of the insurer until the annual premium surcharge is
3 paid.

4 ~~[F.]~~ G. Surcharges shall be set by October 31 of
5 each year for the next calendar year. ~~[Beginning in 2021, the~~
6 ~~surcharges shall be set with the intention of bringing the fund~~
7 ~~to solvency with no projected deficit by December 31, 2026.]~~

8 All qualified and participating hospitals and outpatient health
9 care facilities shall cure any fund deficit attributable to
10 hospitals and outpatient health care facilities by December 31,
11 2026.

12 ~~[G.]~~ H. If the fund would be exhausted by payment
13 of all claims allowed during a particular calendar year, then
14 the amounts paid to each patient and other parties obtaining
15 judgments shall be prorated, with each such party receiving an
16 amount equal to the percentage the party's own payment schedule
17 bears to the total of payment schedules outstanding and payable
18 by the fund. Any amounts due and unpaid as a result of such
19 proration shall be paid in the following calendar years.

20 ~~[H.]~~ I. Upon receipt of one of the proofs of
21 authenticity listed in this subsection, reflecting a judgment
22 for damages rendered pursuant to the Medical Malpractice Act,
23 the superintendent shall issue or have issued warrants in
24 accordance with the payment schedule constructed by the court
25 and made a part of its final judgment. The only claim against

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1 the fund shall be a voucher or other appropriate request by the
2 superintendent after the superintendent receives:

3 (1) until January 1, 2022, a certified copy of
4 a final judgment in excess of two hundred thousand dollars
5 (\$200,000) against a health care provider;

6 (2) until January 1, 2022, a certified copy of
7 a court-approved settlement or certification of settlement made
8 prior to initiating suit, signed by both parties, in excess of
9 two hundred thousand dollars (\$200,000) against a health care
10 provider; or

11 (3) until January 1, 2022, a certified copy of
12 a final judgment less than two hundred thousand dollars
13 (\$200,000) and an affidavit of a health care provider or its
14 insurer attesting that payments made pursuant to Subsection B
15 of Section 41-5-7 NMSA 1978, combined with the monetary
16 recovery, exceed two hundred thousand dollars (\$200,000).

17 [~~F.~~] J. On or after January 1, 2022, the amounts
18 specified in Paragraphs (1) through (3) of Subsection [~~H~~] I of
19 this section shall be two hundred fifty thousand dollars
20 (\$250,000)."