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PERSPECTIVE

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AB-35 makes historic amendments to MICRA statutes

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This year, Gov. Gavin Newsom signed Assembly Bill 35 (AB-35) into law, making the most significant update to the Medical Injury Compensation Reform Act (MICRA) in decades. This article briefly describes MICRA's background, examines key provisions of AB-35, and discusses some of the implications of the new MICRA laws.

MICRA Background

In 1975, the legislature enacted MICRA to reduce the cost of medical malpractice insurance by limiting the amount and timing of recovery in professional negligence cases. Among other things, MICRA: (1) limited recovery of noneconomic damages to $250,000 per injury, Cal. Civ. Code § 3333.2, (2) limited attorneys' contingent fees, Cal. Bus. & Prof. Code § 6146, and (3) allowed periodic payment of future damages, Cal. Civ. Proc. Code § 667.7.

In May 2022, the legislature enacted AB-35, which will take effect Jan. 1, 2023. AB-35 is compromise legislation negotiated by numerous stakeholders concerned with updating MICRA while preserving its salutary purposes. The bill made significant changes to the MICRA cap on noneconomic damages, updated the contingency fee statute, made a minor change to the period payments statute, and created further privilege protections for benevolent statements (such as prelitigation expressions of sympathy, regret, and acceptance of fault) by health care providers. These changes are discussed below.

Changes to the MICRA Cap on Noneconomic Damages

As originally enacted, Civil Code Section 3333.2 set a single $250,000 limit per injury on the recovery of noneconomic damages in a professional negligence action against any number of health care providers. AB-35 amends Section 3333.2 by setting a $350,000 cap for personal injury actions and a $500,000 cap for wrongful death actions, and provides for annual increases of those caps. Cal. Civ. Code § 3333.2(b)–(c), as amended by 2022 Cal. Stat. ch. 17, § 3. AB-35 also contemplates the possible recovery of multiple caps in certain circumstances, e.g., one for health care providers, another for health care institutions, and an additional cap for any unaffiliated health care providers and institutions. Cal. Civ. Code § 3333.2(b)–(c), as amended by 2022 Cal. Stat. ch. 17, § 3. "Unaffiliated" health care providers and institutions may be liable for separate and independent acts of professional negligence that occurred at, or in relation to medical transport to, a health care institution unaffiliated with all other defendant providers and institutions. *Id.*

A health care provider is defined as a practitioner possessing one of various specified professional licenses. *Id.* § 3333.2(j)(1), as amended by 2022 Cal. Stat. ch. 17, § 3. A health care institution is defined as one or more facilities licensed under Health and Safety Code Section 1250, "owned or operated by the same entity or its affiliates and includes all persons and entities for which vicarious liability theories, including, but not limited to, the doctrines of respondeat superior, actual agency, and ostensible agency, may apply." Cal. Civ. Code § 3333.2(j)(2), as amended by 2022 Cal. Stat. ch. 17, § 3 (emphasis added). No health care provider and no health care institution "shall be liable for damages for noneconomic losses in more than one of the categories … regardless of the application or combined application thereof." *Id.* § 3333.2(d) & (e), as amended by 2022 Cal. Stat. ch. 17, § 3.

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The statute defines "unaffiliated" to mean "a specified health care provider, health care institution, or other entity not covered by the definition of affiliated, or affiliated with, as defined in Section 150 of the Corporations Code, or that is not employed by, performing under a contract with, an owner of, or in a joint venture with another specified entity, health care institution, health care provider, organized medical group, professional corporation, or partnership, or that is otherwise not in the same health system with that health care provider, health care institution, or other entity. Whether a health care provider, health care institution, or other entity is unaffiliated is determined at the time of the professional negligence." Cal. Civ. Code § 3333.2(j)(3), as amended by 2022 Cal. Stat. ch. 17, § 3.

Conversely, the statute does not expressly define the term "affiliated," so arguably "affiliated" means any relationship that does not fall within the statutory definition of "unaffiliated." By implication, a health care provider and/or institution is affiliated with another health care provider and/or institution if:

(1) "it directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the other specified corporation," Cal. Corp. Code § 150. Corporations Code Section 150 states: "A corporation is an 'affiliate' of, or a corporation is 'affiliated' with, another specified corporation if it directly, or indirectly through one or more intermediaries, controls,

is controlled by or is under common control with the other specified corporation." Corporations Code Section 150 has rarely been construed in published appellate de cisions. In *Otay Land Co. v. U.E. Ltd., L.P,* 15 Cal.App.5th 806 (2017), the court explained that an "'affiliate' is a 'corporation that is related to another corporation by shareholdings or other means of control.'" *Id.* at 857 (quoting Affiliate, Black's Law Dictionary (10th ed. 2014)). And "[c]ontrol typically involves authority to direct the management of an entity." *Id.* (citing Cal. Corp. Code § 160(a)) (stating that control generally "means 'possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation'" (quoting Cal. Corp. Code § 160(a))).

(2) it is "owned or operated by the same entity or its affiliates," Cal. Civ. Code § 3333.2(j)(2), as amended by 2022 Cal. Stat. ch. 17, § 3, or

(3) it "is … employed by, performing under a contract with, an owner of, or in a joint venture with another specified entity, health care institution, health care provider, organized medical group, professional corporation, or partnership, or that is otherwise not in the same health system with that health care provider, health care institution, or other entity," *id.* § 3333.2(j)(3), as amended by 2022 Cal. Stat. ch. 17, § 3.

Although a plaintiff may seek damages, and recover up to the applicable cap, against all three groups of defendants, each defendant can only be liable for damages under one category in this section. *Id.* § 3333.2(d)–(e), as amended by 2022 Cal. Stat. ch. 17, § 3. And the damages caps for noneconomic loss apply regardless of the number of defendants in each category. *Id.* § 3333.2(f), as amended by 2022 Cal. Stat. ch. 17, § 3. Thus, the statutory language seems to limit the circumstances where multiple noneconomic damage caps could be recovered. However, plaintiffs will surely seek to recover multiple caps in nearly every malpractice lawsuit, so the appellate courts will eventually need to draw the metes and bounds of the statutory provisions governing multiple MICRA caps.

The new MICRA cap on noneconomic damages for personal injury cases will start at $350,000 on Jan. 1, 2023, increase by $40,000 per year for 10 years, and then increase 2% per year thereafter. In wrongful death cases, the noneconomic damages cap will start at $500,000 on Jan. 1, 2023, increase by $50,000 per year for 10 years, and then increase 2% per year thereafter. Thus, beginning in Jan. 2034, the cap amounts of $750,000 (for personal injury actions) and $1 million (for wrongful death actions) will be adjusted by 2% every Jan. 1, to account for inflation. *Id.* § 3333.2(h), as amended by 2022 Cal. Stat. ch. 17, § 3. These new noneconomic damages caps apply to all cases filed, or arbitrations demanded, on or after Jan. 1, 2023. *Id.* § 3333.2(g), as amended by 2022 Cal. Stats. ch. 17, § 3. The cap in effect at the time the case is resolved (by judgment, arbitration award, or settlement) will apply. *Id.*

Changes to Limits on Attorneys' Contingent Fees

As originally enacted, California Business and Professions Code Section 6146 limited an attorney's contingent fee in a professional negligence action against a health care 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.

As amended by AB-35, Section 6146 ties the contingency fee limits to the stage of the representation. The amended statute limits an attorney's contingent fee to 25% of the recovery for cases that settle before a civil complaint or arbitration demand is filed, and 33% of the recovery after a complaint or arbitration demand is filed. Cal. Bus. & Prof. Code § 6146(a)(1)–(2), as amended by 2022 Cal. Stat. ch. 17, § 2. The amended statute also allows a court to grant a higher contingency fee upon a showing of good cause in cases that went to trial or arbitration. *Id.* § 6146(a)(3), as amended by 2022 Cal. Stat. ch 17, § 2.

Changes to Periodic Payment of Future Damages

Currently, Code of Civil Procedure Section 667.7(a), allows a medical malpractice plaintiff to require periodic payment of future damages rather than a lump sum payment if the judgment is $50,000 or more. AB-35 amended only one aspect of Section 667.7 – it increased the minimum future damages award in the judgment from $50,000 to $250,000 before periodic payments may be demanded. Cal. Civ. Proc. Code § 667.7(a), as amended by 2022 Cal. Stat. ch. 17, § 4.

Added Privilege Protections for Benevolent Statements

AB-35 adds Section 104340 to the Health and Safety Code. This new section broadly protects prelitigation expressions of sympathy, regret, or benevolence, and acceptances of fault – as they relate to a person's pain, suffering, or death, or an adverse patient safety event or unexpected health outcome – from "subpoena[s], discovery, or disclosure" and from use as evidence of an admission of liability. Cal. Health & Safety Code § 104340(a), as amended by 2022 Cal. Stat. ch. 17, § 5.

Implications of AB-35

Plaintiffs will benefit from the aspect of AB-35 that increases the baseline limit for noneconomic damages from $250,000 to $350,000 in personal injury cases and $500,000 in wrongful death cases and provides for significant future increases. Plaintiffs also may benefit from the provision allowing separate MICRA caps in situations where an unaffiliated institution shares liability for plaintiffs' injury.

For example, where a patient sues multiple surgeons, a hospital and its nurses, and a skilled nursing facility and its nurses for independent acts of negligence that cause an injury, the surgeons would likely share one "provider cap," the hospital and its nurses would share one "institution cap," and the skilled nursing facility and its nurses – if unaffiliated with the surgeons or the hospital – would share a third cap. But whether the MICRA amendment produces a net benefit to plaintiffs after attorneys' fees are paid will vary from case to case.

A plaintiff awarded $5 million in economic damages plus the noneconomic damages cap in a personal injury action may have a smaller net recovery once AB-35 takes effect because plaintiff's attorney may recover a higher contingency fee under the new MICRA laws. Under the old MICRA laws, the total award would be for $5.25 million, and the maximum contingency fee award would be $859,150 (40% of first $50,000, 33.3% of the next $50,000, 25% of next $500,000, and 15% above $600,000), providing plaintiff with a net recovery of $4,390,850. But once AB-35 takes effect, the award total increases from $5.25 million to $5.35 million, and the maximum contingency fee increases dramatically from $859,150 to $1,337,500 if the case settles pre-complaint or pre-arbitration demand, $1,765,500 if the case is resolved after a complaint or arbitration demand is filed, or $2,140,000 following a trial or arbitration (assuming the court approves a 40% contingency fee). Regardless of when the case is resolved, plaintiff would have a smaller net recovery once AB-35 takes effect.

By contrast, a plaintiff awarded the noneconomic damages cap and no economic damages (such as in a case where all economic damages are paid by a collateral source, so the plaintiff does not pursue them) would have a larger net recovery once AB-35 takes effect. Before AB-35 takes effect, plaintiff's net recovery would be $175,850 ($250,000 in noneconomic damages minus $74,150 in attorneys' fees). Once AB-35 takes effect, plaintiff's net recovery would be $262,500 for a prelitigation settlement ($350,000 in noneconomic damages minus $87,500 in attorneys' fees); $235,000 if the case is resolved after the filing of a complaint or arbitration demand ($350,000 in noneconomic damages minus $115,500 in attorneys' fees); and $210,000 following a trial or arbitration (assuming the court approves a 40% attorneys' fee award) ($350,000 in noneconomic damages award minus $140,000 in fees).

In most cases, plaintiffs' attorneys should benefit from AB-35 because an attorney's maximum contingent fee will be based on when a case ends, not the amount awarded. Plaintiffs' attorneys recover less only in small-dollar cases that they settle prior to filing a complaint. Because an attorney's

maximum contingent fee will increase 8% upon filing a complaint or arbitration demand, this change incentivizes litigation and discourages prelitigation settlements. The prospect of higher contingency fees and larger recoveries will almost certainly result in a higher volume of medical malpractice cases being filed, even if plaintiffs themselves recover no more (or less) than they would have recovered under MICRA as originally enacted. It also may influence settlement negotiations. For example, a written settlement offer by defendants (which must be delivered to the plaintiff) may explain how the plaintiff's own recovery may diminish if a pretrial settlement is not reached.

Because these new noneconomic damages caps and higher limits apply to cases filed on or after Jan. 1, 2023, plaintiffs may delay filing medical malpractice lawsuits until Jan. 1, 2023, to take advantage of the multiple caps and higher limits. As a result, defendants should expect the number of medical malpractice cases filed to decrease in 2022 and increase in 2023 once AB-35 takes effect. Defendants should also look out for plaintiffs who delay the resolution of their claims to take advantage of annual limit increases. The limit on noneconomic damages is determined at the time of judgment, settlement, or arbitration award – not when a case is filed.

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