

Member Briefing on MICRA Modifications

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Welcome & Background



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AB 35: MICRA Reform



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MICRA: Medical Injury Compensation Reform Act



- Enacted in 1975
- Prompted by medical malpractice crisis of the early 1970s
 - Frivolous lawsuits and run-away jury verdicts caused spike in verdicts/settlement costs with resulting increase in insurance costs
 - Rising claims frequency and severity
 - Malpractice insurance companies left CA
- Resulted in legislative action intended to lower cost of medical malpractice liability insurance premiums for hospitals, physicians, and other health care providers by decreasing their potential malpractice liability
- Goal was to keep providers financially solvent, lower the cost of health care services and increasing their availability

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MICRA 1975: Key Provisions



- **Limited non-economic damages to \$250,000**
 - Non-economic damages: pain and suffering, loss of consortium (benefits of a family relationship, including affection and sexual relations/ability to have children), disfigurement
 - ***No limit on economic damages (medical bills, lost wages, other out-of-pocket payments)***
 - No provision for increasing damages cap in the future for inflation, etc.
- Modified the statute of limitations for actions against health care providers
 - The shorter of 3 years after injury or 1 year after plaintiff discovers or should have discovered the injury.
 - 3 years for minors
- Permitted periodic payments over time (rather than requiring a lump sum payment) when future damages are \$50,000 or more

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MICRA 1975: Key Provisions (cont.)



- Allowed evidence of benefits plaintiff receives from collateral source(s)
 - Collateral source rule: the damages awarded to a plaintiff for injury, illness, or disability from cannot be reduced by the amount the plaintiff has already recovered from outside sources (insurance benefits, federal or state disability, worker's comp, etc.)
 - MICRA allowed a defendant to offer evidence of plaintiff's receipt of benefits from these collateral sources
- Limited contingency attorney's fees
 - 40% of first \$50k recovered
 - 33 1/3% of next \$50k recovered
 - 25% of the next \$500k recovered
 - 15% of any amount recovered in excess of \$600k

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Response to MICRA: Tort Reform Spreads



- Medical malpractice actions: 26 states impose a **cap on non-economic damages**; 6 have “total caps” limiting both economic and non-economic damages in these cases.
 - Wide range in amount of non-economic damages cap imposed
 - Higher cap in case of disabling injury/substantial disfigurement/catastrophic injury
 - Cap only in death cases
 - Adjust cap annually for inflation
- Damages caps are not universal
 - Some states have never had them at all or affirmatively prohibit caps in certain cases (such as death cases)
 - Some have enacted caps only to have them overturned by state courts as unconstitutional
- **CA has not increased its non-economic damages cap since 1975. It currently has the lowest cap in the nation.**

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Attacks on MICRA



- Numerous cases have challenged the constitutionality of MICRA—unsuccessfully, so far
 - 2020: 5 cases filed around the state challenging MICRA’s constitutionality; 3 of these are currently being appealed
- Proposition 46 (2014)
 - Would have raised cap on non-economic damages to \$1.1 million and then adjusted annually for inflation

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▪ Initiative Pending in 2022: Fairness for Injured Patients Act

- Would adjust noneconomic damages limit to approx. **\$1.1M** on 1/1/2023 (to reflect inflation since 1975), followed by annual increases for inflation
 - Would allow judges/juries to award **higher damages for “catastrophic injury”** (death, permanent physical impairment, permanent disfigurement, permanent disability, or permanent loss of consortium)
- Would eliminate ability to introduce evidence of collateral payments
- Would eliminate the possibility of periodic payments for future damages
- Would adjust attorney’s fee limits to reflect inflation since 1987, with increases annually going forward to reflect inflation. No limits on attorney’s fees in cases involving catastrophic injury
- Would increase time to file suit to the lesser of **2 years** (instead of 1) after plaintiff discovers the injury or 3 years after the date it occurred; for minors, increases to **4 years** (instead of 3)

Overview of Changes Effective Jan. 1, 2023

- Non-economic damages
 - Change in amount of cap on non-economic damages
 - Different caps for injury cases vs. death cases
 - Separate caps for providers and hospitals/institutions, with possible third cap for “unaffiliated” defendants under rare circumstances
- Change in amount eligible for periodic payments
- Broader protection for “benevolent statements”
- Change in formula for attorney’s fees

What Does Not Change

- Still no limit on economic damages
- Defendants will still be able to introduce evidence of collateral payments received by the plaintiff
- No change in the (shortened) statute of limitations for filing a lawsuit

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- **Increases cap for non-economic damages**
 - **Non-death cases**
 - Cap increases to \$350,000 on 1/1/2023
 - Starting 1/1/2024, cap will increase by \$40,000/year for 10 years until it reaches \$750,000
 - Starting 1/1/2034, 2% annual increase for inflation
 - **Death cases**
 - Cap initially increases to \$500,000 on 1/1/2023
 - Starting 1/1/2024, cap will increase by \$50,000/year for 10 years until it reaches \$1M
 - Starting 1/1/2034, 2% annual increase for inflation

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AB 35: Non-Economic Damages (cont.)



- **Increase in number of caps available to a plaintiff**
 - Creates separate caps for up to 3 categories of defendants
 - 1) **“Health care provider”**: basically limited to individual providers, such as physicians, who are licensed or certified under Division 2 of the Business & Professions Code
 - 2) **“Health care institution”**: one or more health care facilities licensed under the Health & Safety Code (including hospitals) owned or operated by the same entity or its affiliates
 - “Health care institution” includes all persons and entities for which vicarious liability (indirect liability) theories may apply, such as employees
 - 3) **“Unaffiliated” health care institution or provider**
 - Must be “unaffiliated” with any defendant in either category (1) or (2); **and**
 - Must have committed an act of professional negligence separate and independent from the professional negligence of any defendant in category (1) or (2); **and**
 - Their negligent act must have occurred at a health care institution that is not affiliated with any institution in category (2) **or** in relation to medical transport to such an institution

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AB 35: Non-Economic Damages (cont.)



- “Unaffiliated”: defendant cannot be in any of a broad range of relationships with any defendant in (1) or (2), including being owned or controlled by them, being employed by them, performing under a contract with them, or being in a joint venture with them.
- Whether a defendant is “unaffiliated” is determined at the time of the professional negligence.
- Each cap applies regardless of the number of defendants in that category or the number of causes of action (theories of recovery).
 - Combined liability for non-economic damages of all defendants in a category cannot exceed the amount of the cap.
- No defendant (provider or institution) can be liable for non-economic damages in more than one category.
- New caps apply to all cases filed or arbitrations demanded on or after 1/1/2023.
- The cap(s) in effect at the time of judgment, arbitration award, or settle apply

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AB 35: How Many Caps?



■ Facts

Surgeon and Assistant Surgeon negligently perform hip replacement on Patient at Hospital.

During Patient's stay in Hospital, Nurse fails to properly monitor wound site and timely report signs of infection. Because of the resulting treatment delay, the infection spread.

Patient is ultimately transferred to Skilled Nursing Facility (SNF) for further recovery and rehab, where Patient falls out of bed and fractures her hip as a result of a CNA's failure to raise the guardrails on Patient's bed, .

Patient files a malpractice lawsuit against Surgeon, Assistant Surgeon, Nurse, Hospital, SNF, and CAN.

How many non-economic damages caps is Patient eligible for?

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AB 35: How Many Caps? (cont.)



- One "provider" cap to be shared by Physician and Assistant Physician
 - A single "provider" cap applies regardless of the number of health care providers found liable (excluding any "unaffiliated" providers)
- One cap for Hospital (which includes Nurse)
 - A single "institution" cap applies regardless of the number of institutions found liable (excluding any "unaffiliated" institutions)
 - Nurse is included in Hospital's cap because "health care institution" includes all persons and entities for which the Hospital has vicarious (indirect) liability, which includes employees.
 - If only Nurse, and not Hospital, is sued, Nurse would be included in "provider" cap, which covers any person licensed or certified pursuant to Division 2 of the Business & Professions Code.

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AB 35: How Many Caps? (cont.)



- What about the SNF? Is its liability included (with the Hospital's) within the "institution" cap or is Patient able to seek a third cap from the SNF?
 - Reminders
 - As an employee of the SNF, the CNA is included within whatever cap applies to the Skilled Nursing Facility
 - Third cap only available if requirements of WHO, WHAT, and WHERE are met:
 - ✓ WHO: The SNF must be unaffiliated with the Surgeon, Assistant Surgeon, or Hospital;
 - ✓ WHAT: The SNF's liability must be based on a separate and independent act of negligence; and
 - ✓ WHERE: The SNF's negligent act occurred at, or in relation to medical transport to, a health care institution unaffiliated with any health care institution in the "institution" cap (here, the Hospital)

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AB 35: How Many Caps? (cont.)



- WHAT: Guardrail error is separate and independent negligence from that of the Surgeon, Assistant Surgeon, and Nurse
- WHERE: The guardrail incident occurred at the SNF
- WHO: But is the SNF "unaffiliated" with any of the "provider" defendants (the surgeons) or the "institutional" defendant (the Hospital)?
 - If SNF is independent of each of these other defendants (not owned or controlled by, performing under a contract with, employed by, or in a joint venture with any of them), then the SNF is "unaffiliated" and Patient would be entitled to seek a third damages cap from the SNF.
 - If the SNF is affiliated with one of the defendants (such as being a distinct part nursing facility owned by the Hospital), it is not "unaffiliated." Consequently, its liability falls within the "institution" cap, and Patient would be unable to seek a third cap.

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AB 35: Periodic Payments



- Continues to allow either party to request periodic (rather than lump sum) payments for future damages
- Increases the threshold for period payments from \$50,000 to \$250,000

AB 35: Benevolent Statements



- Establishes new discovery and evidentiary protection for all pre-litigation expressions of sympathy, etc., by a health care provider
 - Broadly covers:
 - “Benevolent gestures”: statements/gestures that convey a sense of compassion or commiseration, including sympathy, regret, acceptance of fault
 - That relate to the pain, suffering, or death of a person, or to an adverse patient safety event or unexpected health outcome
 - Made to that person or the family or representative of that person
 - Prior to the filing of a lawsuit or demand for arbitration
 - Makes such statements confidential, privileged, and not subject to discovery or disclosure
 - Cannot be used or admitted in any civil, administrative, licensing, or other proceeding
 - Cannot be used as an admission of liability or in connection with any sanction, penalty, or other liability

AB 35: Contingency Attorney's Fees



- Replaces current 4-tier system with a 2-tier system
 - 25% of dollar amount recovered by settlement PRIOR to civil complaint being filed or arbitration demand being made
 - 33% of dollar amount recovered pursuant to settlement, arbitration, or judgment AFTER a civil complaint or demand for arbitration is filed
- Includes option to petition the court or arbitrator for a contingency fee in excess of specified percentage

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Questions



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Thank You



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