

**THE “NEW” MEDICAL MALPRACTICE INSURANCE CRISIS:
ARE CALIFORNIA REFORMS GOOD FOR THE NATION?
MAYBE, BUT NOT THE ONES YOU HAVE BEEN HEARING MOST ABOUT**

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I. INTRODUCTION

There is a nationwide effort to restrict recovery in medical malpractice cases. Not only is legislation to restrict such recovery pending both in Congress¹ and multiple states around the country, but Nevada and Mississippi already passed similar legislation late last year. President Bush announced that federal legislation to restrict recovery in medical malpractice cases is a “top priority” in 2003.² The model for such tort reform is California’s Medical Injury Compensation Reform Act of 1975 (MICRA).

In 1975, the California legislature passed MICRA in response to a perceived health insurance crisis that had caused malpractice insurance premiums to skyrocket. At the time, many California physicians were forced to close their doors because of lack of availability of affordable malpractice insurance. It was represented that the inflated premiums would be reduced if MICRA was enacted. Since its enactment, California’s MICRA has been touted as a model of tort reform for the nation.

If such tort reform succeeded in reducing insurance costs, such a reduction would have been evident in trends of insurance costs. However, as described below, studies conducted after the enactment of MICRA do *not* support the conclusion that MICRA has been effective in

¹*See, e.g.*, The Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2002, H.R. 4600, 107th Cong. (2002).

² *Bush Enters the Fray Over Malpractice*, Richard Oppel, Jr. NEW YORK TIMES, January 17, 2003.

reducing malpractice insurance premiums.^{3 45}

The reduction in malpractice insurance premiums in California did not coincide with the passage of MICRA. Rather, the reduction occurred only *after* stringent insurance regulation was instituted which required a rollback of premiums and advance approval of any rate increases. Despite such containment of premiums, California continues to lose physicians at an alarming rate. California doctors complaints mirror complaints heard from physicians around the country in states that have no such caps.⁶

II. OVERVIEW OF MICRA :

Following the California Legislature's enactment of MICRA in 1975, the California Supreme Court upheld its constitutionality.⁷ The breadth of the legislation is quite sweeping in its application to almost all cases involving health care providers. There are no statutory exceptions to the MICRA provisions, and only two case law exceptions have been established - one for battery⁸ and the other for elder abuse⁹.

MICRA's main elements include the following:

(1) \$250,000.00 cap on non-economic damages, regardless of how egregious the medical negligence or how serious the injury.¹⁰ There is no provision for *any* increase, not even

³ U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS 25-26 (1986).

⁴HARVEY ROSENFELD, CALIFORNIA'S MICRA : A PROFILE OF A FAILED EXPERIMENT IN TORT LAW RESTRICTIONS 11-16 (1993).

⁵U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS 25-26 (1986).

⁶California Medical Association :*And Then There Were None : The Coming Physician Supply Problem* 2001 Physician Survey Findings (2001) . 43% of surveyed California physicians plan to leave medical practice in the next 3 years *Ibid*, page II .

⁷*Roa v. Lodi Med. Group*, 37 Cal. 3d 920 (1985).

⁸*Perry v. Shaw*, 88 Cal. App. 4th 658 (2001).

⁹*Delaney v. Baker*, 20 Cal. 4th 23 (1999).

¹⁰CAL. CIV. CODE § 3333.2(b) (West 1997). In *Fein v. Permanente Med. Group*, 38 Cal. 3d 137 (1985), the California Supreme Court upheld the provisions of CAL. CIV. CODE § 3333.2.

for a cost of living increase. Taking into account inflation, this cap is worth approximately \$83,000 today.¹¹ The cap would have to be increased to \$753,000 just to maintain the same “level” of dollars as of the time of its original enactment.¹² Despite this economic reality, this cap remains unchanged since its enactment in 1975.

(2) Collateral source provisions that off-set most benefits plaintiffs may receive from third-party insurers, including disability, worker’s compensation, and health insurance benefits.¹³¹⁴

(3) Periodic payments of future damages rather than a lump sum payment of all amounts in excess of \$50,000.00.¹⁵ Such payments cease upon the death of the plaintiff, except for possible continuation of loss of future earnings in the event there was a legal duty of support to a third party immediately before such death.¹⁶

(4) Cap on attorneys’ contingency fees by a sliding scale and a requirement that the payment of costs advanced be subtracted from the award/verdict before calculation of the attorneys’ fees.¹⁷

(5) No claim for damages can even be pled in any action against any health care provider without leave of court.¹⁸ Leave to amend to plead punitive damages is only granted if the court finds that “there is a substantial probability that the plaintiff will prevail “ on such claim. ¹⁹ Such relief is seldom granted .

¹¹U.S. Dep’t of Labor, *Bureau of Labor Statistics-Consumer Price Index, U.S. Cities Average, All Urban Consumers*.

¹²*Id.*

¹³CAL. CIV. CODE § 3333.1(a) (West 1997).

¹⁴CAL. CIV. CODE § 3333.1(b) (West 1997).

¹⁵CAL. CIV. PROC. CODE § 667.7 (West 1987).

¹⁶CAL. CIV. PROC. CODE § 667.7(c) (West 1987).

¹⁷Pursuant to CAL. BUS. & PROF. CODE § 6146(a), no attorney shall contract for or collect a contingency fee exceeding 40% of the first \$50,000 recovered; 33 1/3% of the next \$50,000 recovered; 25% of the next \$500,000 recovered; and 15% of any recovery above \$600,000.

¹⁸ CAL. CIV. PROC. CODE § 425.13 (West 1987)

¹⁹ *Id.*

III. STUDIES DO NOT SUPPORT THE CONCLUSION THAT MICRA HAS BEEN EFFECTIVE IN REDUCING HEALTH CARE MALPRACTICE PREMIUMS.

If there are savings that have resulted from limiting the rights and recovery of patients harmed by medical negligence, there is scant evidence that the insurers have passed the savings on to physicians.

Studies conducted after the enactment of MICRA do *not* support the conclusion that this legislation has been effective in reducing health care malpractice insurance premiums. Rather, in most years after MICRA's passage in 1975, the average California premium was *higher* than the national average. Amazingly, the price of malpractice coverage *increased* in California *after* MICRA was instituted, conforming with the pattern followed by the rest of the nation: through 1989, premiums grew by 331 percent then fell by 5 percent by 1991.²⁰

A. United States General Accounting Office (GAO) Study:

The United States General Accounting Office (GAO) published results that showed the price of medical malpractice liability insurance in California actually *increased* dramatically following the passage of MICRA in 1975. Specifically, between 1980 and 1986, malpractice premiums for California physicians increased from 13 to 337%.²¹ The GAO Report concluded:

[W]hile it is not possible to assess the extent to which [MICRA] has had an impact on the state's malpractice situation, our analysis of key indicators indicated that *the problem is continuing to worsen in California.*²²

B. Study by the United States Department of Justice:

In a study conducted by the U.S. Department of Justice published in 2000, data collected supported the conclusion that tort law limits do not lower insurance rates and that states with little or no tort law restrictions have experienced approximately the same changes in insurance

²⁰HARVEY ROSENFELD, CALIFORNIA'S MICRA : A PROFILE OF A FAILED EXPERIMENT IN TORT LAW RESTRICTIONS 11-16 (1993).

²¹U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS 25-26 (1986).

²²*Id.* at 26 (emphasis added). This finding was consistent with the GAO report that found that four other states (Arkansas, Florida, New York, and North Carolina) reported that the restrictions had "little effect" on insurance premiums. *Id.*

rates as those states that have enacted severe restrictions on victims' rights.²³

IV. IF CALIFORNIA MALPRACTICE INSURANCE RATES ARE LOWER THAN SOME OTHER STATES, IT IS BECAUSE CALIFORNIA HAS STRINGENT INSURANCE RATE REGULATION

Even though MICRA was enacted in 1975, insurance premiums for doctors did not drop until *after* Californians voted to pass strict insurance regulations in 1988.²⁴

In 1988, the California Legislature passed Proposition 103. Heralded as the best insurance rate regulation in the United States, this comprehensive statutory regulation has two major components which have mitigated increases in California malpractice insurance rates . These components are as follows::

1. Insurers Were Required to Roll Back Premium Rates in California.

Pursuant to California Insurance Code § 1861.01, every insurer had to *reduce* its charges to levels which were at least 20% less than the charges for the same coverage which were in effect on November 8, 1987. Of course, without question , this had a direct impact on reducing malpractice insurance premiums !

2. Prior Approval Is Required for Rate Changes in California.

California Insurance Code § 1861.05 requires the insurer to seek *prior approval* for rate changes. The insurer has the burden of proving that the requested rate change is justified and that it meets certain statutory requirements.

There is no question that such prior approval is of great assistance in keeping medical malpractice insurance premiums down in California. For example, in December, 2002, SCPIE, California's second largest medical malpractice insurer, withdrew its application to raise its 2003 premiums for doctors by 15.6% when a hearing on the rate increase was requested by consumer advocates under Proposition 103.²⁵

²³U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Tort Trials and Verdicts in Large Counties*, NCJ-179769, 7 (Aug. 2000).

²⁴ Robert Hunter & Jamie Court, *California Restrictions on Malpractice Victims Have Not Affected Malpractice Premiums: Premium Data Shows California Law Is No Model for the Nation* (visited May 22, 2002)
<<http://www.consumerwatchdog.org/healthcare/pr/pr002466.php>>.3.

²⁵*California's Second Largest Medical Negligence Malpractice Insurer Withdraws 15.6% Rate Hike after Group Challenges Increase* (visited Dec. 5, 2002)

V. AN AGGRESSIVE CALIFORNIA INSURANCE COMMISSIONER ALSO HELPS POLICE THE INSURANCE INDUSTRY.

California has an elected insurance commissioner. The department has over twelve-hundred employees. During the past five years, the department has grown to be the most aggressive governmental insurance regulatory department in the country.

For example, in September, 2002, the California Insurance Commissioner collected a \$1,000,000.00 fine from Kaiser Permanente for the death of a woman.²⁶ This was on the heels of a \$1,100,000.00 fine levied against Kaiser Permanente just months earlier for the death of three patients.²⁷

Therefore, any noted decrease in health care insurance premiums is more likely a result of statutory regulation that was imposed in California in 1988 and the current strong insurance commissioner than it is a result of MICRA's passage.²⁸

VI. WAS THERE A REAL INSURANCE "CRISIS" ?

In retrospect, it is questionable as to whether there even was a real insurance "crisis" in the 1970s which was used as a reason for enacting the California MICRA laws.

The perceived insurance crisis in California was at least in great part generated by Traveler's Insurance Company's overcharging of policyholders. Five-thousand five-hundred (5,500) California physicians successfully filed a suit . The basis of the lawsuit was a hike of malpractice premiums by 327% in 1976. The lawsuit alleged that the firm grossly overcharged for premiums far in excess of what was required to cover the cost of claims.²⁹ The physician

<<http://www.consumerwatchdog.org/insurance/pr/pr002904.php3>.

²⁶ *Kaiser Agrees to Pay Fine for Care Lapse* , Charles Ornstein, THE LOS ANGELES TIMES, Sep. 5, 2002, .B9.

²⁷ *Kaiser Fine Rejected but Soon Reinstated* , Charles Ornstein, THE LOS ANGELES TIMES, May 31, 2002.

²⁸MEDICAL LIABILITY REPORTER, *supra* note 24, at 15-16.

²⁹S.J. Diamond & Harry Nelson, *Doctors Will Get Refunds on Insurance*, LOS ANGELES TIMES, Feb. 6, 1981.

policyholders ultimately attained approximately \$50 million in an out of court settlement.³⁰

There is abundant evidence the California physicians experience with Traveler's Insurance was not an isolated incident. . Rather, the insurance crises over the decades have been self imposed by the insurance industry:

Eight attorneys general , under the auspices of the National Association of Attorneys General, published a report in 1986 ("NAAG Report") analyzing the genesis of the purported insurance crisis.³¹ Their report concluded that the unavailability and lack of affordability of insurance was caused by the unrestrained price cutting undertaken by the insurance industry when it attempted to obtain as much new business as possible to invest the premiums received at the then-high interest rates. ³² Later, to offset the unrealistically low rates, higher rates are charged. That such cyclical pricing leads to periodic insurance "crises" is a well known phenomenon. ³³

The NAAG Report accurately predicted :

"There is little evidence that making the changes in the tort system proposed by the federal government and the insurance industry will prevent a similar 'crisis' in the future given the cyclical nature of the insurance industry." ³⁴

In fact, as predicted, we are now witnessing the cycle coming full circle and the specter of a "crisis" in insurance premiums again looms over the nation..This time the swing of the cycle is likely exacerbated by catastrophic post- 9-11 losses suffered by the insurance carriers , coupled with a persistent downward trend in the stock market . Again, none of this is relevant to caps on damages in medical malpractice cases .

VII . INSURANCE PREMIUM RATES DIRECTLY FOLLOW THE UPS AND

³⁰ *Id.*

³¹ NAT'L ASS'N OF ATTORNEYS GEN.,AN ANALYSIS OF THE CAUSE OF THE CURRENT CRISIS OF UNAVAILABILITY AND AFFORDABILITY OF LIABILITY INSURANCE (May 1986)(prepared by the attorneys general from California, Massachusetts, North Carolina, Texas, West Virginia, and Wisconsin).

³² *Id at 2.*

³³ Robert B. McKay, *Rethinking the Tort Liability System: A Report From the ABA Action Commission*, 32 Vill.L.Rev. 1219,1219-21 (1987) .

³⁴ *Id. at 2.*

DOWNNS OF THE ECONOMY RATHER THAN TRACKING RISING MALPRACTICE RATES.

Americans for Insurance Reform (AIR) is a coalition of approximately one-hundred consumer and public interest groups representing more than fifty-million Americans. The coalition conducted a comprehensive study of rising medical malpractice premium rates. Released in October, 2002, the study refutes the insurance industry's explanation for rising malpractice rates and undermines the industry's claim that a crisis for medical malpractice insurers exists.³⁵

The AIR study makes two specific findings: First, over the last thirty years, medical malpractice pay-outs (e.g., jury verdicts, settlements, etc.) have directly tracked the rate of medical inflation; and Second, over that same period, insurance premium rates have not tracked pay-outs at all, but instead have directly followed the ups and downs of the economy.³⁶

Therefore, it is questionable as to whether there is even a true malpractice insurance crisis now, or whether it is a self imposed crisis by the insurance industry.³⁷ In fact, insurance premiums for all types of policies are escalating nationwide. In 2002 and continuing to date, in addition to many other industries, even California lawyers were also complaining of the skyrocketing costs of malpractice premiums.³⁸

VIII. CAPS ON RECOVERY SHIFT THE BURDEN OF PAYMENT TO MEDICARE AND OTHER GOVERNMENT PROGRAMS AND HURT THE QUALITY

³⁵J. Robert Hunter & Joanne Doroshow, Center for Justice and Democracy, *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices* (last modified 2002) < <http://www.insurance-reform.org>.

³⁶ *Id.*

³⁷ In addition to cyclical nature of premiums, abuses within the insurance industry also continue to drive up rates .For example, Tenet Healthcare Corporation's stock has plunged dramatically since news of a federal audit of its billing practices emerged. It was unveiled that the hospital managers were pushed to bring short-term profits to the hilt. In Tenet's last fiscal year, chief executives at the company's one-hundred thirteen hospitals in the U.S. had an average salary of \$200,000.00. However, collectively it was confirmed that they **doubled** their salaries with cash bonuses that were awarded for boosting their company's earnings. In addition, these chief executives were given stock options.*Tenet's Aggressive Corporate Culture Fed Crisis , Insiders Say*, LOS ANGELES TIMES, Dec. 12, 2002 , at C1.

³⁸Nancy McCarthy, *Malpractice Premiums Skyrocket*, CAL. BAR J. 1 (July 2002).

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By placing caps on damages, an inequitable cost-shifting phenomenon takes place that hurts the entire health care industry in California .

While there is no California cap per se on economic damages such as medical expenses, CAL. CIV. CODE § 3333.1(a) permits the defendant health care provider to introduce evidence that future medical expenses are otherwise “payable” .³⁹Such future expenses are then *deducted* from the amounts otherwise awarded .

.If the victim is not fully compensated by the tort feisor, then either the victim’s own health insurance must bear the cost of such care , or if there is no such adequate alternative insurance, then the cost is shifted to government programs such as Medicaid , Medi-Cal or liquidated through personal bankruptcy by the patient . This creates a negative ripple effect in the economy . Caps on damages have the potential effect of crippling the health care economy, not improving it.

To make governmental insurance programs shoulder the responsibility of caring for victims of medical negligence places another straw on the broken camel’s back. California Governor Gray Davis recently announced a 15 % reduction in Medi-Cal funding⁴⁰. Coupled with already-low reimbursement from Medicare and managed care organizations , the quality of health care in California continues to decline. In treating Medicare patients ,California’s ranking among states has dropped to 44th place in the nation.⁴¹

Again, if MICRA is the cure for the nations’ health care industry then the quality of health care in the nation is about to plummet with the enactment of such federal caps .

IX . DESPITE MICRA’S PASSAGE , CALIFORNIA IS CURRENTLY LOSING PHYSICIANS AT AN ALARMING RATE.

A recent study conducted by the San Diego County Medical Society established that, despite MICRA, *more than one third* of local physicians plan to quit practicing in San Diego

³⁹ CAL. CIV. CODE § 3333.1(a) (West, 1987)

⁴⁰ *State Sees its Ranking in Medicare Arena Drop*, Cheryl Clark , SAN DIEGO UNION TRIBUNE, January 15, 2003.

⁴¹ *Id.*

County in the next three to five years and many others have already cut back on patient care.⁴²

Some of the reasons for the exodus of doctors in California are “declining reimbursements from HMOs, low Medicare and Medi-Cal compared with the rest of the country, and greater pressures from managed care.”⁴³

The exodus of doctors is consistent with findings of a California Medical Association’s study which found that 43% of California doctors are planning “to leave patient care in California: i.e., move out of state to a better medical economic/practice/environment; retire earlier than planned; [or] change professions” in the next three years.⁴⁴

Medical Groups are also closing at a quick pace. As of January 31, 2002, the 36,400 Patient Health Care Medical Group completed its shutdown. This is one of seven such California medical groups that ceased to operate *just in the first quarter of 2002*.⁴⁵ Additionally, three other groups are in bankruptcy proceedings. This is roughly on par with the pace in 2001 when twenty-six California medical groups shut down and in 2000 when thirty-four shut down.⁴⁶ Experts say the trend of California medical group failures will continue unless smaller medical groups can gain some contract negotiating clout through mergers and acquisitions.⁴⁷ Other experts claim rising costs are driven by new medical devices and technology as well as reduced funding from Medicare and Medi-Cal.⁴⁸

In its’ 2001 report, The California Medical Association concluded :

“These findings foretell a dark and startling picture concerning physician supply in California. They predict a future with many fewer physicians....If these trends bear out, California will face a dire situation that will parallel the current nursing

⁴² *County May Soon be Hurting for Doctors: Lower Reimbursement, Managed Care Blamed* , Cheryl Clark, SAN DIEGO UNION TRIBUNE, Dec. 4, 2002, at B1.

⁴³*Id.*

⁴⁴ California Medical Association :*And Then There Were None : The Coming Physician Supply Problem* 2001 Physician Survey Findings (2001) . 43% of surveyed California physicians plan to leave medical practice in the next 3 years *Ibid*, page 18 .

⁴⁵*State’s Physicians Pained by Loss of Medical Groups*, LOS ANGELES TIMES, May 25, 2002, at C1.

⁴⁶*Id.*

⁴⁷*Id.* at C4.

⁴⁸*Id.*

shortage.”⁴⁹ (Emphasis in the original)

Clearly, if MICRA was the panacea, these problems would not be reoccurring in the birthplace of this legislation.

X. VIABLE LAWSUITS NOT ONLY COMPENSATE VICTIMS BUT MAKE PROCEDURES AND HEALTH CARE SAFER FOR ALL.

Innumerable medical and hospital procedures have been made safer as a result of lawsuits. Such improvements have been noted in anesthesia procedures, catheter placements, drug prescriptions, hospital staffing levels, infection control, trauma care, and nursing home care.⁵⁰ Not all such improvements are expensive. For example, because of litigation involving surgery on the wrong limb, the standard of care has evolved to mark the surgical limb with a marking pen before administering anesthesia so as to ensure that no clerical error results in surgery on the wrong body part. Simple yet effective, this change was brought about by litigation.⁵¹

XI. CONCLUSION

California caps on damages have not worked . Why perpetrate caps on damages that are not effective in reducing premiums yet unjustly deny innocent victims from recovering damages that bear a true relationship to the catastrophic injuries they incur? This amounts to a windfall to the insurance industry. Why should an industry benefit from poor business practices?

If California is a model to be followed when crafting federal reform legislation, it would be far more effective to mimic the insurance regulations put in place in California in 1988⁵² as well as strengthening the various federal and state insurance regulatory agencies.

⁴⁹ California Medical Association :*And Then There Were None : The Coming Physician Supply Problem* 2001 Physician Survey Findings , supra at 18.

⁵⁰Meghan Mulligan & Emily Gottlieb, Center for Justice and Democracy, *Lifesavers: CJ&D's Guide to Lawsuits that Protect Us All* (last modified 2002) < <http://www.insurance-reform.org>.

⁵¹*Willie King Wrong Food Amputee*, THE MIAMI HERALD, Oct. 17, 2001 at 58; see also The National Patient Safety Foundation, *A Tale of Two Stories, Report from a Workshop on Assembling the Scientific Basis for Progress on Patient Safety* (visited Jan. 5, 2003) <<http://www.npsf.org/exec/sourcebook.html>.

⁵²California Insurance Code § 1861.01 and California Insurance Code § 1861.05

