Undoing MICRA

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It has been over thirty-five years since California became a leader in healthcare reform, addressing the malpractice insurance crisis in a measured way. In 1975, the Medical Injury Compensation Reform Act ("MICRA") capped non-economic damages at $250,000 and limited contingency fees that plaintiff's attorneys could charge injured plaintiffs according to a sliding scale. No limits were place on the amounts that an injured plaintiff could recover for medical care, lost earnings and other economic damages. The sliding scale provides for a limit of: 40% of the first $50,000 recovered, 35% of the second $50,000, 25% of the next $500,000 and 15% of recoveries over $600,000. Attorney's fees on a $1,000,000 recovery may not exceed $238,333, a decrease of $95,000 over the usual one-third contingency fee. The decrease in fees that can be charged benefits the injured plaintiff. Attempts to amend or repeal MICRA and to challenge it in the courts have occurred regularly since its enactment.

There have been many studies of MICRA. A Rand Corporation study from 2004 concluded that MICRA reduced the amounts awarded to the injured plaintiff in cases that were resolved by a jury verdict by 15%, but reduced attorney's fees in those cases by 60%. Of the estimated savings from MICRA in those cases, savings from attorney's fees accounted for two-thirds of all of the savings from MICRA.

Unsurprisingly, Initiative 1606 is supported by entities associated with the medical malpractice trial bar. On May 15, 2014, Initiative 1606 qualified for the November ballot. It is expected that the battle over Initiative 1606 will attract significant controversy and funding and will be the subject of ongoing campaigns that will flood our mailboxes and dominate the media this Fall.

The essence of this proposal is to change a core decision made when California enacted the non-economic damages limit—that the cap not be increased for inflation. This decision was revisited several times (because the late seventies and early eighties were periods of runaway inflation in the United States) but was never changed. The Initiative would not begin to adjust for inflation on its effective date but would travel back in time and insert an inflation provision in MICRA as of its enactment—overruling the judgments made when it was enacted and those made by later Legislatures. After the initial adjustment, the cap would be annually adjusted for inflation. This change would also apply retroactively to cases that are pending on the effective date of Initiative 1606. Because of the extraordinary inflation in the late seventies and early eighties, the proposed cap would increase to about $1,100,000 under the Initiative; if the increase in inflation was calculated instead beginning in 1985, the year the California Supreme Court held that MICRA was constitutional, then the proposed cap would be about $560,000.

Initiative 1606 is an example of the current trend in designing initiative measures. Rather than seek an up or down vote on the core issue, measures are designed with messages or elements expected, if the polling is correct, to resonate with the public and to draw focus away from the core of the proposal. For example, while the Initiative will increase the amount of attorney's fees paid by injured plaintiffs, the Initiative adds an unneeded reference to the existing attorneys fee provision of MICRA. This would permit supporters to assert that the Initiative limits attorney fees when it has the opposite effect.

In addition, the increase in the amount that can be recovered for non-economic damages has been combined with a proposal to require drug testing of physicians (and to impose the cost on physicians and hospitals) and to require use of the CURES (Controlled Substance Utilization Review and Evaluation System) prescription database before a physician may prescribe certain drugs (to reduce or eliminate prescribing to patients seeking opiate prescriptions from multiple physicians). There are many undeniably tragic situations involving both of these issues and the issues are expected to resonate with the public. But each of these issues has other solutions, such as a

diversion program to avoid harm to the public and to permit recovery by the physician. Funding for these programs can also be increased with salutary results and these programs have suffered from budget cuts along with other important state funded programs in California. Similarly, the CURES database is underfunded and, as a result is not used or useful. While SB 809 has been adopted to begin to address this issue the changes will be implemented slowly.

The result of this Initiative is to increase the cost of healthcare. All purchasers of malpractice insurance will have increased costs which will be passed on to purchasers of health care, whether it is to the government, to employers or to individuals or groups who purchase exchange plans. The Legislative Analyst's Office estimated the costs to state and local government alone to be "likely at least in the low tens of millions of dollars annually, potentially ranging to over one hundred million dollars annually." State and local government have few choices to meet this increased cost: reduce expenditures in other government programs, increase taxes or shift the cost to the private sector.

If the goal is, as it should be, to protect patients from harm and compensate them when harm occurs in an efficient and fair manner then the promise of the future is to develop a system that, on the one hand, efficiently compensates persons injured during the course of medical care on a no-fault basis while at the same time taking steps to improve the system of care to reduce harm. Returning to 1975 is not the way to address either issue.

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