

**RESOLUTION 03-01-2015**

**DIGEST**

Healthcare Law: Uncapped Damages After Statutory Offer to Compromise

Amends Civil Code section 3333.2 to permit general damages exposure, uncapped by the \$250,000 MICRA limit, for a healthcare defendant who fails to accept an offer to compromise.

**TEXT OF RESOLUTION**

**RESOLVED**, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 3333.2 to read as follows:

§3333.2

1           (a) In any action for injury against a health care provider based on professional  
2 negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate  
3 for pain, suffering, inconvenience, physical impairment, disfigurement and other non-pecuniary  
4 damage.

5           (b) In no action shall the amount of damages for noneconomic losses exceed two hundred  
6 fifty thousand dollars (\$250,000), except that if a demand for compromise in an amount that is  
7 within the limits of all applicable insurance policies is made and refused pursuant to the  
8 provisions of Code of Civil Procedure section 998, this limitation on noneconomic damages shall  
9 not apply to a subsequent verdict that exceeds two hundred fifty thousand dollars (\$250,000).

10           (c) For the purposes of this section:

11           (1) “Health care provider” means any person licensed or certified pursuant to Division 2  
12 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to  
13 the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter  
14 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any  
15 clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with  
16 Section 1200) of the Health and Safety Code. “Health care provider” includes the legal  
17 representatives of a health care provider;

18           (2) “Professional negligence” means a negligent act or omission to act by a health care  
19 provider in the rendering of professional services, which act or omission is the proximate cause  
20 of a personal injury or wrongful death, provided that such services are within the scope of  
21 services for which the provider is licensed and which are not within any restriction imposed by  
22 the licensing agency or licensed hospital.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** San Diego County Bar Association

The Problem: Settlement of medical malpractices cases is problematic because carriers believe that their downside liability is minor given the statutory cap on noneconomic damages. As such, even when settlement demands are made that are reasonable, cases do not settle.

The Solution: This amendment provides an incentive for settlement within policy limits by increasing the downside potential for cases that must be tried because a settlement demand within policy limits is not accepted.

**IMPACT STATEMENT:**

The proposed resolution does not impact any other law, statute, or rule.

**CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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**RESPONSIBLE FLOOR DELEGATE:** Karen R. Frostrom

**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

Similar to Resolution 07-03-2009, which was approved in principle.

Reasons:

This resolution amends Civil Code section 3333.2 to provide permit general damages exposure, uncapped by the \$250,000 MICRA limit, for a healthcare defendant who fails to accept an offer to compromise. This resolution should be approved in principle because, with the current MICRA cap on general damages, defendant health care providers and their insurers have little incentive to settle even where the plaintiff's demand is reasonable, and the resolution would interject balance into the negotiations, foster responsible case assessment and decision-making, and promote settlement prior to trial.

The resolution only impacts MICRA's \$250,000 general damage limitation — imposed some four decades ago by the Legislature and Governor on medical malpractice cases in the face of a statewide crisis in the availability of health care services, when physicians could no longer afford the cost of reasonable professional liability insurance. The resolution would only open up the limits in those cases where the medical defendant chooses not to settle when faced with a statutory demand to settle under Code of Civil Procedure section 998, and then fails to obtain a better result at trial than the health care provider could have done had that defendant accepted the statutory offer or entered a pretrial settlement. The resolution would not affect the MICRA limitation in cases where the parties settle prior to trial.

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**COUNTERARGUMENTS TO RESOLUTION 03-01-2015**

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## **ORANGE COUNTY BAR ASSOCIATION**

The Medical Injury Compensation Reform Act of 1975 (MICRA) cap on noneconomic damages in cases against health care providers has historically been one of the most controversial MICRA provisions. MICRA was enacted at a time of a serious healthcare crisis in California. At the time “the Legislature was primarily concerned with capricious jury awards when it established the MICRA cap. . . . The prospect of a fixed award of noneconomic damages not only increases plaintiffs’ motive to settle, . . . but also restrains the size of settlements. Settlement negotiations are based on liability estimates that are necessarily affected by the cap. By placing an upper limit on the recovery of noneconomic damages at trial, the Legislature indirectly but effectively influenced the parties’ settlement calculations.” *See Rashidi v. Moser*, 2014 WL 701400. The proposed resolution seeks to create an end run around this very purpose.

Additionally, there is no showing as to how this proposed change addresses the problem described. While the proponent’s desire to incentivize health care providers to settle is understandable, amending Civil Code section 3333.2 as proposed swings the pendulum too far and shatters the very limitations the Legislature sought to maintain.