

CONCURRENCE IN SENATE AMENDMENTS  
AB 35 (Reyes and Umberg)  
As Amended April 27, 2022  
Majority vote

**SUMMARY**

Original Committee of Reference: JUD.

Updates the Medical Injury Compensation Reform Act.

**Senate Amendments**

Current Committee Recommendation: Concur

Delete the Assembly version of this bill and instead:

*Major Provisions*

- 1) Adjusts the contingency fees an attorney can contract for or collect for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence to the following limits:
  - a) 25% of the dollar amount recovered if the recovery is pursuant to a settlement agreement and release of all claims executed by all parties thereto prior to a civil complaint or demand for arbitration being filed;
  - b) 33% of the dollar amount recovered if the recovery is pursuant to settlement, arbitration, or judgment after a civil complaint or demand for arbitration is filed; and
- 2) Provides that if an action is tried in a civil court or arbitrated, the attorney representing the plaintiff or claimant may file a motion with the court or arbitrator for a contingency fee in excess of the above percentage, which motion shall be filed and served on all parties to the action and decided in the court's discretion based on evidence establishing good cause for the higher contingency fee.
- 3) Provides that in any action for injury against a health care provider or health care institution based on professional negligence that does not involve wrongful death, the injured plaintiff shall be entitled to recover up to \$350,000 in noneconomic losses, regardless of the number of health care providers or institutions, in each of the following three categories:
  - a) Against one or more health care providers, collectively;
  - b) Against one or more health care institutions, collectively; and
  - c) Against one or more health care providers or health care institutions that are unaffiliated with the above defendants based on separate and independent acts of professional negligence that occurred at, or in relation to medical transport to, a health care institution unaffiliated with a health care institution described above, collectively.
- 4) Increases this \$350,000 limit by \$40,000 each January 1st for 10 years up to \$750,000.

- 5) Provides that the limit for noneconomic damages is raised to \$500,000 in each of the above categories if the action is for wrongful death against a health care provider or health care institution based on professional negligence. These amounts are to increase each January 1st by \$50,000 for 10 years up to \$1 million.
- 6) Prohibits a health care provider or health care institution defendant from being found liable for damages for noneconomic losses in more than one of the above categories.
- 7) Applies the above applicable dollar amounts regardless of the number of defendant health care providers or health care institutions against whom the claim is asserted or the number of separate causes of actions on which the claim is based.
- 8) Applies to all cases filed or arbitrations demanded on or after, January 1, 2023. The dollar amount in effect at the time of judgment, arbitration award, or settlement shall apply to an action. The amounts are to be adjusted for inflation each January by two percent beginning on January 1, 2034.
- 9) Updates the definition of "health care provider" and defines related terms.
- 10) Allows for the payment of a judgment by periodic payments rather than by a lump-sum payment if the award equals or exceeds \$250,000 in future damages.
- 11) Requires that statements, writings, or benevolent gestures expressing sympathy, regret, a general sense of benevolence, or suggesting, reflecting, or accepting fault relating to the pain, suffering, or death of a person, or to an adverse patient safety event or unexpected health care outcome, in relation to an act or omission to act in the provision of or failure to provide health care, and made to that person or the family or representative of that person prior to the filing of a lawsuit or demand for arbitration, be confidential, privileged, protected, not subject to subpoena, discovery, or disclosure, and cannot be used or admitted into evidence in any civil, administrative, regulatory, licensing, or disciplinary board, agency, or body action or proceeding.

## COMMENTS

The bill makes two significant changes to the Medical Injury Compensation Reform Act (MICRA) by 1) restructuring MICRA's limit on attorney fees; and 2) raising MICRA's cap on noneconomic damages.

*Attorney fee cap.* Existing law places limitations on the contingency fee an attorney can contract for or collect in connection with their representation of a person against a health care provider based on the latter's professional negligence. The current system ties the limits to the amount recovered. An attorney can collect 40% of the first \$50,000 recovered, 33 1/3% of the next \$50,000, 25% of the next \$500,000, and 15% of anything exceeding that amount. (Business & Professions Code Section 6146.)

This bill restructures the metrics and instead ties the tiered fee limits to the stage of the representation at which the amount is recovered. An attorney can collect a fee of 25% for an amount recovered pursuant to a settlement agreement and release of claims executed by the parties prior to a civil complaint or demand for arbitration being filed. If it is recovered pursuant to a settlement, arbitration, or judgment after a complaint or demand for arbitration is filed, then

the fee can be 33% of the dollar amount recovered. Where the action is actually tried in a civil court or arbitrated, an attorney can petition the court for a fee in excess of these limits and the court must decide whether good cause has been established for approving a higher contingency fee. These changes simplify the structure of the statute and make the ultimate fee award more logically tied to the stage of representation the amount was recovered in, loosely approximating the amount of work that it takes to secure the judgment or settlement, rather than basing it solely on the amount recovered.

*Cap on noneconomic damages.* Existing law entitles an injured plaintiff in any action for injury against a health care provider based on professional negligence to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage. However, such damages are capped at \$250,000. (Civil Code Section 3333.2.) This figure has not been modified since the statute was enacted almost 50 years ago. Based on the United States Bureau of Labor Statistics' Consumer Price Index calculator, that amount has the same buying power as approximately \$1.3 million today. This bill not only increases the amount and provides for future increases to account for inflation, but also restructures how these caps function.

The bill establishes two separate caps, depending on whether a wrongful death claim is involved. In a wrongful death case against a health care provider or health care institution based on professional negligence, the cap increases to \$500,000. Each January 1st thereafter, this cap increases by \$50,000 until it reaches \$1 million.

If the medical malpractice case does not involve wrongful death, the cap starts at \$350,000, and increases each year by \$40,000 until it reaches \$750,000.

While existing law applies the cap regardless of the number and type of defendants, this bill creates three separate categories for which a plaintiff is able to seek the limit. In the respective cases, a plaintiff can seek the cap against one or more health care providers, collectively; against one or more health care institutions, collectively; and against one or more health care providers or institutions that are "unaffiliated" with the other defendants based on professional acts of negligence that are separate and independent from the other acts and that occurred at, or in relation to medical transport to, a health care institution unaffiliated with the other institutions.

The bill also raises the ceiling for when a court must, at the request of either party, enter a judgment ordering that an award for future damages be paid in whole or in part by periodic payments rather than by a lump-sum payment. Currently the award must equal or exceed \$50,000. This bill moves this threshold to \$250,000.

Finally, the bill also adds a new section to the law regarding certain relevant evidence. It makes specified expressions of sympathy, benevolence, or fault in the provision of health care confidential. The covered expressions include statements regarding sympathy or even fault relating to the pain, suffering, or even death of a person, as well as an "adverse patient safety event or unexpected health outcome."

#### **According to the Author**

Times have changed, but MICRA hasn't. California's medical malpractice statute has been unchanged for nearly five decades and in that time has magnified and exacerbated political differences.

Finally, stakeholders representing patients and the medical community were determined to provide a balanced and equitable solution and put aside the political divides of the past. They have succeeded. AB 35 represents the tireless work of stakeholders to protect patients and provide stability for medical providers.

### **Arguments in Support**

Writing in support of this bill, the Consumer Attorneys of California and Californians Allied for Patient Protection (CAPP), the co-sponsors of this bill, together hail this "historic agreement" and assert that the "consensus demonstrates a willingness to put aside outworn political differences and to enact a compromise that will settle this issue moving forward and protect the rights of patients."

In an open letter to its members, the California Medical Association highlights the process and the compromise, which this bill represents:

... [A]t long last, a historic agreement to modernize MICRA is on the horizon. As part of this modernization of MICRA, it was important that the underlying principles be preserved – ensuring access to care and protecting our health care delivery system from runaway costs. Important guardrails of MICRA will continue unchanged, including advance notice of a claim, the one-year statute of limitations to file a case, the option of binding arbitration, early offers of proof for making punitive damages allegations and allowing other sources of compensation to be considered in award determinations.

### **Arguments in Opposition**

The Union of American Physicians and Dentists (UAPD/AFSCME) writes in opposition:

This bill would increase health care costs for working families while raising the cost of medical malpractice insurance premiums beyond that which most physicians in private practice and small groups simply can afford, driving physicians out of private practice and exacerbating existing physician shortages. The current economic situation with runaway inflation is devastating to working families and AB 35 will make it much harder for them to pay for adequate health care. This is untenable for working families who are already struggling to pay for health care costs. Ultimately, all these increased health care costs will be borne by working families.

## **FISCAL COMMENTS**

None

## **VOTES**

**ASM JUDICIARY:** Vote Not Relevant

**YES:**

**NO:**

**ABS, ABST OR NV:**

**ASM ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND INTERNET MEDIA:** Vote Not Relevant

**YES:**

**NO:**

**ABS, ABST OR NV:**

**ASM APPROPRIATIONS:** Vote Not Relevant

**YES:**

**NO:**

**ABS, ABST OR NV:**

**ASSEMBLY FLOOR:** Vote Not Relevant

**YES:**

**NO:**

**ABS, ABST OR NV:**

**SENATE FLOOR: 37-1-2**

**YES:** Allen, Archuleta, Atkins, Bates, Becker, Borgeas, Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hueso, Hurtado, Jones, Kamlager, Laird, Leyva, Limón, McGuire, Melendez, Min, Newman, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener

**NO:** Nielsen

**ABS, ABST OR NV:** Hertzberg, Wilk

**ASM JUDICIARY: 9-0-1**

**YES:** Stone, Bloom, Davies, Haney, Kalra, Kiley, Maienschein, Reyes, Robert Rivas

**ABS, ABST OR NV:** Cunningham

## **UPDATED**

VERSION: April 27, 2022

CONSULTANT: Alison Merrilees / JUD. / (916) 319-2334

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