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Capping Non-Economic Awards in Medical Malpractice Trials

California Jury Verdicts Under MICRA

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Summary

Concerns over the price and availability of medical malpractice insurance have sparked a vigorous national debate over proposed medical malpractice liability legislation. Proponents of changes in the existing rules and procedures governing medical malpractice liability argue that skyrocketing medical liability insurance premiums and withdrawals of insurers from the market are forcing some health care providers out of practice and deterring others from performing risky procedures or taking up certain medical specialties. Many such proponents claim that the root cause of these problems is the growing cost of resolving malpractice claims. This assumption forms the basis of proposals to change the laws that govern the medical malpractice dispute process, including proposals that call for placing limits on trial awards and attorney fees in malpractice cases.

A model for such limits has been the Medical Injury Compensation Reform Act (MICRA), a law enacted in California in 1975 to control soaring medical malpractice insurance premiums in the state and to ensure the continuing availability of malpractice insurance coverage. This complex legislation has two main provisions. First, it limits (or caps) to \$250,000 the amount of non-economic damages a plaintiff can recover at a medical malpractice trial. Trial awards granted to compensate plaintiffs for their physical and financial injuries consist of *economic damage awards* for specific expenses that are incurred or likely to be incurred, such as medical treatment expenses and wage loss, and *non-economic damage awards* that address losses that are more difficult to quantify, such as pain or suffering, loss of consortium¹ and companionship, emotional distress, and mental anguish. MICRA's caps apply only to non-economic damages. Typically unaware of the MICRA limit, a jury can award whatever amount it believes is appropriate for non-economic losses,² but following the verdict, the judge will reduce the award to \$250,000 if necessary prior to entering the final judgment in the case. Second, MICRA limits the contingency fees of the

¹ *Loss of consortium* claims allege that the injuries incurred by one member of a marital relationship have adversely affected the other spouse's expectations of care, comfort, companionship, emotional support, or sexual intimacy.

² The terms "damages" and "losses" are for the most part interchangeable. In this report, the word "damages" refers specifically to claimed losses.

plaintiffs' attorneys according a sliding scale that allows attorneys to charge no more than 40 percent of the first \$50,000 of any recovery, one-third of the next \$50,000, 25 percent of the next \$500,000, and 15 percent of the amount over \$600,000. Together, the limits on trial awards and on contingency fees were intended to reduce the costs of resolving individual claims and to reduce the overall number of claims brought against health care providers in the first place. In turn, it was hoped that any savings resulting from these rule changes would be reflected in lower premium levels and a healthier insurance industry.

Critics of proposals that contain limits on awards and fees similar to those contained in MICRA claim that they result in inadequate compensation for the most severely injured individuals; that they shift the costs of liability from malpractice insurance companies to other types of insurers, benefit providers, or government agencies; that they are increasingly unfair over time as the cap's size remains fixed at \$250,000 in nominal terms despite inflation; and that they prevent many victims with legitimate claims from obtaining skilled legal representation. These critics of the proposals have suggested that the current problems in the malpractice insurance industry are due more to the cyclical nature of the insurance market and poor underwriting conditions and also question claims that the insurance industry is so weak that it needs this kind of specialized relief and that MICRA-like rule changes would translate into reduced premiums and greater availability of coverage.

As this debate heats up in Congress and in some state legislatures, it underscores that there is a clear need for empirical analysis of the issues that are involved. The most contentious issues revolve around MICRA's imposition of a ceiling of \$250,000 on non-economic damages in malpractice awards and its maximum limits on attorney fees, two features of the legislation that are the subjects of this research.

Study Objectives

This report presents the results of an empirical study of the effects of MICRA on plaintiffs' recoveries, the fees plaintiffs' attorneys receive, and the liabilities of defendants following trial. After examining data from 257 plaintiff verdicts in malpractice trials from 1995 to 1999, we sought to answer the following questions:

- How have MICRA's caps on non-economic damages affected the final judgments in California jury trials?
- What types of cases and claims are most likely to have an award cap imposed following trial?
- What have been the effects of MICRA on plaintiffs' attorney fees?
- What have been the effects of MICRA on plaintiffs' net recoveries (the final judgments minus estimated fees)?

- If the MICRA cap had been adjusted for inflation, what would have been the effect on the final awards in the trials we examined?

Research Approach

Our analysis is based on the outcomes of 257 medical malpractice trials (195 with non-fatal injury claims and 62 death claims) with jury verdicts granted in favor of the plaintiffs over a five-year period (1995 to 1999) in California state courts. The source for these data was the *California Jury Verdicts Weekly* (CJVW), a private publication used primarily by lawyers, insurance adjusters, and others who follow what juries are awarding for specific types of claims in the state. We abstracted extensive information from the case reports in the publication, including information on type of claim, litigant characteristics, and award amounts for economic damages, non-economic damages, and punitive damages.

Because the MICRA award cap is applied by the trial judge only after the jury's decision has been delivered, we were able to use the jury verdict data to calculate the difference between what the jurors believed to be the proper amount of damages (as evidenced by their original awards) and what the plaintiffs were likely to have received as a result of MICRA. Because of MICRA's clear and explicit rules, we were able to determine the size of any post-verdict award reduction, which then enabled us to assess the difference between what the jurors believed was the proper amount of damages and what the plaintiffs were likely to have received as a result of MICRA.

Limitations and Caveats

The answers to our study questions should help to provide a clearer picture of MICRA's effects on litigants in actual trials. But this study addresses only the impact of MICRA on jury awards, attorney fees, and plaintiffs' recoveries arising from such trials. We are aware that MICRA influences the entire claiming and litigation process and that focusing on jury verdicts ignores MICRA's effects on the much larger number of cases that were resolved before trial and on disputes and losses arising from health-care-related injuries that may never have been filed as formal actions. MICRA's most important ramifications for both patients and health care professionals (and their insurers) may not be on trial awards but instead on the far greater number of matters that never went before a jury. But such cases and claims are outside the scope of this analysis. MICRA is likely to have changed the number and character of cases that reached the trial stage; however, our analysis focused solely on actual trials concluded during our study period.

We did not attempt to calculate the effects of MICRA on malpractice insurance premiums or on coverage availability. As a result, no conclusion can be drawn from the study as to whether MICRA achieved the California Legislature’s ultimate goal of maximizing the availability of health care services by holding down insurance premium levels. Nor does this study address other important issues such as MICRA’s effects on (1) the costs and quality of health care services; (2) specific medical practices, such as the extent of “defensive” medicine; (3) transaction costs of the malpractice liability system; (4) the frequency of what some observers have characterized as “frivolous” lawsuits; (5) shifts in costs to other types of insurance and benefit providers; (6) the size of pre-trial settlements; and (7) the ability of injured individuals to receive fair compensation through settlement or trial.

As described more fully in Appendix C, privately published jury verdict reporters such as CJVW do not capture all trials. We have no way of determining the extent of the gap in our data, but limited evidence suggests that it could be substantial. As a result, our results should be viewed as reflecting the experience of just a sample of all trials during the five-year period of the study (which would in turn impact our findings for aggregate verdict awards and for aggregate attorney fees calculated on the basis of those awards). Additionally, there is evidence that smaller-value awards are more likely to be underreported in these publications, which would also impact our findings on average award size.

How Has MICRA Affected Jury Awards?

About 22 percent of California medical malpractice trials during our study period resulted in a verdict in favor of one or more plaintiffs in each case (compared with 53 percent for all other types of trials). In those plaintiff verdicts, MICRA-triggered changes by judges to jury awards are a common occurrence. The cap on non-economic awards was imposed in 45 percent of the cases won by plaintiffs in our sample. Verdicts in death cases were capped more often (58 percent) than those in non-fatal injury trials (41 percent).

Awards in the original verdicts in our sample totaled \$421 million, but with MICRA, the final judgments in those cases dropped to \$295 million. In other words, MICRA reduced the overall liabilities of the defendants by 30 percent. In death cases, defendants’ liabilities were reduced by 51 percent, compared with a 25 percent reduction in non-fatal injury claims. When their awards are capped, plaintiffs typically lose many hundreds of thousands of dollars. The median³ reduction in non-economic awards was \$366,000. Although some awards were reduced by only a few

³ The “median” award is that value for which half of all values are above it (and half are below it). The “mean” award is the arithmetic average.

thousand dollars, the largest cut found in our sample during the five-year period (1995 to 1999) was nearly \$9 million, a reduction representing 97 percent of the jury's original non-economic damage award. Similar cases with multi-million-dollar reductions are often cited as evidence that some plaintiffs are shouldering a disproportionate share of MICRA's impact.

What Types of Cases Are Most Affected by MICRA?

To identify the types of cases that realized the greatest changes in award size, we looked at the data in a number of different ways. First, although we give aggregate results for all cases, we also examined the difference in results for non-fatal injury cases (which we refer to from here on as "injury cases") and cases that resulted in death, and we found some stark differences. Second, we estimated the effect of MICRA on awards in terms of absolute size of reduction (in dollars) and also in terms of the percentage reduction in the total award, by which we mean the economic and non-economic damages combined. Injury cases with absolute reductions of \$2.5 million or more usually involved newborns and young children with very critical injuries (such as permanent coma, quadriplegia, or severe retardation). But such large dollar losses did not always translate into large percentage reductions in total awards because these very young plaintiffs needed extensive medical care over the rest of their lives and were often awarded economic damages of equal or greater value than their non-economic awards. Even after MICRA reductions, the total awards in most of these cases were still more than a million dollars. Arguably, the injury cases most affected by MICRA were the ones in which the plaintiffs lost the greatest percentage of the total award as a result of the cap on non-economic damages.

Cases with the greatest percentage losses in total awards are those with small economic losses but great damage to the plaintiff's quality of life. These cases, with economic awards of \$100,000 or less (and sometimes as little as \$1,200), had non-economic awards of about a million dollars or more (suggesting that the jury believed the plaintiff's injuries resulted in extreme levels of pain, suffering, anguish, distress, and the like), resulting in a drop of 67 percent or more in total award size. In one instance, the final total award was reduced by 94 percent.

Cases involving claims of death have larger reductions than non-fatal injury cases—in both absolute and relative terms. The median reduction in capped-death cases was \$459,000, compared with \$286,000 for injury cases, and the median percentage reduction in total awards when the cap was imposed was 49 percent, compared with 28 percent in injury cases. The reason for these deep percentage cuts in total award size for death cases is that, on average, death cases receive relatively low

awards for economic damages compared with the awards originally granted by juries for non-economic damages.

What Types of Injuries Experienced the Greatest Reductions in Awards?

Table S.1 describes the effects of MICRA by injury type along several dimensions: the percentage of capped cases, the median award reduction when the case is capped, and the percentage reduction in aggregate total awards (including cases above and below the cap). The table shows that plaintiffs with the most serious injuries, such as brain damage, a variety of catastrophic injuries, and paralysis, have their awards capped most frequently, and when they do, they incur median reductions of more than a million dollars. Dental cases, however, experience the highest percentage reduction in aggregate awards in all plaintiffs' verdicts, even though they resembled

Table S.1
Effects of MICRA by Various Injury Categories

Injury Category ^a	Percentage of Cases Capped (Among Plaintiff Wins)	Median Dollar Reduction in Capped Cases (1999\$)	Percentage Change in Aggregate Total Awards ^b
Brain damage (any degree) (n = 31)	65	\$1,239,000	-23
"Catastrophic" loss (n = 30) ^c	63	\$1,150,000	-23
Paralysis (any body part) (n = 16)	56	\$1,699,000	-16
Loss of consortium (n = 39)	49	\$212,000	-35
Any injury to an arm (n = 13)	46	\$127,000	-30
Any injury to an eye or reduced vision (n = 11)	45	\$498,000	-30
Dental injuries (n = 17)	41	\$260,000	-47
Any injury to a leg or hip (n = 17)	41	\$410,000	-21
Any Injury to a foot or ankle (n = 11)	27	\$328,000	-38
Emotional or psychological injury (n = 31)	26	\$156,000	-13
Head or face injury (n = 12)	17	\$183,000	-21

NOTE: Dollar amounts are rounded to the nearest thousand.

^a These categories overlap (a plaintiff may be counted in more than one category) and reflect only those claimed injury types found in 5 percent or more of the injury cases in which plaintiffs won. Counts for each category correspond to the number of cases with plaintiff wins, whether or not they are capped.

^b Includes cases both above and below the cap.

^c "Catastrophic losses" as we have defined them include claims of burns over more than 50 percent of the body, quadriplegia, paraplegia, becoming infected with HIV or allowing AIDS to develop, severe brain damage, or blindness.

many other injury cases in their frequency of being capped and median dollar reduction. Jury awards for these injuries are reduced by nearly half because of the cap. A few other types of non-catastrophic injuries, such as injury to a foot or ankle or claims of a loss of consortium, also experienced deep cuts in total awards aggregated across all cases.

Among the injuries least affected by the cap are those that involve emotional or psychological injuries. Verdicts for the plaintiffs in such cases trigger the MICRA cap 26 percent of the time (compared with 41 percent for all injury cases), have one of the smallest median dollar reductions of any commonly claimed injury when the cap is triggered, and result in one of the smallest reductions in aggregate total awards for all cases with such claims (13 percent).

Which Age Groups and Gender Are Most Affected by MICRA?

Injured plaintiffs under one year of age⁴ had MICRA reductions imposed in 71 percent of their cases. The median reduction for this age group in capped cases was also very high: 1.5 million dollars, far more than the median for individual plaintiffs with injury claims (\$268,000). But because their economic awards are also relatively large, cases involving infants have the smallest median percentage reductions in the total award when the cap is imposed: losses of 22 percent compared with losses of 32 percent for all individual plaintiffs with injury claims.

Plaintiffs 65 years of age and older also have a very high percentage of awards reduced by the cap (67 percent), but they have the smallest median dollar reduction of any age group because their awards for non-economic damages often fall relatively close to the \$250,000 limit. Undoubtedly, the fact that different age groups are likely to experience different sorts of injuries may play a role in these distinctions.

Female plaintiffs typically have larger cuts to their total verdicts, with a median change of -34 percent compared with -25 percent for males. As with the differences between age groups, some of the differences between men and women in the frequency and impact of the cap's imposition may be due to differences in the types of medical conditions for which they originally sought treatment.

What Are MICRA's Effects on Attorney Fees?

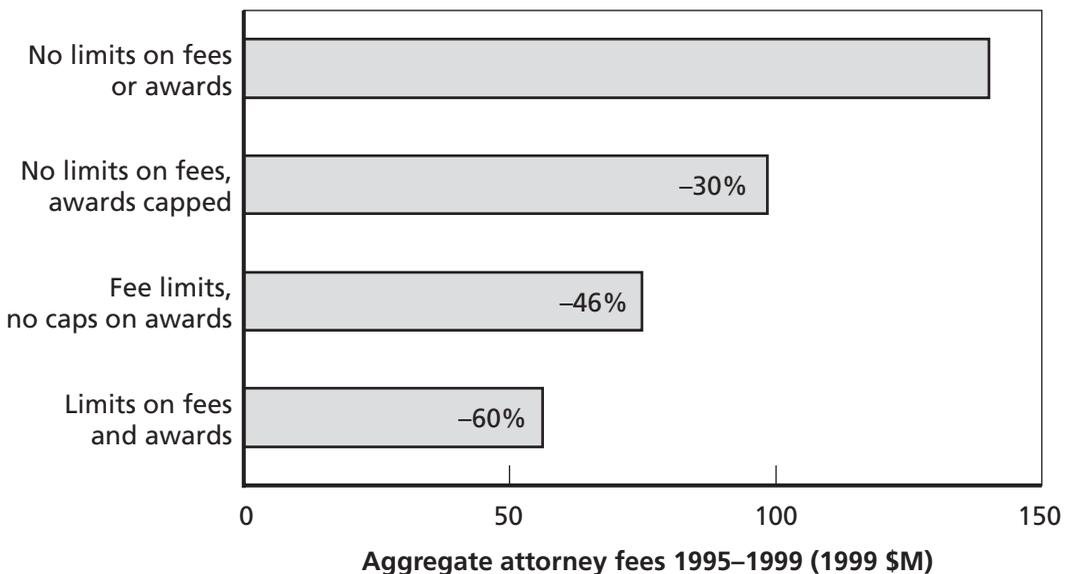
In the absence of MICRA, the cases we examined would have generated an estimated \$140 million in fees for the plaintiffs' attorneys, assuming a contingency fee rate of one-third of the recovery and using the jury's original verdict for calculating that fee.

⁴ This group includes newborns and fetal injuries.

But with the effects of the award caps and sliding scale, attorney fees were reduced by 60 percent overall (59 percent for injury cases and 65 percent for death cases). Figure S.1 shows the impact of various assumptions on estimated fees. From top to bottom, the figure shows estimated total fees (\$140 million) with no limits on the fees or awards), the effect of award caps without any limits on fees (a 30 percent decrease), effects of fee limits without any caps on awards (a 46 percent decrease), and the effect of MICRA on fees with limits on both awards and fees, which yields aggregate fees of \$56 million (a 60 percent decrease). These results suggest that MICRA has had a major impact on plaintiffs' attorney fees in medical malpractice cases and that the sliding scale has a greater effect on those fees than has the damage cap.

What Are MICRA's Effects on Plaintiffs' Net Recoveries?

One justification for imposing limits on attorney fees was to help offset the impact of award reductions on plaintiffs. To gauge the size of this offset, we estimated plaintiffs' net recoveries—i.e., the final judgments minus estimated fees—for all cases in our data. In the absence of MICRA, the plaintiffs in the cases we examined would have received estimated net recoveries of about \$280 million, using the jury's original verdict and assuming a contingency fee of one-third of the recovery. We found that net recoveries were reduced by 15 percent overall (9 percent in injury cases and 44 percent in death cases) as a result of MICRA's limits of awards and fees.

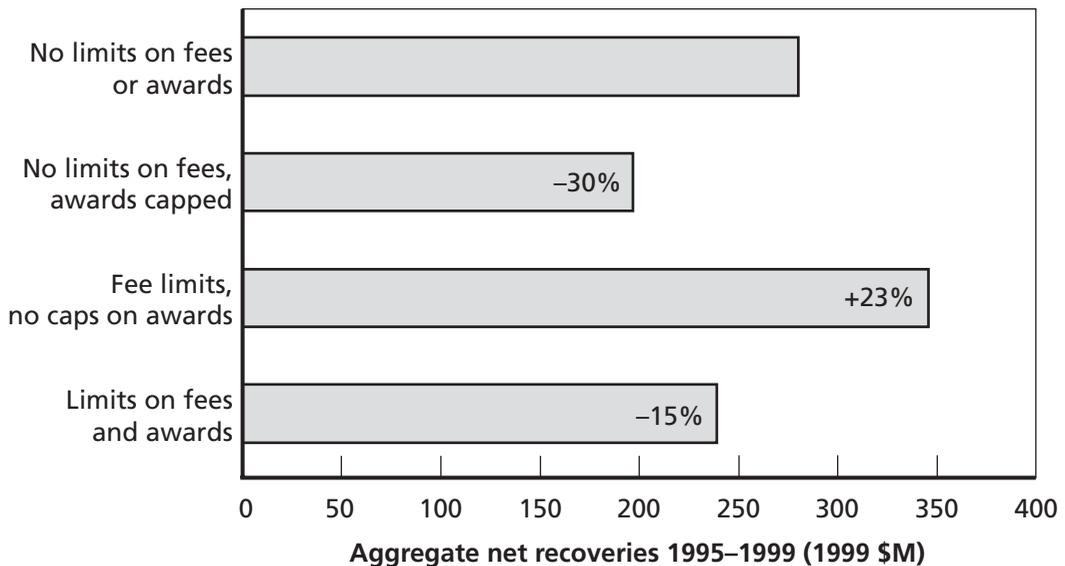


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Figure S.1—Effects of Fee Scales and Award Caps on Aggregate Attorney Fees

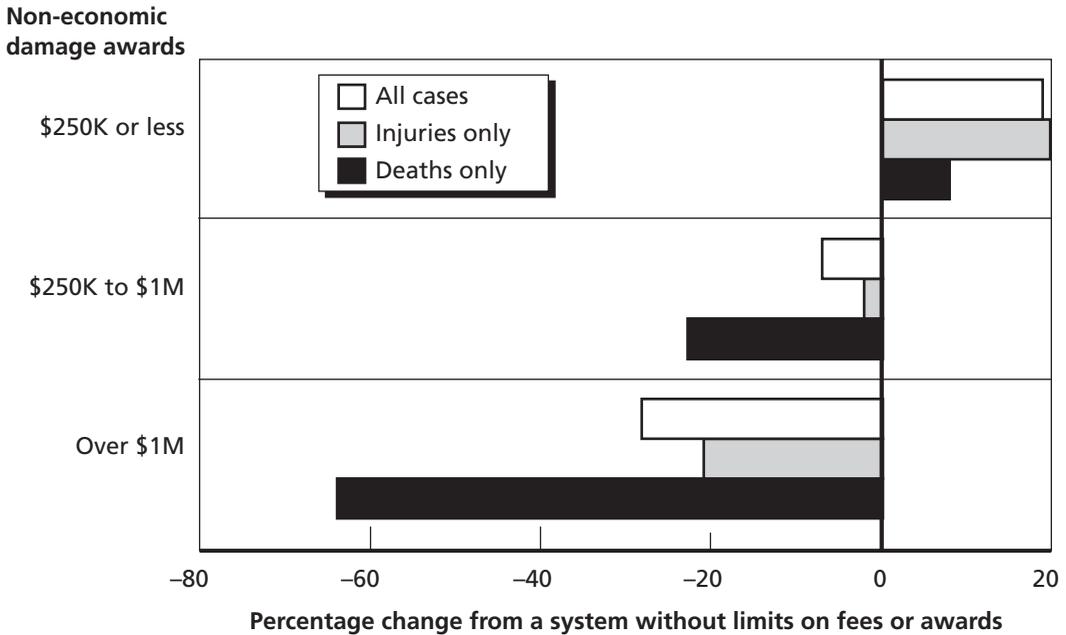
Figure S.2 shows the impact of various assumptions on estimated net recoveries. Moving from top to bottom, the figure shows estimated net recovery in the aggregate without MICRA (\$280 million), the effect of award caps but no fee limits on that amount (a 30 percent decrease), the effect of fee limits without award caps (a 23 percent increase), and the effect of both fee and award limits on the original amount (\$240 million, a 15 percent decrease).

Such aggregate numbers, however, hide significant differences in the effects of MICRA on net recoveries in cases that were awarded different amounts for non-economic damages. Figure S.3 illustrates those differences. It shows that when combined with the award cap, the attorney fee limits work to the greatest advantage of those plaintiffs with relatively modest non-economic awards, but does not provide complete offset for those with the largest awards. Net recoveries for all cases with original jury awards for \$250,000 or less in non-economic damages were increased by 19 percent, while those with non-economic damage awards over \$1 million were reduced by 28 percent. The change in net recovery was greatest in high-value death cases, with a 64 percent drop in aggregate size despite the limits on fees.



RAND MG234-S.2

Figure S.2—Effects of Fee Scales and Award Caps on Aggregate Net Recoveries to Plaintiffs



RAND MG234-S.3

Figure S.3—Change in Aggregate Net Recoveries by Size of Original Non-Economic Damage Awards

Adjusting the Cap for Inflation

With the cap remaining fixed in nominal terms at its 1975 levels, the real value of the maximum award for non-economic damages has been declining over the years. To explore this issue, we calculated how final judgments in our five-year sample of trials would have changed if the MICRA caps had been allowed to increase at the rate of inflation (or “indexed”) as part of the original legislative package. Based on the Consumer Price Index for urban consumers as the benchmark for annual increases, the cap would have been \$708,000 in 1995, \$729,000 in 1996, \$746,000 in 1997, \$757,000 in 1998, and \$774,000 in 1999.

If the MICRA cap had been indexed for inflation since 1975, the savings to defendants in the five years’ worth of cases we examined would have been 21 percent of the amount originally awarded (compared with 30 percent under the fixed cap), assuming that the same number and types of trials would occur under these modified conditions. The tripling of the cap’s size for the study period would have resulted in a 13 percent increase in defendant liabilities for the trials found in our data. The proportion of verdicts over the cap in the five-year period of the study would decrease by more than half, from 45 percent to 19 percent. However, it is possible that

additional cases would have been filed and more trials would have taken place with the higher limits, increasing defendant expenditures.

Conclusions and Implications

MICRA does appear to have had the California Legislature's intended *initial* result of limiting defendants' expenditures. Whether such savings have translated into reduced premiums and greater availability of coverage—which were the California Legislature's *ultimate* goals—is beyond the scope of this analysis.

Although the study did not assess the adequacy of compensation for plaintiffs, it did identify the types of cases and plaintiffs that lose the most as a result of MICRA:

- Plaintiffs with the severest injuries (brain damage, paralysis, or a variety of catastrophic losses) had their non-economic damage awards capped far more often than all plaintiffs with injury claims and had median reductions of more than one million dollars (compared with a median reduction of \$286,000 for all injury cases).
- Plaintiffs who lost the highest percentage of their total awards were often those with injuries that led to relatively modest economic damage awards (about \$100,000 or less) but that caused a great loss to their quality of life (as suggested by juries' million-dollar-plus awards for pain, suffering, anguish, distress, and the like). These plaintiffs sometimes received final judgments that were cut by two-thirds or more from the jury's original decision.
- Death cases are capped more frequently than injury cases (58 percent versus 41 percent), and when they are capped, death cases have much higher percentage reductions in total awards than injury cases, with a median drop of 49 percent versus a 28 percent drop for injury cases.

The study results also suggest that MICRA has resulted in a sea change in the economics of the malpractice plaintiffs' bar. Because of the law's combination of award caps and limits on maximum contingency percentages, attorneys lost 60 percent of the fees they would have made from these plaintiff victories without MICRA. The analysis suggests that the savings to defendants and their insurers are funded by both plaintiffs and their attorneys. Because the fee limits help offset award reductions (aggregate net recoveries for plaintiffs are 15 percent less than they would have been without MICRA even though defendants are realizing a 30 percent drop in aggregate liabilities), the legislation's provisions regarding awards and fees could be character-

ized as shifting some of the costs for compensating medical malpractice from defendants to not only plaintiffs but also to plaintiffs' counsel.⁵

The effect of this financial shift on attorney practices is unclear. Has MICRA discouraged attorneys from practicing in this field? Has MICRA changed the way claims are litigated and settlements are negotiated? Has MICRA made it more difficult for plaintiffs in malpractice cases to find attorneys who will represent them? These are all important questions raised by this analysis. Steeply reduced fees, combined with the relatively low rate of plaintiff victories in California medical malpractice cases and the high costs of expert medical witnesses—which are almost always borne by the attorney if there is no recovery—suggest that attorneys in California are likely to be much more selective in evaluating new malpractice clients than they would be in the absence of MICRA.

The study suggests that the research that is required to fully inform the policy discussion would include an analysis of the following:

- the effects of MICRA on a patient's access to attorney representation
- the comparative effects of MICRA on different demographic groups and between patients with various types of losses arising from malpractice incidents (e.g., those with low out-of-pocket expenses versus those with more substantial economic losses)
- the effects of MICRA's trial award limits on the size of settlement offers
- the effects of MICRA's impact on award and settlement size on other types of benefit providers, such as government programs or disability insurers
- the effects of current and proposed liability rules on medical errors and the quality of care
- the effects of current and proposed liability rules on access to medical care
- the effects of various liability regimes on health care costs
- the impact of any savings to defendants occasioned by MICRA upon medical malpractice insurance premium levels and the availability of coverage.

⁵ To put it another way, defendants would have paid out \$420.6 million without MICRA but with the award cap, aggregate liabilities were \$295.5 million, a \$125.1 million savings. Without MICRA, we estimate that plaintiffs would have received \$280.4 million in net recoveries after fees were deducted but with the award cap and the fee limits, aggregate net recoveries were \$239.5 million, a \$40.9 million drop. The difference between the defendants' savings and the reduction in plaintiffs' net recoveries, approximately \$84 million, would come in the form of reduced attorneys fees.