

The Issue:

Medical liability lawsuits continue to play a major role in rising health care costs across the nation. Increasingly frequent malpractice lawsuits and excessive jury awards in other states have caused professional liability insurance premiums to skyrocket, making the delivery of care more expensive and reducing access to care, particularly in high risk specialties. The threat of potential litigation also drives physicians to practice “defensive medicine.” Even in California, where the landmark Medical Injury Compensation Reform Act (MICRA) has helped check runaway medical liability costs and ensure patients have access to doctors, the threat of medical liability lawsuits can still drive physicians to practice defensive medicine. The Congressional Budget Office estimates national reforms would save \$54 billion nationwide.

President Obama has publicly recognized the role medical liability lawsuits play in encouraging defensive medicine and rising health care costs, but has indicated he does not support caps on attorney fees or noneconomic damages. This is despite the success of MICRA-like caps in California and other states in keeping medical liability premiums and thus health care costs in check, while ensuring fair compensation to injured patients. The President has indicated interest in exploring alternative medical liability systems, such as early offer systems and certificates of merit.

Health reform proposals in the U.S. House of Representatives and U.S. Senate track the President’s approach. These proposals are strongly supported by medical associations in other states that have unsuccessfully attempted to enact caps and are desperately seeking relief from high liability costs. Both congressional proposals include provisions that encourage states to test programs that address the issue of medical liability, although in very incremental steps. Neither proposal would pre-empt or otherwise directly impact MICRA and other similar state laws, although the House version does

incentivize states to adopt pilot programs using early offer and certificates of merit while explicitly excluding MICRA-like caps from such incentives.

CMA’s primary goal relating to medical liability is to protect MICRA, which ensures that patients are compensated in a fair and timely manner for medical injuries by providing injured patients unlimited economic compensation and limiting the amount of their recovery that can be consumed by attorney’s fees. CMA also supports the ability of other states to enact effective medical liability reform laws, as long as MICRA is not undermined.

The Proposals:

In the House (HR 3962)

Standard of Care Not Affected: Section 261 of the House proposal sets forth rules of construction that apply to the entire Act. Under Section 261(a), guidelines or other standards related to payment policies and delivery system reform in public health, preventative programs or best practices are not to be construed to establish the standard of care or duty of care in any medical malpractice action or claim. Subdivision (c) of that section sets forth an explicit, “Savings Clause for State Medical Malpractice Laws,” under which nothing in the Act is to be construed to modify or impair state law governing legal standards or procedures used in medical malpractice cases or the authority of a state to make or implement such law.

CMA was instrumental in getting this section into the House bill to ensure that any practice guidelines or payment policies established in the bill do not increase the liability exposure for physicians. CMA is seeking similar language in the Senate bill.

Moreover, this section applies to the entire Act and expresses clear Congressional intent that nothing in the Act shall be construed to modify or impair any aspect of the California MICRA law. This section is important because it not only protects the caps on noneconomic damages but the other important components

of MICRA, such as the collateral source rule, periodic payments of future damages, and binding arbitration agreements.

State Medical Liability Laws: Section 2531 authorizes financial incentives for state legislatures that enact medical liability reforms that include certificate of merit or early offer laws and do not include caps on damages or limits on attorney's fees. While excluding MICRA-like caps from the type of program for which states can receive federal dollars, Section 2531 expressly protects existing medical liability reform laws, including MICRA. It states that the financial incentives shall not be construed to preempt or modify the application of any existing state law. This section will not affect the validity or enforceability of MICRA.

In the Senate (HR 3590)

The Senate proposal does not actually create incentives for states to adopt pilot programs to explore alternative forms of medical liability reform, nor does it create any federal program. Instead, it merely expresses the "Sense of the Senate" that:

- Health care reform presents an opportunity to address issues related to medical malpractice and medical liability insurance;
- States should be encouraged to develop and test alternatives to the current civil litigation system as a way of improving patient safety, reducing medical errors, encouraging the efficient resolution of disputes, increasing the availability of prompt and fair resolution of disputes, and improving access to liability insurance, while preserving an individual's right to seek redress in court; and
- Congress should consider establishing a state demonstration program to evaluate alternatives to the current civil litigation system.

What It Means for Doctors

While California physicians certainly need additional liability relief, California has the strongest medical liability law in the

country and CMA must first ensure that any federal legislation does not preempt or undermine MICRA.

In short, nothing in either the House or Senate version will have a major negative impact on doctors in California. Neither Congressional proposal pre-empts or directly impacts MICRA. However, doctors needing liability relief in other states that have been unable to pass MICRA-like protections may benefit from the reform programs incentivized in the House legislation.

The House version does include language prohibiting federal incentive funding for MICRA-like caps, which some medical advocates fear may be used to discredit caps on trial attorney fees and noneconomic damages as an effective tool for combating high medical liability costs. CMA understands this concern, and is working to address it with House leadership, who has already worked with us to include language making very clear that MICRA and similar medical liability regimes are not pre-empted by HR 3962. CMA has specifically asked that the language that prohibits federal incentives for MICRA-like caps be removed in any House-Senate health reform conference committee agreement.

Although CMA certainly supports national reform if it preserves our valuable MICRA protections, sweeping national liability reform is unlikely in the current political environment.

What It Means for Patients

Patients in California will continue to benefit from MICRA's caps on trial attorney fees and noneconomic damages, which have helped to combat rising health care costs and ensure that patients have access to doctors, particularly high-risk specialists. Patients in other states may also benefit if they are able to get effective reforms enacted.