Legal Backgrounder

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California's Medical-Injury Compensation Law Provides a Model for Federal Tort Reform

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Debate over the repeal and replacement of the federal Affordable Care Act (ACA) continues to intensify in Congress and in numerous public forums. One detail that could be critical to the success of any new federal healthcare law, but has received little attention, is whether such a law would include medical-liability tort reform.

Proponents of federal medical-liability tort reform often cite California's Medical Injury Compensation Reform Act (MICRA) as a model for such a law. If a federal medical-liability reform tracks MICRA, federal courts might rely on California appellate decisions as persuasive authority in analyzing the law's provisions and resolving disputes over their meaning and application. This LEGAL BACKGROUNDER briefly describes MICRA's key provisions, discusses attempts by reform opponents to undermine the law in court, and explains ways federal lawmakers can learn from California's 40-plus years of experience interpreting MICRA to fashion a federal healthcare law that includes sensible medical-liability tort reform.

MICRA Background

The California legislature enacted MICRA in 1975 to contain the rapidly escalating cost of medical malpractice insurance by limiting healthcare providers' liability exposure. MICRA, among other things: (1) limits attorneys' contingent fees;[1] (2) allows defendants to introduce evidence of collateral source benefits received by plaintiffs and precludes collateral sources from asserting subrogation rights to obtain reimbursement of benefits paid;[2] (3) limits recovery of noneconomic damages to $250,000;[3] (4) sets a statute of limitations period;[4] (5) mandates prefiling notice of claims;[5] (6) allows periodic payment of future damages;[6] and (7) encourages arbitration.[7]

MICRA applies to actions seeking damages for personal injury against healthcare providers whenever the alleged negligent conduct was "necessary or otherwise integrally related to the medical treatment and diagnosis of the patient." *Flores v. Presbyterian Intercommunity Hosp.*, 369 P.3d 229, 236-37 (Cal. 2016).

Numerous aspects of MICRA have been litigated over the past 40-plus years.[8] California's experience with four parts of MICRA are discussed below.

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[1] CAL. BUS. & PROF. CODE § 6146 (West 2003 & Supp. 2017).
[2] CAL. CIV. CODE § 3333.1 (West 2016).
[3] CAL. CIV. CODE § 3333.2 (West 2016).
[4] CAL. CODE CIV. PROC. § 340.5 (West 2006).
[5] CAL. CODE CIV. PROC. § 364 (West 2006).
[6] CAL. CODE CIV. PROC. § 667.7 (West 2009).
[7] CAL. CODE CIV. PROC. § 1295 (West 2007).
[8] *See* Horvitz & Levy LLP, *MICRA MANUAL* (2012 ed.) *available at* http://www.horvitzlevy.com/horvitzlevy/assets/File/attachment740.pdf (last visited Mar. 14, 2017).

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Limiting Recovery of Noneconomic Damages

California Civil Code § 3333.2 places a $250,000 limit on the recovery of noneconomic damages in a professional negligence action against a healthcare provider. Noneconomic damages are awarded for subjective, non-monetary losses, such as physical pain, mental suffering, and emotional distress. *See* CAL. CIV. CODE § 1431.2(b)(2) (West 2007). A cap on the recovery of noneconomic damages is intended to provide a more stable base for calculating insurance rates by eliminating the "unpredictability of the size of large noneconomic damage awards." *Fein v. Permanente Medical Group*, 695 P.2d 665, 683 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985). The awards are unpredictable because of the inherent difficulty of valuing subjective losses "and the great disparity in the price tag which different juries placed on such losses." *Ibid*. Another purpose of the cap is to "promote settlements by eliminating 'the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble.'" *Id*. (citation omitted).

While a provision similar to California Civil Code § 3333.2 in a federal law would undoubtedly face constitutional challenges under the Due Process Clause of the Fifth Amendment, as well as the Seventh Amendment, California courts have consistently upheld § 3333.2 as constitutional in the face of similar challenges.[9] For instance, in *Fein,* the California Supreme Court emphasized that the "Legislature retains broad control over the measure ... of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." 695 P.2d at 680 (emphasis omitted). The California Supreme Court also rejected an argument that the cap on noneconomic damages "limits the potential recovery of medical malpractice claimants without providing them an adequate quid pro quo." *Id*. at 679.

Constraining Attorneys' Contingent Fees

California Business and Professions Code § 6146 limits an attorney's contingent fee in a professional negligence action against a healthcare provider to 40% of the first $50,000 recovered; 33.3% of the next $50,000 recovered; 25% of the next $500,000 recovered; and 15% of any amount that exceeds $600,000. These limits apply whether the recovery is by settlement, arbitration, or judgment, and whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

California's limit on attorneys' fees in medical malpractice cases has survived multiple court challenges. In *Roa v. Lodi Medical Group, Inc.*, 695 P.2d 164 (Cal. 1985), the California Supreme Court upheld § 6146 against due process, equal protection, and separation-of-powers challenges. The court held that § 6146 is rationally related to the goal of reducing medical malpractice insurance costs. "[B]ecause section 6146 permits an attorney to take only a smaller bite of a settlement, a plaintiff will be more likely to agree to a lower settlement since he [or she] will obtain the same net recovery from the lower settlement." *Id*. at 170. Section 6146 also discourages plaintiffs' attorneys from filing frivolous or marginal suits, and protects the already diminished awards of malpractice plaintiffs from further reduction by high contingent fees. *Id*. at 170-71.

Limiting the Collateral Source Rule and Subrogation Rights

Under the collateral source rule, benefits that an injured party receives from a source independent of the tortfeasor do not diminish the recovery of damages against that tortfeasor. *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 63 (Cal. 1970). California Civil Code § 3333.1(a) overrides this rule to a considerable extent in medical malpractice cases, allowing a healthcare provider to introduce evidence of benefits payable to the plaintiff from a variety of collateral sources. The statute does not mandate that the jury reduce the plaintiff's damages by the amount of collateral source benefits. Juries still get to decide. *Fein,* 695 P.2d at 684-85 & n.21. Section

[9] *See*, *e.g.*, *Fein*, 695 P.2d at 679-84 (upholding § 3333.2 against due process and equal protection challenges); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (§ 3333.2 is consistent with the Equal Protection Clause of the Fourteenth Amendment); *Stinnett v. Tam*, 130 Cal. Rptr. 3d 732, 745-48 (Ct. App. 2011) (§ 3333.2 does not deny equal protection); *Yates v. Pollock*, 239 Cal. Rptr. 383, 385-86 (Ct. App. 1987) (§ 3333.2 does not violate the constitutional right to a jury trial).

3333.1(b) provides that if evidence of collateral source benefits is introduced, the benefit provider is precluded from recouping its payments, either directly from the plaintiff or in a subrogated action against the defendant.

Fein upheld the constitutionality of § 3333.1(a) against due process and equal protection challenges. The court ruled that plaintiffs do not have a vested right in a particular measure of damages and that abolition of the collateral source rule rationally relates to the legitimate state goal of reducing medical malpractice insurance costs. "[T]he Legislature apparently assumed that in most cases the jury would set plaintiff's damages at a lower level because of its awareness of plaintiff's 'net' collateral source benefits." *Fein*, 695 P.2d at 684-85.

Numerous other jurisdictions have enacted statutory restrictions on the application of the collateral source rule in medical malpractice cases. Constitutional challenges to such enactments have been routinely rejected.[10] However, federal laws that guarantee subrogation or reimbursement rights preempt inconsistent state laws. Consequently, federal laws have constrained efforts by states to adopt laws regarding the collateral source rule. A federal medical malpractice law with a provision similar to § 3333.1(a) would not face such preemption; however, Congress would need to clearly specify which federal law controls in the event of inconsistencies.

Periodic Payment of Future Damages

California Code of Civil Procedure § 667.7 allows a medical malpractice plaintiff to require periodic payment of future damages. The statute, however, says almost nothing about how to convert a jury's verdict into a periodic payment judgment. The California Supreme Court has explained the approach a trial court must take:

> When a party properly invokes section 667.7, '... the [trial] court must fashion the periodic payments based on the *gross* amount of future damages.' [Citations.] This is because if a present value award is periodized, a plaintiff might not be fully compensated for his or her future losses; the judgment, in effect, would be discounted twice: first by reducing the gross amount to present value and second by deferring payment. (Italics in original.) The proper approach ... is for the jury to determine the gross amount of future damages and for the court to structure a periodic payment schedule based on that amount. (*Ibid.*) In structuring a periodic-payment schedule under section 667.7, a trial court is 'guided by the evidence of future damages' introduced at trial. [Citations.] The fundamental goal in this respect is to attempt to match losses with compensation to ensure that money paid to an injured plaintiff will in fact be available when the plaintiff incurs the anticipated expenses or losses in the future.'

Salgado v. County of Los Angeles, 967 P.2d 585, 590 (Cal. 1998) (citation omitted) (alterations original).

Periodic payment of future damages tends to reduce the cost of professional liability insurance because payments designed to provide for the plaintiff's needs terminate upon death.[11] To avoid leaving an injured plaintiff with inadequate compensation to meet future medical needs, juries often accept the *longest* possible life expectancy and award generous damages for future medical needs. Defendants can fund periodic payments designed to cover those future needs by purchasing an annuity, which may be favorably priced if the life insurance company underwriting it determines that the plaintiff's realistic life expectancy is significantly less than what the jury determined. *See Holt v. Regents of University of California*, 86 Cal. Rptr. 2d 752, 758-59 (Ct. App. 1999).

The California Supreme Court rejected due process and equal protection challenges to § 667.7 in *American Bank & Trust Co. v. Community Hospital*, 683 P.2d 670 (Cal. 1984). The court held that to protect the right to jury trial guaranteed by the California Constitution, the jury must separately specify the amount of future damages in the verdict. *Id.* at 680-81.

[10] *See* James J. Watson, Annotation, *Validity and Construction of State Statute Abrogating Collateral Source Rule as to Medical Malpractice Actions*, 74 A.L.R. 4th 32, §§ 3[a]-4[c] (1989).

[11] CAL. CIV. PROC. CODE § 667.7(b)(1), (c), (f) (West 2009); *Salgado*, 967 P.2d at 591 ("Code of Civil Procedure section 667.7, was enacted for the express purpose of avoiding a windfall to the plaintiff's family in the event of his or her premature death").

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Divergence from the California Law May Be Warranted

If Congress chose to model a federal medical-malpractice reform law on MICRA, the following modifications would be advisable:

1. *Precisely Define Circumstances under which Federal Medical Liability Tort Reforms Apply*. Including precise definitions regarding the scope and application of federal medical-liability tort reform would avoid (or at least limit) the type of litigation that has been necessary in California to resolve the scope and application of MICRA. For example, California courts litigated whether MICRA applies to certain types of negligence by healthcare providers.[12] California courts also have decided that various types of defendants, including emergency medical technicians, unlicensed social workers, and medical students, are "healthcare providers" within the meaning of MICRA.[13] However, California appellate courts have split over whether medical groups are "healthcare providers."[14] MICRA has also been held not to apply to certain entities including residential care facilities and HMOs.[15] Federal medical malpractice reform should include comprehensive definitions to address these issues.

2. *Ensure the Amount of the Limit on Noneconomic Damages Is Fair*. In California, noneconomic damage awards against healthcare providers were limited to $250,000 in 1975, and that limit has never been increased. The fairness of this has been a source of contention for years, with vocal advocates calling for judicial or legislative modification of the limit.[16] The amount of the limit should be thoroughly evaluated during any legislative process to ensure that the new law is fair and has broad support.

3. *Ensure that Arbitration and/or Administrative Rulings Are Reviewable for Legal Error.* The Federal Arbitration Act encourages arbitration as a more expeditious and less costly alternative to litigation. The California Supreme Court addressed arbitration in *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 604 (Cal. 2008), holding that parties to an arbitration agreement may "agree that legal errors are an excess of arbitral authority that is reviewable by the courts." This is important. Arbitration with legal errors can be more of a hindrance than a help, especially if the legal errors concern the proper application of medical-liability tort reform statutes. Therefore, a federal medical malpractice reform law modeled after MICRA should ensure that arbitration and administrative rulings are subject to judicial review for legal error.

Conclusion

MICRA provides the proponents of federal medical-liability tort reform with an excellent model. Federal lawmakers can learn much from 40 years of legislative history, state court rulings, and coverage battles. Modifications can and should be made to improve upon the California experience and to adjust the approach to a national market.

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[12] *See Flores v. Presbyterian Intercommunity Hosp.*, 369 P.3d 229 236 (Cal. 2016) (holding that MICRA applies when the negligent conduct was "necessary or otherwise integrally related to the medical treatment and diagnosis of the patient"); *Lathrop v. HealthCare Partners Med. Grp.*, 8 Cal. Rptr. 3d 668, 674-77 (Ct. App. 2004) (holding that MICRA applies to claims of vicarious liability for the professional negligence of a healthcare provider).

[13] *See, e.g.*, *Canister v. Emergency Ambulance Serv., Inc.*, 72 Cal. Rptr. 3d 792, 798-99 (Ct. App. 2008) (holding that an emergency medical technician is a "healthcare provider"); *Prince v. Sutter Health Care*, 74 Cal. Rptr. 3d 750, 752 (Ct. App. 2008) (holding that a social worker, registered with the Board of Behavioral Sciences and working toward licensure, is a "healthcare provider").

[14] *Compare Scripps Clinic v. Superior Court*, 134 Cal. Rptr. 2d 101 (Ct. App. 2003) (holding that a medical group was a healthcare provider for purposes of limiting a punitive damages claim under § 425.13), *with Lathrop v. HealthCare Partners Med. Grp.*, 8 Cal. Rptr. 3d 668 (Ct. App. 2004) (holding that a medical group is not a health care provider for purposes of limiting noneconomic damages under § 3333.2).

[15] *See Kotler v. Alma Lodge*, 74 Cal. Rptr. 2d 721, 730 (Ct. App. 1998) (holding that residential care facility is *not* a "healthcare provider"); *Palmer v. Superior Court,* 127 Cal. Rptr. 2d 252, 265 & n.9 (Ct. App. 2002) (stating same for an HMO).

[16] *See Stinnett v. Tam*, 130 Cal. Rptr. 3d 732, 744-49 (Ct. App. 2011); *see also* Consumer Attorneys of California, MICRA, https://www.caoc.org/?pg=issmicra (last visited Mar. 14, 2017).

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