Damage Caps—And Why *Fein* May No Longer Be Good

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It was 38 years ago this spring when, in my home state of California, a number of physicians went on strike to protest the rising cost of medical malpractice insurance premiums. In response, then-newly-elected Governor Jerry Brown convened a special session of the California Legislature and charged them with remedying a problem that was "endangering the health of the people of this state." Legislators heeded Brown's call, ultimately passing the Medical Injury Compensation Reform Act (MICRA), a multi-faceted law, which, among other things, limited contingency fees, modified the collateral source rule, and—most important for present purposes—capped noneconomic damages to $250,000. In September 1975, Governor Brown signed MICRA into law, ushering in the era of modern tort reform.

Nearly four decades have passed since MICRA's enactment. In that time, at least 48 states have followed California's lead, enacting some planks of the tort reformers' legislative agenda, while 31 states, home to roughly 68% of the U.S. population, have enacted laws specifically limiting plaintiffs' recovery for noneconomic loss. Nor is reformers' work finished. In 2012, the American Tort Reform Association (ATRA) notched legislative victories in nearly a dozen states, and just last March, H.R. 5, modeled in part on MICRA, was passed by the U.S. House of Representatives, though there it has stalled.

Given that MICRA's cap on noneconomic damages (codified at Cal. Civil Code § 3333.2) has been so tightly embraced and widely emulated, it seems almost self-evident that it must be constitutional. But that's not so obvious.

To be sure, MICRA has been tested—and survived. The relevant precedent is *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985). In *Fein*, the plaintiff challenged MICRA's $250,000 cap under both the Due Process Clause (purportedly violated by the Act's failure to provide an "adequate quid pro quo") and the Equal Protection Clause (purportedly violated by the Act's "discrimination" between medical malpractice victims and other tort victims, as well as the Act's "discrimination" between the more and less grievously hurt). But in a 4-3 opinion, the challenge fizzled. The $250,000 ceiling, the Court concluded, was "rationally related to the objective of reducing the costs of malpractice defendants and their insurers." *Id*. at 680.

Why isn't that the end of the matter? There are three reasons why, I believe, *Fein* is ripe for reconsideration.

First, the *Fein* Court did not address what is probably plaintiffs' most powerful argument: that § 3333.2 unconstitutionally abridges one's right to a jury trial, which is an "inviolate right" enshrined in California's Constitution. Interpreting analogous constitutional provisions, a number of other states have invalidated damage caps, reasoning, to quote a 2012 opinion of the Missouri Supreme Court, that "[t]he individual right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case." *Watts v. Lester E. Cox Medical Centers*, 376 S.W. 3d 633, 640 (Mo. 2012). *See also Atlanta Oculoplastic Surgery v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Sofie v. Fibreboard Corp.*, 771 P.2d

711 (Wash. 1989). While it's true that lower courts in California have, in recent years, considered—and rejected—the argument that § 3333.2 violates art. 1, § 16 of the California Constitution, the question merits careful consideration, and a clear answer, by the state's supreme court.

Second, in *Fein*, the Court raises the possibility (though, granted, does not hold) that a hypothetical statute that prevented "an injured person from even recovering the amount of his medical expenses" might be so "harsh[]" as to be constitutionally infirm. 695 P.2d at 682. Accepting that as the test, there's a strong argument that today's $250,000 cap, which has never been adjusted for inflation ($250,000 in 1975 is the equivalent of $1.07 million today), fails it.

The argument proceeds as follows. Recent research has documented that when caps are imposed, there are some plaintiffs (mostly those who earn low wages or who do not participate in the workforce, such as children, stay-at-home mothers, and the elderly) whose recoveries are most substantially affected. At the same time, research has shown that many of these would-be plaintiffs will, predictably, be unable to find contingency fee lawyers willing to initiate (ever more expensive but ever less remunerative) medical malpractice lawsuits on their behalf. These victims are legitimately hurt. Yet, because their damages are capped, they're effectively priced out of the justice system. The upshot is that more and more victims injured by acts of medical negligence cannot recover even for their medical expenses. Ergo, the "harsh" result that was judged constitutionally problematic—though improbable—in *Fein* has come to pass.

The third reason why *Fein* may be ripe for reconsideration relates to how the *Fein* Court viewed other states' precedent. Namely, the *Fein* majority seemed swayed by the rulings of other state courts. And in the decades since *Fein*, the judicial landscape has shifted considerably.

In 1985 when *Fein* was decided, rulings from other state courts concededly militated in favor of MICRA's validity. At that time, though a number of states had invalidated damage caps, most had done so only when the cap "applied to both pecuniary and nonpecuniary damages." *Id.* at 682. Only New Hampshire had gone further. Fast-forward over two decades, however, and now New Hampshire has plenty of company. A *number* of recent courts have invalidated caps, even when they target solely noneconomic damages, meaning, of course, that if California wants to follow the crowd, it ought to reconsider its precedent.

So might a reconsideration of MICRA be in the offing? Quite possibly. Just last year, a challenge to § 3333.2 made its way to the Court of Appeals, where it garnered broad amici support, before going down in defeat. Undaunted, as I write, a plaintiff's challenge to the reduction of her $1 million award for noneconomic loss is working its way through San Francisco Superior Court. There, plaintiff's counsel has declared: "The fixed ceiling of MICRA, in the dynamic environment of medical malpractice litigation, with its rising tide of cost and risk, leads to the inevitable suffocation of plaintiffs' rights to due process just as if they were trapped in a room with rising flood water."

Nor are court challenges the only available avenue. In *Fein*, the California Supreme Court admonished: "The forum for the correction of ill-considered legislation is a responsive legislature." 695 P.2d at 684. These days, California's legislature, firmly in democratic hands, might well be responsive. So too, Governor Jerry Brown, who started all this back in 1975, may have had a change of heart. On June 13, 1993, then-former Governor Brown apparently issued a statement declaring that MICRA "has revealed itself to have an arbitrary and cruel effect upon the victims of malpractice. It has not lowered health care

costs, only enriched insurers and placed negligent or incompetent physicians outside the reach of judicial accountability." Perhaps it's time, then, for Governor Brown, who started us down this road of tort reform, to lead us in a different direction.