

**PROPOSITION 46: MEDICAL MALPRACTICE LAWSUITS CAP AND DRUG
TESTING OF DOCTORS INITIATIVE**

September 2014

SDCTA Position:

OPPOSE

Rationale for Position:

Raising the medical malpractice lawsuits cap will drive up healthcare costs and potentially reduce the availability of services to Californians. Even with the ongoing implementation of the Patient Protection and Affordable Care Act, this policy is anticipated to result in more people looking to taxpayer-funded programs and the unrecoverable cost of treatment for the uninsured and underinsured will be shifted to those fully-covered with private insurance.

Title: Proposition 46: The Medical Malpractice Lawsuits Cap and Drug Testing of Doctors Initiative

Jurisdiction: California

Type: Initiative

Vote: Majority

Status: On November Ballot

Issue: Malpractice Insurance Lawsuits Cap

Description: Proposition 46, the Medical Malpractice Lawsuits Cap and Drug Testing of Doctors Initiative, is a measure designed to inflate the current “non-economic” damages cap from \$250,000 to \$1.2 million dollars and require drug and alcohol testing of doctors.

Fiscal Impact: Knowing this, raising the Medical Injury Compensation Reform Act (MICRA) cap in California will result in a loss in cost-savings that the State and local government expect from the current cap. Although it is not clear how significant the increase in healthcare costs will be, the Legislative Analyst’s Office (LAO) estimates “that state and local government health care costs are associated with raising the cap would likely range from **the tens of millions of dollars to several hundred million dollars annually.**”

Background:

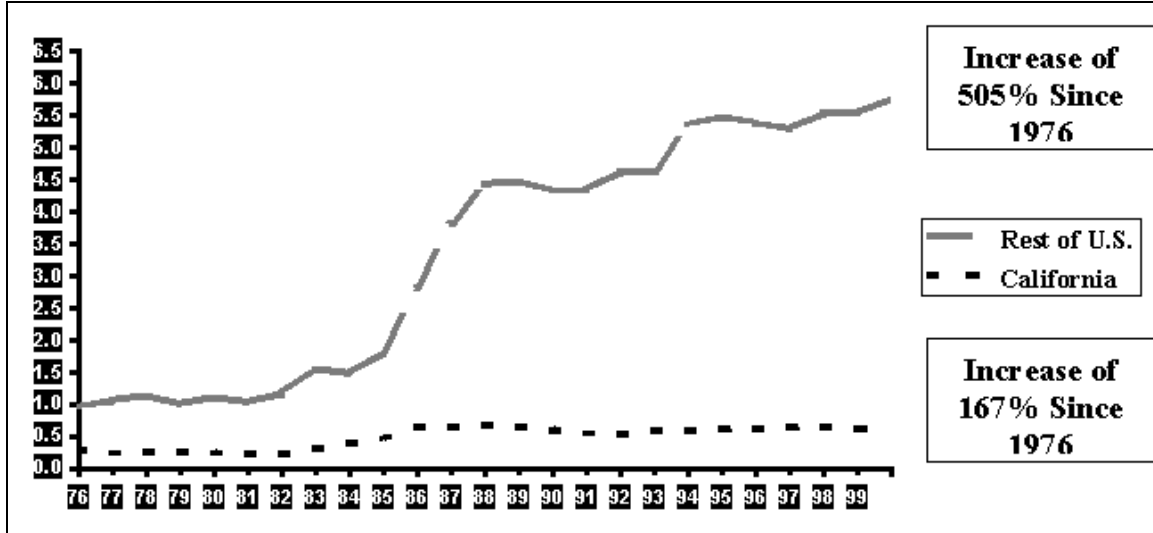
In August 1975, Governor Jerry Brown enacted a statute, known as the Medical Injury Compensation Reform Act (MICRA). MICRA specifically capped the limit for non-economic damages to \$250,000, while leaving economic damages uncapped. Non-economic damages refer to the physical and emotional stress caused by the injury, such as physical pain, emotional stress, and mental suffering. As the non-economic damages are subjective, courts determine a monetary value after reviewing the analysis and proof. Economic damages are more objectively determined by the damages calculated from documents, records, medical bills, expenses, loss of wages and earnings, future lost earning capacity and profits, and a person’s real and personal property.

By capping the non-economic damages, MICRA was designed to help stabilize medical malpractice liability insurance premiums for healthcare providers. Medical malpractice liability insurance premiums are annual fees paid by the healthcare provider to a malpractice insurance carrier to cover liability of medical malpractice. The insurance carriers protect

individuals and companies from bearing the full costs of medical negligence claims (cases from failure to use reasonable care, resulting in damage or injury to patients) and the awarded damages.

Many believe that the MICRA cap on non-economic damages is responsible for the stabilization of medical malpractice liability insurance costs. Over the same period of time, medical malpractice liability insurance costs substantially increased in other states.

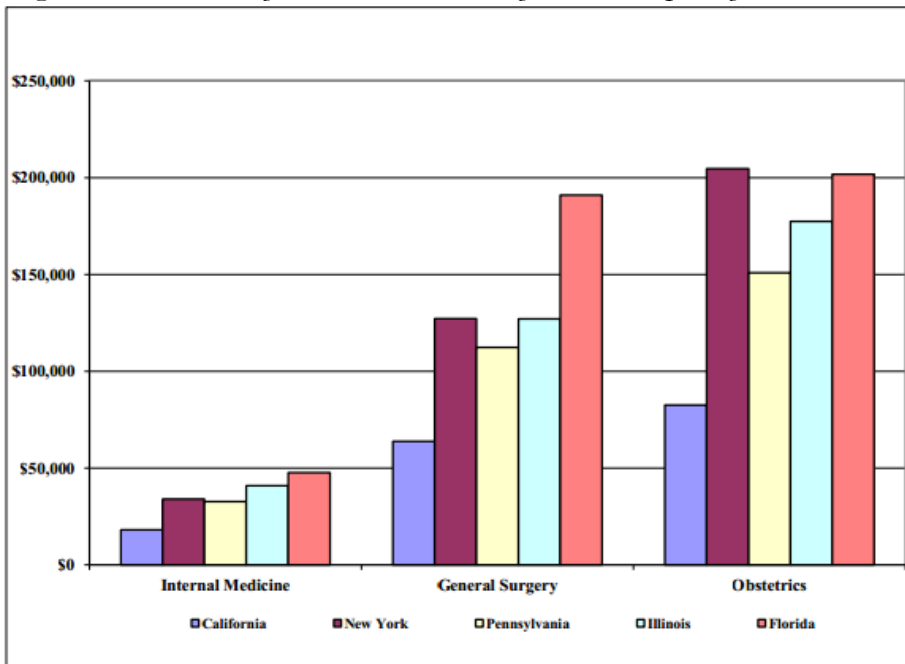
Figure 1: Malpractice Insurance Premium Growth: California vs. U.S. 1976-2000. (In billions of dollars).



Source: NAIC Profitability Study, 2000

As a result, medical liability insurance premiums were significantly lower than those in the other states that did not have strong MICRA-type reforms.

Figure 2: 2012 Liability Insurance Premiums by State and Specialty



Source: Medical Liability Monitor, October 2012 (Vol. 37, No. 10)

Others attribute the stabilization of medical malpractice insurance rates to Proposition 103 (1988), which required an elected insurance commissioner to give approval to the insurance rates before they changed.

Overall, the insurance rate stabilization subsequent to MICRA's passage resulted in reduced healthcare service costs for Californians and an increase in the availability of services. As concluded in a January 2014 study¹ from the Berkeley Research Group, a cap on non-economic damages makes health care more affordable:

"...non-economic damages caps reduce the incentive for health care providers to order costly and medically unnecessary tests and procedures that reduce their vulnerability to lawsuits but do nothing to improve patients' health and well-being."

This act, also known as defensive medicine, occurs when healthcare providers are overly cautious with patients due to the risk of malpractice lawsuits. By reducing the costs of medical liability insurance, the incentive to practice defensive medicine is subsequently reduced. As a result, healthcare is more affordable and access to physicians and hospitals when care is required is increased.

SDCTA Past Positions

None known.

Proposal:

Proposition 46, the Medical Malpractice Lawsuits Cap and Drug Testing of Doctors Initiative, is a measure designed to inflate the current "non-economic" damages cap from \$250,000 to \$1.2 million dollars and require drug and alcohol testing of doctors. If tested positive, it must be reported to the California Medical Board, who then will suspend doctors pending investigation and take disciplinary action if the doctor was found impaired while on duty. The proposed measure also requires healthcare practitioners to report any doctor suspected of drug or alcohol impairment or medical negligence and consult state prescription drug history database before prescribing certain controlled substances.

Policy Implications:

A shift from the increase in physician and hospital fees to the consumers, employees, and taxpayers are expected as a result of the higher cap. As the California Legislative Analyst's Office (LAO) states, "Our analysis assumes additional costs for healthcare providers...are generally passed along to purchasers of healthcare services, such as governments." They state that the state and local governments pay for a substantial amount of healthcare, including health coverage for government employees and retirees, Medi-Cal, state-operated mental hospitals and prisons, and local government health programs for low-income families.² As the expenses for healthcare increase as a result of Proposition 46, Californians will have to pay for the increasing costs of the increased government programs.

¹ William G. Hamm, H.E. French III, C. Paul Wazzan, "MICRA and Access to Healthcare"

² Legislative Analyst's Office, "Proposition 46"

Not only will the government programs become more costly, but consumers will also have to pay for the additional expenses related to higher premiums. The U.S. Government Accountability Office (GAO) also found that:

“...hospitals and physicians incur and pass on to consumers additional expenses that directly or indirectly relate to medical liability. Therefore, estimates of higher medical liability premiums – taken themselves – understate the full effect of medical liability costs on national health expenditures.”³

*Figure 4: Who Bears the Costs of a Higher Cap? * Signifies Who Ultimately Bears the Costs*

Cost Category	Initially Impose On	Shifted To
Increased Loss Costs	Medical Liability Insurers	Insured Providers
	Self-Insured Providers	Uninsured Consumers* Healthcare Insurers Government Programs
Higher Medical Liability Insurance Premiums	Insured Providers	Uninsured Consumers* Healthcare Insurers Government Programs
Increased Cost of Defensive Medicine	Uninsured Consumers*	(Remains with Uninsured Consumers)*
	Healthcare Insurers	Employers Insured Consumers*
	Government Programs	Taxpayers*
Increased Cost of Providing Health Insurance	Employers Insured Customers*	Employees* (Remains with Uninsured Consumers)*
Increased Cost of Government Programs	Federal, State, and County Agencies	Taxpayers*

Source: MICRA and Access to Health Care. William Hamm, et al. January 2014

In particular, taxpayers will ultimately bear the cost as a consequence of the increase in uninsured Californians. As the cap is raised and upward pressure is placed on healthcare costs, it is estimated that more Californians will be uninsured: “...some employers [will] drop coverage for their employees and some participants [will] decide that health insurance has become too costly,” according to the GAO.³ As a result, more will look to taxpayer-funded programs and the unrecoverable cost of treatment for the uninsured and underinsured will be shifted to those fully-covered with private insurance.

Fiscal Impact:

As the non-partisan Congressional Budget Office (CBO) estimates⁴, enacting MICRA-like reforms in all states would save \$41.3 billion in spending for Medicare, Medicaid, Federal Employees Health Benefits, and other health benefits programs in the 2012-2022 period. They state, “...lowering the cost of medical malpractice tends to reduce the use of health care services.” The \$41.3 billion in savings epitomizes the strength and influence of the MICRA cap.

Knowing this, raising the MICRA cap in California will result in a loss in cost-savings that the State and local governments expect from the current cap. Although it is not clear how

³ GAO, “Medical Liability: Impact on Hospital and Physician Cost Extends Beyond Insurance”

⁴ Congressional Budget Office, “Cost Estimate for Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2011

significant the increase in healthcare costs will be, the Legislative Analyst’s Office (LAO) notes that even a small increase strongly influences government healthcare spending.⁵ They state, “Given the range of potential effects on health care spending, we estimate that state and local government health care costs are associated with raising the cap would likely range from **the tens of millions of dollars to several hundred million dollars annually.**”

Agreeing with this prediction, the Berkeley Research Group estimated additional government expenditures on healthcare as a result of the increased cap.

Figure 3: Annual Estimate Healthcare Expenditures Resulting From Cap Increase.

State Government	\$ 1,086 million
Higher Education (UC and CSU)	\$ 86 million
K-12 Schools	\$ 170 million
Community Colleges	\$ 25 million
Counties	\$ 297 million
Cities (Including San Francisco)	\$ 173 million
Special Districts	\$ 111 million
Total California State and Local Government	\$ 1,948 million

Source: MICRA and Access to Health Care. William Hamm, et al. January 2014.

Additionally, a loss of General Fund revenue by the State is predicted as a result of the increase in the medical cap by the Berkeley Research Group, “...employers offset the increased cost of employee health insurance premiums by holding down salaries and wages or by increasing the employees’ share of the costs.”⁶ As salaries and wages are taxed, the offset will reduce the amount that the State gains from personal income tax. In addition to a decrease in personal income tax, the increased cost of healthcare is predicted to reduce the spending of employees on taxable purchases, decreasing the State’s sales and use tax. This further reduces State and local government revenues.

List of Proponents:

- Barbara Boxer (US Senator)
- California Conference Board-Amalgamated Transit Union
- California Teamsters Public Affairs Council
- Candace Lightner (founder of Mothers Against Drunk Driving)
- Consumer Attorneys of California
- Congress of California Seniors
- Consumer Federation of California
- Consumer Watchdog
- Erin Brockovich (consumer advocate)
- 38 Is Too Late

⁵ Letter from Douglas W. Elmendorf, Director of CBO

⁶ William G. Hamm, H.E. French III, C. Paul Wazzan, “MICRA and Access to Healthcare”

Proponent Arguments:

- "According to a study published in the *Journal of Patient Safety*, medical negligence is the third leading cause of death in the country behind only heart disease and cancer. As many as 440,000 people die each year from preventable medical negligence. That's like a 747 crashing every 10 hours." – Consumer Watchdog
- "The California Medical Board estimates that almost one-in-five doctors (18%) suffer from drug and/or alcohol abuse at some point during their careers – and leading medical safety experts have called for random drug testing to curb substance abuse and ensure patient safety." – Consumer Watchdog
- "The *Journal of the American Medical Association* found that doctors are the biggest suppliers for chronic prescription drug abusers, and called for the mandatory usage of state prescription drug databases... A 2012 *Los Angeles Times* investigation found that drugs prescribed by doctors caused or contributed to nearly half of recent prescription overdose deaths in Southern California." – Consumer Watchdog
- "Medical malpractice insurers in California have consistently had such high profits that they would continue to make above-average profits even if the MICRA cap were indexed to inflation. The insurance industry earned a 6.5% return on net worth during the last ten years. California medical malpractice insurers, however, earned a 16.7% return – more than 250% of the industry average." – "Yes on Prop 46"
- "Proposition 103 gave the California State Insurance Commissioner the power to regulate many types of insurance rates, including medical malpractice insurance... California already has an effective and successful system to regulate medical malpractice insurance premiums – a system that won't change because of an adjustment of the cap." – "Yes on Prop 46"

List of Opponents:

Numerous Doctors and Medical Groups/Associations including:

- California Medical Association
- California Hospital Association
- Hospital Association of San Diego & Imperial Counties

Numerous Taxpayer and Business Groups including:

- California Chamber of Commerce
- San Diego Regional Chamber of Commerce
- Inland Empire Taxpayers Association
- California Taxpayer Protection Committee

Numerous Other Groups and Labor Unions including:

- American Civil Liberties Union of San Diego and Imperial Counties
- California NAACP
- California Teachers Association
- American Civil Liberties Union of California

Opponent Arguments:

- “Proposition 46 will increase the burden on California state and local governments by hundreds of millions of dollars, reducing funding available for local services including police and fire, libraries, parks and road infrastructure.” – Jim DeBoo, Campaign Manager for “Vote No On 46”
- The “MICRA” ballot measure is a “costly threat to your personal privacy Californians can’t afford.” – “Vote No On 46”
- “If you’re a highly-paid doctor in Los Angeles or San Francisco, it would be OK. You could pass those costs on to your patients. But if you’re an anesthesiologist or an OBGYN in a rural area or a low-income area, a dramatic increase in your medical malpractice insurance premiums could make a big difference to your ability to practice.” – Kimberly Stone, President of the Civil Justice Association of California
- “If this initiative passes, trial lawyers will profit wildly, and California consumers will be the ones left holding the bag. A recent study found that this initiative will increase health care costs by \$9.9 billion annually – or more than \$1,000/year in higher health costs for a family of four.” – Tom Scott, Executive Director of California Citizens Against Lawsuit Abuse
- “A ballot measure that is certain to generate more medical lawsuits and drive up costs for every health consumer in California is the worst possible idea at the worst possible time. This initiative is bad for patients, bad for taxpayers and bad for California’s entire system of healthcare delivery.” – Dr. Richard Thorp, President of the California Medical Association