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HEALTHCARE LAWYERS

Client Alert: Recalculating Insurance Premiums for Physicians in California

Priority Update: Recalculating Insurance Premiums for Physicians in California

For nearly half a century, California law has capped non-economic (pain and suffering) damages in medical malpractice cases at $250,000. The law – known as the Medical Injury Compensation Act of 1975 (MICRA) – has held the amount of pain and suffering and emotional distress damages steady without any allowance for inflation. As a consequence, in real terms, the original limitation represented slightly more than $1.35 million dollars in spending power today, amounting to an over 80% reduction in real value.

Based on this decline, stakeholders representing patient interests argued that a raise in the cap was overdue. Meanwhile, opponents argued that any increase would translate to higher insurance premiums, first for providers but ultimately for patients, as costs will inevitably be passed down. After some two years of wrangling, a compromise was reached, and the new bill (AB 35) was signed into law on May 23rd by Governor Newsom modifying MICRA.

Key Provisions

The updated law is effective January 1, 2023, and there are several noteworthy changes that will impact any cases filed (or arbitrations demanded) next year:

- For non-fatal injuries, the cap on non-economic damages was increased to $350,000, but this amount will be lifted in yearly increments of $40,000 till it reaches $750,000 in 2033. Thereafter, increases will be adjusted for inflation every January 1st by 2%.
- For cases involving a wrongful death, the cap was increased to $500,000. This amount will be raised in yearly increments of $50,000 till it reaches $1,000,000 in 2033. Thereafter, yearly adjustments for inflation are set at 2%.
- In a win for insurers and providers, the caps are fixed regardless of the number of defendant healthcare providers, institutions, or separate causes of action.
- In addition, attorney contingency fee limits are tiered to the stage of litigation when a recovery claim is finalized.
    - Attorneys are to receive 25% of amount recovered when a settlement is reached *prior* to filing a complaint or an arbitration demand.
    - If a settlement is reached *after* filing the lawsuit or arbitration demand, the contingency fee is capped at 33%.
    - If the case is tried or arbitrated, attorneys for the plaintiff can request court approval for a higher contingency fee, provided they have established good cause.

When Will Malpractice Premiums Change?

In California, changes to insurance rates require public notification and prior approval of the Insurance Commissioner before use. In addition, when an insurance company requests an increase of 7% or more, this can trigger a public hearing. These regulations are conducive to more modest pricing changes throughout the California insurance marketplace. Nevertheless, once clinicians themselves discover that beginning in 2023 they will have additional liability, they may voluntarily opt for more expensive policies. The new bill may also impact industry pricing outside California, albeit indirectly. Since 1975, California's MICRA cap has been considered the "gold standard" for liability reform advocates. Some 29 states have successfully borrowed California's template and implemented similar statewide caps. Now that California's has upped liability limits on non-economic harm, other states may consider incrementally raising statutory caps as well.

Does *More* Malpractice Liability Lead to *Better* Patient Care?

In theory, the primary function of medical malpractice laws is victim compensation and the deterrence of physician

misconduct. As such, many argue that “damage caps” cheat victims what they’re due, and consequently undermine the deterrence power evoked by the specter of unmitigated civil damages. Providers, however, particularly solo-practitioners, do not want to see their premiums rise because insurance companies require, or claim they require, more reserve margins to cover higher potential payouts. In addition, they argue that high premiums increase general healthcare costs by encouraging physicians to practice “defensive medicine” whereby clinicians feel pressured to order tests and other procedures *not* because they are medically necessary but in order to avoid potential malpractice allegations.

There is conflicting evidence whether uncapped liability is the primary driver of high premiums, however, when we take a step back and look at the larger picture, there is broad consensus that greater malpractice liability does little to improve patient outcomes. In 2020, a group of Stanford researchers reviewed 37 studies regarding the association between malpractice liability risk and healthcare quality and safety. Only 5 studies could point to a significant association, while the majority found no evidence or very limited evidence of a relationship between greater malpractice liability and better healthcare outcomes. Bigger risk, apparently, does not do a significantly better job deterring physician negligence, or improving patient care.

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