LETTER TO THE EDITOR

Re: Horvitz & Levy Article on MICRA Changes

This letter is in response to the column "AB-35 Makes Historic Amendments to MICRA Statutes," by Lacey Estudillo and H. Thomas Watson of the Horvitz & Levy LLP firm, published by the Daily Journal on Nov. 11, 2022.

The article provides an excellent primer on AB-35 and its changes to the 48-year-old MICRA laws.

However, either because Horvitz & Levy only practices appellate law or only represents defendants (or both), there are some incorrect statements regarding the impact on a plaintiff under AB-35. This is particularly true under the section "Implications of AB-35" and the MICRA fee statute under Business and Professions Code section 6146. In its article, Horvitz & Levy writes: "Regardless of when the case is resolved, [a] plaintiff would have a smaller net recovery once AB-35 takes effect." This is simply not true and ignores the reality of medical malpractice litigation. Most importantly, the article conveniently and completely ignores litigation costs and its impact on both the plaintiff and the plaintiff's attorney.

Under the old MICRA fee statute per Business and Professions Code section 6146, a plaintiff's attorney was limited to only 15% of any recovery over $600,000. In addition, unlike in general personal injury cases, the 15% was limited to the net recovery of the plaintiff only after costs were deducted. Now, the statute provides for an attorney of 33% of the net recovery.

Horvitz & Levy oversimplifies the impact of the change, stating that the plaintiff herself is now in a worse off position since her attorney fees are higher under AB-35. Medical malpractice insurance adjusters and defense lawyers were trained to use the declining fee structures as a sword to negotiate lower settlements, which hurt plaintiffs. Indeed, in prior editions of its prominent MICRA Manual prior to the AB-35 change, even Horvitz & Levy advocated for defense lawyers and adjusters to take a pointed interest in the fees asserted by the plaintiff's attorneys. (See Horvitz & Levy MICRA MANUAL 2021 Edition at ¶ C(12(a) ["Ensuring compliance with the fee limit: It matters to the defendant."]

Because of the need for expert witnesses, "[m]edical malpractice cases are complex and sufficiently expensive to prosecute..." (*Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, 1424.) Due to the draconian MICRA cap on general damages, the only cases that could even possibly be in the seven-figure range were those where economic damages were substantial. For a damage work-up only, such cases will often require numerous experts, such as expert neurologists, physical medicine and rehabilitation physicians, neuroradiologists, life care planners, and economists. Of course, medical malpractice cases also require expert physicians to establish standard of care and causation.

These cases easily cost well over $100,000 to proceed to trial. The defense knows this, and it dramatically impacts the recovery to the plaintiff.

For example, let's say there is a medical malpractice case where the plaintiff has an above-the-knee amputation. After accounting for the MICRA cap on general damages, the fair settlement value is $1,500,000. The additional costs to try the case if it does not settle is conservatively estimated to be $100,000.

In such a scenario, adjusters and defense lawyers are well-versed in using the fee cap against a plaintiff and her lawyer and driving a wedge in the relationship. In such cases, they will offer less than fair settlement value, such as a maximum of $1,000,000.

Even if the plaintiff's attorney prevails at trial for $1,500,000, the attorney fee on the extra $400,000 net amount recovered is only $60,000. By rejecting the defense offer of $1,000,000, the plaintiff's attorney has now spent hundreds of hours of her time and has risked $100,000 of her own money for an attorney fee award of $60,000.

And if the defense proceeds with an appeal and the plaintiff now must hire appellate counsel to affirm the award, any appellate attorney fees cannot be considered costs and are instead directly deducted from the plaintiff's attorneys' fees. As held in *Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583, "section 6146 fixes the maximum allowable contingent fee for a medical malpractice action as a whole, including an appeal after judgment, and the limitation may not be avoided by charging separate fees for segments of the case or by charging both contingent and hourly fees."

Horvitz & Levy acted as amici curiae in the *Yates* case in their successful attempt to limit attorney fees and make the costs of litigating most medical malpractice cases cost prohibitive for plaintiff's attorneys.

While an attorney should always do what is in the best interests of her client, the economic impossibility of an attorney being able to pursue full value often *does* make accepting the smaller settlement the best option for the client. The defense bar and its insurance companies knew this, and it impacted their offers.

However, the increase from 15% to 33% for medical malpractice cases will now have a dramatic impact on these higher value cases and actually increase recoveries for plaintiffs. Under the same example above, the additional $400,000 would yield an attorney fee of $132,000. While certainly not a windfall for the plaintiff's attorney, it at least makes pursuing the additional recovery economically viable. This will undoubtedly cause the defense bar to make fairer settlement offers, increasing the net recovery to medical malpractice plaintiffs even with the increase in attorney fees. Of course, the yearly increases in the general damages cap under Civil Code section 3333.2 will also increase the net recovery to plaintiffs.

Lastly, the whole purpose of the various MICRA provisions when they were passed in 1975 were to reduce litigation costs in medical malpractice cases and lower insurance premiums. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111-112 ["The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation."].) Perhaps in addition to the 33% cap on plaintiff attorneys, the legislature should consider putting a cap on the lucrative hourly fees asserted by medical malpractice defense firms and appellate counsel, such as those asserted by Horvitz & Levy.

— Benjamin T. Ikuta
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