Toward a more just MICRA

Trial attorneys and the medical/insurance interests quietly reach a momentous deal in Sacramento to end the $250,000 pain and suffering limitation of 1975's MICRA; ballot initiative would be scrapped

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A deal to rewrite the terms of MICRA was quietly struck in Sacramento late last month which would modify that terrible law from 1975 that limited non-economic or "pain and suffering" damages to $250,000 for victims of medical malpractice. That cap was frozen in time with no inflation adjustments, and it effectively limited medical-malpractice actions in California to only those cases with large economic damages such as "bad baby" cases. As the years wore on, MICRA made it near impossible for Californians who were maimed or even killed by negligent doctors to seek redress in the courts; few trial attorneys would take malpractice cases because the costs were too high and the contingency fees, with the percentage limited by statute in addition to the unconscionable damages cap, too low.

To say this deal came as a surprise to many in the trial-lawyer community would be an understatement, given that a ballot initiative to revise MICRA had already received enough verified signatures to place it on the ballot in November. That ballot initiative, The Fairness for Injured Patients Act, would have effectively ended the $250,000 cap by adjusting it for inflation, informing jurors of the cap, and allowing judges and juries to decide if it even applied in the case of "catastrophic injuries." The medical and insurance communities were lining up with big bucks to oppose the initiative. Even the Planned Parenthood Affiliates of California were against the ballot initiative, claiming it would raise their malpractice-insurance costs.

Higher ceiling for non-economic damages

The new legislative deal, struck with the specter of a costly and uncertain ballot initiative hanging over them, would raise the MICRA limitation to $350,00 for injuries and $500,000 for wrongful death effective January 1, 2023. In cases where there was more than one medical defendant (e.g., a doctor and a hospital), the limit would apply to each defendant with a maximum of three caps. So, a single verdict in 2023 could be $1.5 million for death cases or $1.05 million for other injuries resulting from medical negligence. Beyond 2023, the cap would increase $40,000 to $50,000 each year until in 2033 it reaches $1 million for wrongful death cases, and $750,000 for all other medical negligence cases. Beyond that it would be adjusted 2% annually for inflation. The cap on med-mal contingency fees, today effectively 25% on judgments up to $500,000 and 15% on amounts above $600,000, would also be changed (see below). Interestingly enough, doctors would now be free to apologize to patients and even acknowledge mistakes without their apology being held against them in court.

How it happened

So, how did this legislative proposal, which at this writing has the support of both the state trial lawyers association (CAOC) and the California Medical Association but still needs final legislative approval and the governor's signature, come about?

According to Stuart Zanville, the long-time and now former director of the Consumer Attorneys Association of Los Angeles, the credit largely goes to trial lawyer Nicolas Rowley. "Three years ago, Rowley pledged to get MICRA changed, and he put up about $4 million of his own money to get the ballot initiative signatures. It's an extremely good deal for Californians because it will get more trial lawyers to try medical malpractice cases. It would not have happened without Nick Rowley."

Rowley

The ballot initiative also had the financial support of a Rowley-affiliated law group, San Francisco-based Trial Lawyers for Justice, and of Los Angeles-based Consumer Watchdog. Jamie Court, the president of Consumer Watchdog, told the Los Angeles Times, "The current political climate is different than in 2014 (the last time a change to MICRA was on the ballot and lost)." He said stories in The Times detailing the lax punishment of doctors accused of repeated acts of negligence or sexual abuse, along with an increasing awareness of maternal mortality rates, have "raised the public consciousness."

Lawmakers are now considering several proposals to change the state medical board, including a bill that would take the medical license of doctors convicted of sexually abusing patients and another that would alter the state medical board to a public-member majority. "When you put it all together," Court told the Times, "that created a perfect storm for this deal."

Revised contingency fee

Here are the pertinent paragraphs of the proposed bill as it pertains to contingency fees:

AB35 amended in the Senate April 27, 2022

(1) Twenty-five percent of the dollar amount recovered if the recovery is pursuant to settlement agreement and release of all claims executed by all parties thereto prior to a civil complaint or demand for arbitration being filed.

(2) Thirty-three percent of the dollar amount recovered if the recovery is pursuant to settlement, arbitration, or judgment after a civil complaint or demand for arbitration is filed.

(3) If an action is tried in a civil court or arbitrated, the attorney representing the plaintiff or claimant may file a motion with the court or arbitrator for a contingency fee in excess of the percentage stated in paragraph (2), … and decided in the court's discretion based on evidence establishing good cause for the higher contingency fee.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

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