



California  
CHAPTER

# LEGISLATIVE REPORT #255

## Recent MICRA Articles

**November 26, 2013:** We are less than one year away from when the MICRA initiative is expected to be on the ballot. We will begin to send out articles on the MICRA topic on a periodic basis to give you a sense of what is being written about the MICRA topic and initiative.

As we discussed in the Board meeting on Saturday, we encourage everyone to visit the website of Californians Allied for Patient Protection (CAPP). This is the group whose sole role is to protect MICRA. The [website](#) includes more information and talking points on the MICRA fight.

Below are some recent MICRA and ballot measure articles.

**Daily Journal – Paul Jones “Tort Lawyer Lobby Convention Focuses on MICRA, Court Funding,”**

November 19, 2013

**CSAHQ.org**

Jeffrey Poage, MD “Mandatory Alcohol and Drug Testing for Doctors: What Does This Have to do With MICRA??” November 18, 2013

**Clinical Advisor**

Ann Latner, JD “California Ballot Initiative Seeks to Raise Malpractice Caps,” November 20, 2013

**Daily Journal - Tort Lawyer Lobby Convention Focuses on MICRA, Court Funding**

By Paul Jones

November 19, 2013

California's tort lawyer bar capped off its annual convention last week with a gala studded with high-powered attorneys, influential legislators and a glowing awards ceremony at the historic Palace Hotel. But beneath the veneer of festivity, leaders of the Consumer Attorneys of California were hard at work seeking to burnish their influence in Sacramento and bolster their ambitious - and risky - push to ask voters to raise the state's medical malpractice payout cap.

Outgoing president Brian Kabateck of Kabateck Brown Kellner LLP highlighted the importance of increasing the limit on pain and suffering damages in malpractice cases to the lobby's members Saturday night in his farewell speech.

"It's time for you, and all of you, to consider MICRA," Kabatack told a rapt audience, referring to the Medical Injury Compensation Reform Act of 1975. "How can any of us sit one more day ... when this law sits there and stands after 38 years, saying that the life of a child is worth \$250,000?"

Consumer attorneys' fight against the decades-old law was a major theme throughout the convention. The lobby this year failed to get legislation to tackle the \$250,000 limit, which, if adjusted for inflation since the initial law's passage, would be worth more than \$1 million today. Kabatack urged members to take a harder line with lawmakers, urging them not to "sit there and hand out money anymore to politicians if they're not willing to support this organization."

The CAOC has turned to the 2014 ballot to change the law, and guests signing in to the convention were confronted with a wall of signature-gathering materials seeking support for the ballot initiative. The fight is one in which consumer attorneys appear certain to be outspent by the medical insurance industry, but Kabateck has said the group's polls show public support favors the initiative, which includes other popular patient safety protections including random drug testing of hospital doctors.

The CAOC is pursuing the initiative in alliance with nonprofit Consumer Watchdog and Silicon Valley technology entrepreneur Bob Pack, whose children died after being struck by a driver on illegally obtained medication. Not coincidentally, CAOC honored Pack as its "Consumer Advocate of the Year" at the Saturday awards dinner where Kabateck stepped down as president, relinquishing his position to John Feder of Rouda Feder Tietjen & McGuinn.

Feder inherits an agenda that is in no small part defined by his predecessors, including the MICRA effort and an ongoing push to increase funding for the state's judicial branch.

"Nothing is more important in my mind than winning our battle for MICRA reform in 2014," Feder said.

Kabateck will be staying on as head of the lobby's MICRA campaign. He also made the rounds over the three-day event, introducing two state assemblymen to members and urging support for their runs for the California senate. Those lawmakers - Assemblyman Bob Wieckowski, D-Fremont, chairman of the Assembly Judiciary Committee, and Assemblyman Roger Dickinson, D-Sacramento - are allies of trial lawyers. Dickinson is running for Senate President Pro Tem Darrell Steinberg's seat - with Steinberg's blessing - against Assemblyman Richard Pan, D-Sacramento, who opposes MICRA reform. Wieckowski pushed hard last session for increases to court funding in concert with trial lawyers' advocacy.

The CAOC's support for more court funding was also emphasized at last weekend's convention. Former CAOC president Niall McCarthy of Cotchett, Pitre & McCarthy LLP is co-chair of the "Open Courts Coalition" - a group of legal professionals urging more court funding by the state. He urged attorneys at a panel Saturday to fight for funding restoration alongside outgoing State Bar President Patrick Kelly and the presiding judges of the Los Angeles and San Mateo county courts. The judicial branch was hit with \$1.2 billion in cuts over the past few years. Despite a \$63 million increase last year, "There's nothing quite as drastic right now as the court funding crisis in California," McCarthy said.

The push for court funding is important to the CAOC in particular because of the case delays and fee hikes it has imposed on trial lawyers. But the effort has also created a higher profile for attorneys in the Capitol and enabled them to strengthen relations with judges. At Saturday's award dinner, California Supreme Court Chief Justice Tani Cantii-Sakauye appeared in a video montage praising Kabateck for push for court funding.

Despite the energy at the convention, the MICRA fight and advocacy for court funding follow several years of disappointing legislative outcomes for the CAOC, including the death of bills to challenge binding arbitration agreements, increase injury suit payouts and revive sex abuse lawsuits against private groups. Turning to voters instead of legislators is a break in strategy for the group, and a risk that could pay off big or hurt the organization for years to come.

**CSAHQ.org - Mandatory Alcohol and Drug Testing for Doctors: What Does This Have to do With MICRA?**

By Jeffrey Poage, M.D.

November 18, 2013

[> Read full article](#)

Here's the scoop:

MICRA, or the Medical Injury Compensation Reform Act, has been around a long time. Every few years, the trial attorneys get together and think of ways to change the MICRA provisions in their favor. In particular, they dream of lifting the limits on "pain and suffering," otherwise known as non-economic damages. Why? Because 1) there is a cap of \$250,000 on such damages, and 2) MICRA limits attorneys' fees so patients, not lawyers, receive more from awards. In fact, the only change in MICRA since its inception in 1975 was a victory by trial attorneys to increase their fees through the MICRA payout schedule. In past years, attempts by trial lawyers to weaken MICRA have failed. Moreover, in 1985 the California Supreme Court upheld the constitutionality of MICRA.

So what's a group of trial lawyers to do?

Let's think about this. If I were a trial attorney, I might promote an initiative with provisions to raise the cap on "pain and suffering" to \$1.2 million, with a cost of living adjustment (COLA). But wait, we've tried this in the past and failed. I know! Let's come up with something nice and juicy to distract voters from the real goal. How about an initiative to protect voters from alcohol- or drug-impaired physicians? Plus we'll require doctors to report other doctors who are impaired by drugs or alcohol!

Is physician impairment really a problem?

Doesn't matter. Trial attorneys want voters to associate doctors with something bad and not think about lawyers trying to increase their portion of malpractice awards. In fact, they framed the whole thing as a Patient Safety Initiative! This way, trial attorneys make themselves appear to be all about patient safety, while protecting the voters from "bad" doctors! But first, they will need to find someone with a tragic story to take the message to the voters.

Thus, The Troy and Alana Pack Patient Safety Initiative was born. This ballot initiative, sponsored by [Consumer WatchDog](#), was approved last week by the State Attorney General's office for circulation. As reported in the Sacramento Bee: "One can certainly grasp why the measure's sponsors want to hide the

pea, but why would the attorney general's office abet the subterfuge by providing a bogus "title and summary?" Could it be that Harris counts the trial lawyers among the deep-pocket interests who might help her become governor or otherwise climb up the political ladder? She wouldn't be that cynically self-serving, would she?"

Read more: [Dan Walters: Malpractice measure given a misleading title.](#)

Who are Troy and Alana Pack?

I know because I live in Danville where the horror unfolded ten years ago. These two children (brother and sister, ages 10 and 7) were struck and killed by a vehicle driven by Jimena Barreto, who fled the scene and was arrested two days later. Barreto was an intoxicated nanny, not a physician, as some voters might be led to believe by the proposed ballot initiative. In addition to alcohol and cocaine abuse, the nanny had multiple prescriptions for painkillers and muscle relaxants from multiple doctors at a local Kaiser hospital.

Bob Pack, Troy and Alana's father, claimed he was victimized twice, once by the tragic accident and again by MICRA. Pack went on to champion the Controlled Substance Utilization Review and Evaluation System (CURES) legislation, recently signed into law by Governor Brown. The online system will make it easier for authorized prescribers and pharmacists to quickly review controlled substance information via the automated Patient Activity Report (PAR) in an effort to identify and deter drug abuse and diversion through accurate and rapid tracking of Schedule II through IV controlled substances. We applaud Bob Pack for his efforts and can only imagine the pain his family endured

With regard to Pack's ballot initiative, however, we have to look at the facts. MICRA only limits those intangible harms that cannot be quantified by a specific dollar amount. MICRA allows UNLIMITED damages for any and all past and future medical costs, lost wages, lifetime earning potential and malicious or willful misconduct. The reasonable damage cap of \$250,000 reduces incentives to file meritless lawsuits, while at the same time allowing legitimate claims to move forward. And what's important to know is this: Despite MICRA, malpractice awards to patients are still going up at a rate more than two times inflation!

Who supports MICRA?

Over 800 prominent groups who believe the current laws work to fairly compensate patients while lowering health care costs while improving access to care.

How do they know this? [In the early to mid-1970s, insurance premiums were skyrocketing because of record malpractice awards.](#) Many hospitals and community-based health care clinics were faced with closure as the possibility of operating without insurance coverage became imminent. As physician malpractice rates more than tripled, anesthesiologists and surgeons in Northern California staged a "walkout," refusing to handle any patients except for emergency cases. The crisis went on for weeks.

On May 13, 1975, hundreds of doctors, nurses and health care personnel marched on the State Capitol. A much younger Governor Brown called for a special legislative session, which convened three days later. Shortly thereafter, MICRA was conceived and signed into law.

Today, MICRA remains a model for medical liability tort reform for the entire country. [What would have happened without MICRA?](#) Take a look at New York's hostile malpractice environment, where nearly one million people in 19 counties have no access to OB-GYN's, because there are none!

Since the cap of \$250,000 was set 38 years ago, why not adjust for inflation and bring it up to \$1.2 million?

[An analysis by William Hamm,](#) California's former independent legislative analyst, found simply doubling the cap to \$500,000 could increase health care costs for consumers and taxpayers by nearly \$10 billion annually. The current legislative analyst, Mac Taylor, stated changes in MICRA could [cost the state and local governments hundreds of millions of dollars.](#)

It's simple: consumers and taxpayers would pay more so trial attorneys can make more money.

In a [recent SF Chronicle op-ed piece,](#) Kathy Kneer, President and CEO of Planned Parenthood of California, and Richard Throp, MD, CMA President, summed it up well:

"A broad coalition of doctors, nurses, hospitals, Planned Parenthood, community health centers, local governments, labor unions and hundreds of other organizations strongly oppose the trial lawyers' measure and will mount a vigorous campaign to defeat it. At a time when California is expanding access to care for millions of patients, the last thing we need is more lawsuits, higher health care costs, and fewer doctors, community health centers and medical providers."

Fortunately, we have people like Californians Allied for Patient Protection (CAPP), whose mission is to protect MICRA. To learn more about their efforts to preserve MICRA, visit the CAPP website, <http://www.micra.org/>.

What can you do to help?

Support the CSA and its advocacy efforts, including preserving MICRA and supporting physician-led anesthesia care, by [donating to GASPAC](#). In the past few months, members of the CSA's Legislative and Practice Affairs Division have met with key state legislators in Sacramento, Los Angeles and Northern California. These are focused, small group events with an important mission: to educate our elected officials about the vital role physician anesthesiologists play in caring for patients, not only in the OR, but throughout the hospital or surgery center experience, and how our field has contributed to patient safety and quality initiatives that make a difference. I assure you: your voice is being heard.

Of course, the CSA will continue to work with the California Medical Association and its component societies, as well as the CAPP group, to monitor the attack on MICRA and other vital issues of concern to all physicians. More to come...

### **Clinical Advisor - California Ballot Initiative Seeks to Raise Malpractice Caps**

By Ann W. Latner, JD

November 20, 2013

[> Read article](#)

In 1975 California became the first state to enact caps on noneconomic damages in medical malpractice cases. Although the idea was progressive and became a template for other states, the law has faced increasing scrutiny over the last few years.

California's cap was set at \$250,000, which in 1975 was worth a lot more than it is today -- the amount is equivalent to about \$58,000 in 2013 dollars. A new ballot initiative, slated for 2014, aims to raise the cap to \$1.1 million to account for inflation, and is already causing a commotion. The California Medical Association alone has spent \$5 million to defeat the measure so far, and more than \$31 million has been raised in total to oppose the measure.

Increasing the malpractice cap is only one part of the ballot initiative. The measure also aims at reducing harm caused by clinicians under the influence of drugs or alcohol, and requires random drug and alcohol testing for clinicians, as well as mandatory testing after an unexpected death or injury to a patient.

The ballot measure, called the [Troy and Alana Pack Patient Safety Act of 2014](#), was authored by Bob Pack. Pack's 7-year-old daughter, Alana, and 10-year-old son, Troy, were killed in an accident, in which a drugged driver fell asleep at the wheel and ran the children over. The driver turned out to be a doctor-shopping prescription drug addict, whose medications were not being monitored by his various physicians.

One of the measures in the ballot initiative calls for mandatory use of the electronic CURES database, which tracks prescriptions dispensed in the state to help identify drug-seekers.

The initiative needs about 750,000 valid signatures to make it onto next year's ballot.