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MICRA and custodial neglect vs. professional negligence

HOW TO AVOID MICRA WHEN BRINGING AN ELDER OR DEPENDENT-ADULT ABUSE CASE AGAINST A HEALTHCARE PROVIDER

Over the past 50 years, practitioners have had to live with the unduly restrictive nature of MICRA, often turning down cases or watching severely injured clients recover only a fraction of what they deserved due to the procedural and substantive "safeguards" that MICRA purports to create. For years, consumer advocate groups have fought, without success, to erase, or at least adjust, the antiquated limitations created by MICRA.

While the application of MICRA is overbroad and extremely unfair for injured victims and their families in the context of medical services, the good news is that MICRA does not apply to cases involving the *custodial neglect* of an elder or dependent adult, even when those cases are brought against healthcare providers.

The Medical Injury Compensation Reform Act ("MICRA")

What is MICRA and how does it impact plaintiffs?

MICRA was enacted by the California Legislature and signed into law by Governor Brown in 1974. "The impetus for MICRA was the rapidly rising costs of medical malpractice insurance in the 1970s… [and] the response was to pass the various statutes… to limit damages for lawsuits against a health care provider based on professional negligence." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33-34.) Defendants tirelessly argue that MICRA "reflects a strong public policy to contain the costs of malpractice insurance… to meet the state's health care needs." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111-112.)

The full statutory scheme that is "MICRA" contains several limitations that practitioners should be aware of. Some of the MICRA restrictions that are most concerning to plaintiffs and their attorneys include the $250,000 cap on noneconomic losses (Civ. Code, § 3333.2), the cap on attorneys' fees (Bus. & Prof. Code, § 6146), and the shortened statute of limitations (Code Civ. Proc., § 340.5.)

Who is entitled to invoke MICRA's procedural and substantive safeguards?

A defendant must be a licensed health care provider (*with some limited exceptions*) to invoke MICRA. Moreover, MICRA only applies to lawsuits that arise out of professional negligence, i.e., medical malpractice. "Health care provider means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. Health care provider includes the legal representatives of a health care provider." (Bus. & Prof. Code, § 6146; Civ. Code, §§ 3333.1, 3333.2; Code Civ. Proc., §§ 340.5, 667.7, 1295.)

Despite this clear and explicit statutory language, defendants often argue that licensure is not required, and that any injury caused by any service even remotely related to human health implicates MICRA. For example, we've had several dependent-adult abuse cases against drug-rehab facilities where the defense attempted to invoke MICRA even though a rehab facility is clearly not a healthcare provider licensed to practice medicine. The MICRA issue typically comes up by way of a demurrer or a motion for summary adjudication regarding damages.

Unfortunately, some judges are still inclined to apply MICRA to cases involving non-medical, non-licensed services related to human health. Anticipating this issue, practitioners should understand that the exceptions to the licensing requirement under MICRA are extremely narrow and are almost always tethered, in some way, to a duly issued license to provide medical care. (See, e.g., *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, 966-967 [license not required for medical group defendant where the medical group was completely comprised of licensed medical practitioners who provide direct medical services to patients]; *Chosak v. Alameda Cty. Med. Ctr.* (2007) 153 Cal.App.4th 549, 555 [license not required for medical student lawfully practicing medicine under an explicit statutory exemption to licensing requirements]; *Prince v. Sutter Health Cent.* (2007) 161 Cal.App.4th 971, 974 [license not required for social worker, registered with the appropriate agency and working toward licensure.].)

In fact, the California Supreme Court has explicitly described "professional negligence as a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is *licensed* and which are not within any restriction imposed by the *licensing* agency or *licensed* hospital." (*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 187.) Indeed, certain facilities like drug-rehab facilities and residential-care facilities, which only provide incidental medical services, have been exempted from MICRA's reach. (Health & Saf. Code, § 11834.02; *Kotler v. Alma Lodge* (1998) 63 Cal.App.4th 1381, 1393-94.)

In our experience, one of the most effective ways to contain the application of MICRA to licensed medical-business entities and individuals is by citing the fundamental policy reasons behind MICRA's enactment; policy reasons that defendants themselves will invoke time and time again. "MICRA was a response to concerns that the cost of *medical malpractice insurance* was threatening the availability of reasonably priced health care in California, and its various

See Rhodes, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2020

provisions were *intended to reduce the premiums for such insurance* by placing limits on the availability and extent of recovery in medical malpractice litigation." (*Chosak v. Alameda Cty. Med. Ctr.* (2007) 153 Cal.App.4th 549, 561.) Since non-licensed, non-medical individuals and business entities like drug-rehab facilities cannot obtain "medical malpractice insurance," the legislative intent of MICRA is not furthered by, and therefore should not be applied to, such cases.

Elder Abuse and Dependent Adult Civil Protection Act ("Act")

The Elder Abuse and Dependent Adult Civil Protection Act, codified in Welfare & Institutions Code section 15600, et seq., was enacted to protect vulnerable elders and dependent adults who rely on their care custodians for basic human needs and protection. The Act was premised on the idea that elders and dependent adults are at heightened risk of harm, and the purpose of the Act was to "protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Winn v. Pioneer Med. Grp., Inc.* (2016) 63 Cal.4th 148, 159; *Delaney*, 20 Cal.4th at 33.)

"When legislators enacted the Elder Abuse Act, they enhanced the potential sanctions for neglect of elders or certain dependent adults. They did so by establishing heightened remedies – allowing not only for a plaintiff's recovery of attorney fees and costs, but also exemption from the damages limitations otherwise imposed by Code of Civil Procedure section 377.34. Unlike other actions brought by a decedent's personal representative or successor in interest, claims under the Act allow for the recovery of damages for predeath pain, suffering, and disfigurement." (*Winn*, 63 Cal.4th at 155.) Plaintiffs are entitled to these enhanced remedies upon a showing, by clear and convincing evidence, of recklessness, oppression, fraud, or malice. (Welf. & Inst.Code, § 15657.)

Does MICRA apply to elder neglect actions brought against healthcare providers?

The short answer is no. The California Supreme Court has unequivocally held that actions brought under the Elder Abuse Act are not subject to MICRA, even when they are brought against healthcare providers because "claims under the Elder Abuse Act are not brought against health care providers in their capacity as providers but, rather, against custodians and caregivers… that may or may not, incidentally, also be health care providers." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 786.) "Statutorily, as well as in common parlance, the function of a health care provider is distinct from that of an elder custodian, and the fact that some health care institutions, such as nursing homes, perform custodial functions and provide professional medical care does not mean that the two functions are the same." (*Id.*)

However, the Act only applies if the "defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant – not the defendant's professional standing – that makes the defendant potentially liable for neglect." (*Winn*, 63 Cal.4th at 152.) Thus, to avoid MICRA in an elder abuse case brought against a healthcare provider, it is incumbent upon practitioners to plead and prove injuries that were caused by the healthcare provider's *custodial neglect* as opposed to *professional negligence*.

Care and custody (custodial relationship)

For neglect to be 'custodial' there must be a custodial relationship between the healthcare provider and the elder or dependent adult. The California Supreme Court described this relationship as a substantial *custodial or caretaking* "relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn*, 63 Cal.4th at 158.) Google dictionary defines "care" as the provision of what is necessary for the health, welfare, maintenance, and protection of someone or something. Google dictionary defines "custody" as the protective care or guardianship of someone or something.

Welfare & Institutions Code section 15610.17 provides a non-exhaustive list of persons and facilities that are considered "Care Custodians" under the Act. Unfortunately, the California Supreme Court ruled that "[w]hile it may be the case that many of the care custodian[s] defined under section 15610.17 could have the care or custody of an elder or a dependent adult as required under section 15610.57, plainly the statute requires a separate analysis to determine whether such a relationship exists." (*Id.* at 164.)

Ultimately, "[t]he focus… is on the nature and substance of the relationship between an individual and an elder or a dependent adult." (*Id.* at 158) For example, the relationship must be more than a "casual or temporally limited affiliation." (*Id.* at 161.) The relationship should involve more than "casual or limited interactions." (*Id.* at 158.)

Practitioners will have greater success avoiding MICRA with facts establishing that "the defendant [was] in a position to deprive an elder or a dependent adult of medical care," or determine whether to "initiate medical care at all." (*Ibid.*) Put another way, the higher the degree of dependence and reliance by the elder, the greater the risk of abandonment, and therefore the more likely it is that the relationship was custodial. (*Stewart v Superior Court* (2017) 16 Cal.App.5th 87, 103-104.)

Custodial neglect versus medical malpractice

Once you have established a custodial relationship between the healthcare provider and the elder or dependent adult, the next objective is to

See Rhodes, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2020

plead and prove that the injuries were caused by custodial neglect rather than medical malpractice.

"[N]eglect within the meaning of Welfare & Institutions Code section 15610.57 covers an area of misconduct distinct from professional negligence." (*Covenant Care, Inc.*, 32 Cal.4th at 783.) "The difficulty in distinguishing between neglect and professional negligence lies in the fact that some health care institutions, such as nursing homes, perform custodial functions and provide professional medical care." (*Delaney*, 20 Cal.4th at 34.) Moreover, courts have made clear that the "Elder Abuse Act does not apply *whenever* a doctor treats *any* elderly patient [because] [r] eading the act in such a manner would radically transform medical malpractice liability relative to the existing scheme." (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 223.)

Generally speaking, "professional negligence is failure to exercise knowledge, skill, and care ordinarily employed by members of the profession in good standing." (*Covenant Care, Inc.*, 32 Cal.4th at 781.) "As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." (*Id.*, at 783.) "Thus, the statutory definition of neglect speaks not of the *undertaking* of medical services, but of *the failure to provide* medical care." (*Ibid.*) That seems to be the demarcation line in this particular body of law. Professional negligence involves an unreasonable act or omission committed while undertaking or providing medical services, whereas custodial neglect involves a decision to withhold, or failure to provide, the care and protection that an elder or dependent adult requires.

Welfare & Institutions Code section 15610.57 provides a non-exhaustive list of "neglect" examples. "Neglect includes the failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; the failure to provide medical care for physical and mental health needs; the failure to protect from health and safety hazards; and the failure to prevent malnutrition or dehydration." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 843.)

Finally, if the neglect is "reckless, or done with oppression, fraud or malice, then the action… cannot be considered simply based on ... professional negligence." (*Delaney*, 20 Cal.4th at 35.) Framing the case to establish a custodial relationship together with injuries that were caused by custodial neglect renders your case against a healthcare provider free from the restraints and limitations of MICRA.

Punitive damages under Code Civ. Proc., § 425.13(a)

Code of Civil Procedure section 425.13(a) requires plaintiffs seeking punitive damages against a licensed healthcare provider to obtain a court order before including the prayer in the complaint. The plaintiff seeking the court order must establish a "substantial probability that plaintiff will prevail" and the motion must be filed "within two years after the complaint…is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier." (Code Civ. Proc., § 425.13, subd. (a).)

In *Central Pathology*, the California Supreme Court held that "any claim for punitive damages in an action against a health care provider [is] subject to the statute if the injury that is the basis for the claim was caused by conduct that was directly related to the rendition of professional services." *(Id.*, 3 Cal.4th at p. 192.) "Section 425.13(a) applies to intentional torts as well as negligence causes of action." (*Country Villa Claremont Healthcare Ctr., Inc. v. Superior Court* (2004) 120 Cal.App.4th 426, 431-32.)

Needless to say, this is a heavy standard to meet. Fortunately, the Court has since clarified that there is "nothing in the text, legislative history, or purposes of either section 425.13(a) or the Elder Abuse Act to suggest the Legislature intended to afford health care providers that act as elder custodians, and that egregiously abuse the elders in their custody, the special protections against exemplary damages they enjoy when accused of negligence in providing health care." (*Covenant Care, Inc.*, 32 Cal.4th at 776.) "Where the gravamen of an action is violation of the Elder Abuse Act, Central Pathology's rationale for applying section 425.13 to the common law intentional torts at issue in that case does not obtain." (*Id*. at 790.)

Thus, to avoid the application of Code of Civil Procedure section 425.13(a), practitioners should once again plead, position, and prove the case from intake to trial from the perspective of custodial neglect. Make custodial neglect the gravamen of the case. Make it less about what the healthcare provider did or didn't do while providing medical care, and more about the healthcare provider's failure to provide for, or decision to withhold, the basic human needs, protection, and care that the elder or dependent adult needed and relied upon from a quality of life standpoint.

Wrongful death and hybrid actions

Technically speaking, a wrongful-death cause of action brought by the heirs of a decedent under Code of Civil Procedure section 377.60 is not a cause of action brought under the Elder Abuse Act. Does that mean that MICRA applies to wrongful-death actions brought against healthcare providers even if there is a separate cause of action for elder abuse? Not necessarily.

Generally speaking, if the wrongful death is caused by medical malpractice, the case is subject to the limitations of MICRA. (See *Yates v. Pollack* (1987) 194 Cal.App.3d 195, 200-201.) However, if the wrongful death was caused in whole or in part by something other than conduct constituting professional negligence, such as elder or dependent-adult neglect, then the procedural and substantive limitations

See Rhodes, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2020

of MICRA do not apply. (*Barris v. Cty. of Los Angeles* (1999) 20 Cal.4th 101, 116.)

In our practice, we tend to exclude a medical-malpractice cause of action in our elder or dependent-adult abuse cases, instead focusing on intentional torts and custodial neglect. However, for those practitioners who do choose to proceed on both grounds, courts have held that "when a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of section 6146 should not apply." (*Waters v. Bourhis* (1985) 40 Cal.3d 424, 437.) Arguably, none of the limitations of MICRA should apply in a hybrid case against a healthcare provider where recovery can be based, at least in part, on the non-MICRA elder abuse cause of action. (*Ibid*.)

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