DECLARATIONS

2022-2023 YEAR IN REVIEW

THE IMPACT OF MICRA MODERNIZATION ON CALIFORNIA

Healthcare Liability Costs

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On May 23, 2022, California Governor Gavin Newsom signed Assembly Bill 35 ("AB 35") into law. This Bill provided sweeping reform to the longstanding Medical Injury Compensation Reform Act (MICRA). MICRA, which limits a plaintiff's recovery for noneconomic damages in medical negligence cases, was initially signed into law in 1975 by then-Governor Jerry Brown. The cap was set at $250,000 and did not provide a mechanism for the cap to increase in order to account for inflation.

MICRA was initially enacted at a time when both insurance premiums and inflation were on the rise. Its purpose was to provide predictable malpractice awards, which would enable insurers to provide lower premiums to healthcare providers and to prevent physicians from fleeing the state to escape the cost of litigation. In turn, this was expected to incentivize providers to relocate to, or remain in, California and to ensure that consistent, affordable and high-quality healthcare remained accessible throughout the state.

AB 35 was first passed by the Senate on April 27, 2022, signaling that the status quo would soon change. The newly signed law expanded MICRA's reach by subjecting healthcare institutions to the relevant limits. The new iteration also contains a separate recovery limit where the action includes a claim for wrongful death. Representatives from both the defense and plaintiff sides drafted AB 35 as a compromise to reform MICRA.

The revised MICRA (codified in CA CIVIL § 3333.2) took effect January 1, 2023. The new cap for recovery of noneconomic losses is $350,000, while matters involving wrongful death are capped at $500,000. The recovery limits for non-death cases will increase by $40,000 annually, from January 1, 2023 through January 1, 2033. The recovery limits for wrongful death cases will increase by $50,000 annually, from January 1, 2023 through January 1,

2033. As of January 1, 2033, the limits will be $750,000 for non-death cases, and $1,000,000 for wrongful death cases. Beginning January 1, 2034, the limits will increase by two percent annually, in an effort to keep pace with inflation. Economic damages, which are not capped, are designed to restore a plaintiff's financial condition. Noneconomic damages, on the other hand, include pain and suffering, emotional distress, reduced quality of life, disfigurement, loss of society, loss of enjoyment of life, mental anguish, and loss of consortium. In wrongful death cases, noneconomic damages may also include damages related to the loss of the relationship, such as loss of guidance, support, comfort, instruction, and companionship.

Notably, the revised Act creates the potential for three possible caps in each case if all three categories of providers are involved. The three categories of providers that a plaintiff can now recover from are: (1) physicians and nonphysician providers (regardless of the number of providers or causes of action), (2) healthcare institutions (regardless of the number of institutions or causes of action), and (3) unaffiliated healthcare institutions or providers. Healthcare providers are defined as a person licensed or certified under Division 2 of the Business and Professions Code, county medical facilities, and any outpatient clinic, health dispensary, or health facility. A healthcare provider also includes the legal representatives of a healthcare provider and the healthcare provider's employer, professional corporation, partnership, or other form of recognized professional practice organization. A healthcare institution is defined as a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of illness where persons are admitted for at least a twenty-four hour stay. Finally, unaffiliated health care providers or institutions are defined as those who are not employed by, performing under a contract with, an owner of, or in a joint venture with another specified entity, healthcare institution, healthcare provider, organized medical group, professional corporation, or partnership, or that is otherwise not in the same health system with that health care provider, healthcare institution, or other entity, or those who are not covered by the definition of affiliated under Corporations Code Section 150.

Therefore, three separate recovery caps could apply to a case. Notably, the limits are not fluid, and apply despite the number of healthcare providers or institutions involved within a category. This means in 2023, a plaintiff in a non-death case could recover a maximum of $1,050,000 from the three categories of providers ($350,000 cap per category of provider), and a maximum of $1,500,000 for wrongful death cases ($500,000 cap per category of provider). In 2033, a plaintiff in a non-death case will be able to recover a maximum of $2,250,000 from the three categories of providers ($750,000 cap per category of provider) and a maximum of $3,000,000 in a wrongful death case ($1,000,000 cap per category of provider). The creation of separate caps for separate categories of providers will likely encourage plaintiff's attorneys to bring more defendants into cases to expand the potential recovery available.

Another noteworthy provision, which provides some evidentiary protection to providers, mandates that statements, writings, or benevolent gestures expressing sympathy, regret, a general sense of benevolence, or suggesting, reflecting, or accepting fault be kept confidential. This includes statements by providers relating to pain, suffering, or death of a person, or to an adverse patient safety event or unexpected healthcare outcome. This allows providers to accurately document their feelings without concern it will be used against them down the road in litigation.

Additionally, the recoverable contingency fees for plaintiff's attorneys have been increased. Under the previous law, limitations on the contingency fee an attorney could collect were tied to the amount recovered. An attorney could collect forty percent of the first $50,000 recovered, thirty-three percent of the next $50,000, twenty-five percent of the next $500,000, and fifteen percent of anything that exceeded $600,000. Now, the recoverable contingency fees are tied to the stage of representation at which the amount is recovered. Where the recovery is made under a settlement agreement and release of claims executed by all parties prior to the filing of a civil complaint or arbitration demand, counsel can recover twenty-five percent. However, where settlement occurs subsequent to the filing of a civil complaint or arbitration demand, the attorney may recover up to thirty-three percent. This provision will likely contribute to an increase in lawsuits in the coming years and in the number of attorneys

willing to take on medical malpractice lawsuits. This could also lead to a number of reputable malpractice defense attorneys switching sides. Additionally, the changes may provide leverage to the defense by increasing the backlogs in the judicial system. However plaintiff's attorneys may be less willing to settle claims after they have filed suit since the fees they can recover rise after commencing formal litigation.

Finally, it is also worth noting that the minimum judgment of future damages required to request periodic payments increased from $50,000 to $250,000. Future damages is defined in the Act as including damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering.

The changes to MICRA will undoubtedly increase the rate and severity of medical malpractice lawsuits, which will in turn cause insurance premiums to rise. Increases to premiums will likely continue over the next few years, as premiums tend to be delayed in following claim trends. An increase in premiums could mean a higher cost for medical care in California, which could lead to a reduction of access to affordable healthcare. Additionally, these changes may cause insurance carriers to limit the amount of business they write in California until underwriters determine the rates which are adequate for the new risk environment. Further, the reinsurance industry could feel the effects of MICRA's cap increase as more claims will likely trigger reinsurance policies as the dollar amount of possible recoveries grows. Ultimately, the increase in the number of claims and loss costs in 2023 will impact rates for 2024 and beyond. While it is not possible to predict the exact amount premiums will rise, it is safe to say medical malpractice liability insurance will gradually become more expensive in California, which could potentially cause physicians to leave the state.

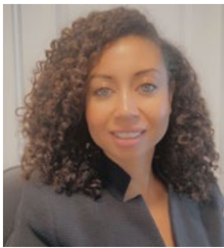
The passing of AB 35, and its ultimate signing by Governor Newsom, avoided the Fairness for Injured Patients Act (FIPA) from appearing on the November 2022 ballot. FIPA would have increased the noneconomic damages cap to $1.2 million, introduced a broad "catastrophic injury" category with no cap, eliminated the caps on attorneys' fees, required juries to be informed about the cap, and increased the statute of limitations. Additionally, FIPA would have implemented retroactive inflation adjustments from the time the cap was set in 1975. Critics of FIPA allege the Act would have all but removed safeguards for limiting recovery in medical lawsuits, and case values would have exponentially increased overnight resulting in skyrocketing healthcare costs and huge windfalls for attorneys which would have incentivized litigation. This likely would have caused medical costs to rise due to insurers demanding higher premiums. Whether FIPA would have received sufficient votes in the November election is unclear, but based on California's current political and social climate, it likely would have been a close vote. A similar measure in 2014 known as Proposition 46 was defeated after a long political battle. However, it is safe to say MICRA is a more modest compromise compared to FIPA's proposed drastic reforms.

Change has also come or is soon coming to other states across the country, mainly in reaction to rising inflation. For example, in Texas there is a $250,000 cap for all individual physicians or healthcare providers combined and a $250,000 cap for a hospital or facility, up to a maximum of $500,000 if there are multiple hospital or facility defendants. Since its inception in 2003, this cap has not been adjusted for inflation. However, there have been numerous challenges to Texas' cap, including a 2022 class action lawsuit, Winnett et al v. Frank et al, which challenged the cap's constitutionality, and House Bill 719, which proposed adjusting the caps to account for inflation. Additionally, in 2020, Colorado increased its noneconomic damages cap to account for the effects of inflation, and will continue to readjust the cap for inflation every two years. The new cap in Colorado is $642,180, which may be increased by the Court upon clear and convincing evidence up to a maximum of $1,284,370. Seven other states periodically adjust their damage caps for inflation: Idaho, Michigan, Maryland, Missouri, North Carolina, South Carolina, and West Virginia.

Although the landscape has changed and is continuing to change across the country, California's gradual increase in the amount of non-economic damages a plaintiff can recover should permit insurers, providers, and institutions sufficient time to prepare and position themselves appropriately for the increased exposure they will face, allowing for premiums to rise gradually. This new framework only applies to cases filed, or arbitrations demanded, after January 1, 2023. Although there may be future legal challenges to MICRA, it is not anticipated that these challenges will be successful since there have been numerous court challenges throughout the years to MICRA, and courts have routinely upheld it as being constitutional.

While the changes seem to strike a prudent balance between the old statute and the proposed FIPA, the changes to the contingency fee percentages awarded to plaintiffs' counsel, coupled with the increased amount available to plaintiffs, will likely lead to an increase in the number of lawsuits filed as well as higher settlements and awards. Although the full impact is still uncertain, it is clear that financing healthcare liability risks will become more expensive in California. As such, insurance carriers will need to explore new and proactive approaches of resolving these cases, ones which take into account the new caps and the increased costs of litigation.

About the Authors



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Lorraine is a partner at Mound Cotton Wollan & Greengrass and a member of the Diversity Equity and Inclusion Committee. Her practice focuses on Healthcare Professional Liability, advising insurers on liabilities faced by healthcare providers, and the underwriting considerations relevant to insuring those liabilities. She manages a diverse portfolio of nationwide healthcare programs, including physicians, long term care, allied health, dental, social services, and mental health liabilities. She represents insurers in the U.S. and the U.K. providing complex coverage opinions, managing high-exposure liabilities, and providing consultation.

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