

December 15, 2017

Governor Jerry Brown
State Capitol
Suite 1173
1315 10th Street
Sacramento, CA 95814

Dear Governor Brown:

It's rare that an elected leader is granted an opportunity to correct a legislative error as devastating as California's arbitrary cap on the amount of compensation a doctor or hospital must pay when they injure or kill a patient. Rarer still when that leader has long embraced (and been recognized for) his sensitivity to injustice, concern for the unrepresented and the marginalized, and an abiding ability to reflect deeply, dispassionately and honestly upon the world and his role within it.

Forty two years ago, during your first term as the Governor of California, you signed into law the egregiously misnamed Medical Injury Compensation Reform ACT – MICRA, as it is known to its victims – after an insurance industry boycott intentionally disrupted the insurance marketplace and propelled the state's medical lobby to the forefront of a cynical assault in Sacramento on their patients' health and safety. Ostensibly to entice insurance companies to resume selling malpractice coverage to medical providers at less than stratospheric rates, MICRA inserted into California law a variety of roadblocks to access to the court system for victims of medical malpractice or their next of kin, shifting the responsibility for medical negligence or even intentional assaults to victims, their next of kin, and taxpayers.

MICRA imposes an arbitrary \$250,000 limit on the authority of a jury to determine how much a wrongdoer must pay to reimburse a person's non-economic losses. It permits those found by a jury to be responsible for malpractice to pay the compensation they owe their victims on an installment plan basis – and to keep the balance should the victim die. It establishes unprecedented limits on how much a victim of medical malpractice can agree to pay her lawyer, discouraging attorneys from accepting serious or complicated malpractice cases on behalf of all but the wealthy who can afford to pay their lawyer out of pocket.

MICRA's impact on the people of California is staggering. Every year in the US, between 210,000 and 440,000 hospital patients experience preventable medical errors that lead to their deaths.¹ Death by medical mistake is now the third leading cause of death in the United States, behind heart disease and cancer – far more than auto accidents or homicides. That's about 42,000 – 88,000 Californians killed each

¹ John T. James, "A New Evidence-based Estimate of Patient Harms Associated with Hospital Care," Journal of Patient Safety, September 2013.

year – just in the state’s hospitals, 37% of which have received patient safety grades of C or lower.²

Extrapolating these data to California, millions of Californians have suffered medical injuries or died without justice since MICRA took effect. And it’s pernicious effects worsen every day. MICRA’s original \$250,000 cap on compensation is now worth about \$58,000 – equivalent to the cost of a few days in the hospital. It has left many innocent victims of medical mayhem unrepresented and helpless in the face of often grotesque negligence as well as assault and even rape.

Denial of needed compensation is not the only wrong imposed by MICRA. Many Californians *become victims* of medical malpractice precisely *because of MICRA*: by limiting the legal accountability of doctors and hospitals, MICRA allows them to engage in shoddy and dangerous practices, knowing they would likely not face a judge, jury or punishment.

Tragically, MICRA has had nationwide impact: it became a model for politicians in states around the country, who are happy to note progressive Governor Jerry Brown’s support for caps on victims’ rights while prostrating themselves for campaign cash from the insurance and medical lobbies. More than half the states have enacted some form of MICRA.³

With the benefit of hindsight, we know now that the “California malpractice insurance crisis” of 1974-1975 was a hoax orchestrated by the insurance companies to cover up their greed and mismanagement.⁴ There was no “lawsuit crisis” or “litigation explosion.”⁵ Indeed, after the passage of MICRA, the reductions in malpractice insurance premiums you and other lawmakers had been promised by the insurance industry failed to materialize.

To the contrary, malpractice premiums went up approximately 450% percent between 1975 and 1988.⁶ It was not until California voters took matters into their own hands and ordered sweeping rate rollbacks and stringent regulation of the insurance industry in 1988 that malpractice premiums finally dropped – by 20.2%!

² Chad Terhune, “Almost 40% Of California Hospitals Graded C Or Lower For Patient Safety,” Los Angeles Times, April 29, 2015.

³ Fact Sheet: Caps On Compensatory Damages: A State Law Summary, Center for Justice and Democracy, June 22, 2017.

⁴ Harvey Rosenfield, Silent Violence, Silent Death: The Hidden Epidemic of Medical Malpractice (Essential Books, 1994), pp. 61-76.

⁵ Id., p. 69-71.

⁶ National Association of Insurance Commissioners’ Reports on Profitability By Line By State, 1976-2001.

- and stabilized.⁷ And thanks to the public transparency required by that voter-approved law - Proposition 103 - a top executive of one of the state's leading malpractice insurance companies was forced to acknowledge that under oath, that "while MICRA was the legislature's attempt at remedying the medical malpractice crisis in California in 1975, it did not substantially reduce the relative risk of medical malpractice insurance in California."⁸

On June 13, 1993, not even two decades after you signed MICRA, you issued this public statement recognizing your mistake:

As the Governor of California in 1975, I signed into law the Medical Injury Compensation Reform Act, or MICRA. Based on the experience under this unusual statute, I strongly recommend against using its provisions in the upcoming Clinton Health Care Plan.

At the time, California's medical community was in the midst of a crisis. The cost of medical malpractice insurance policies was skyrocketing. Many physicians were forced to "go bare," because they could not afford to purchase insurance, some discontinued providing certain high-risk procedures, while others threatened to quit. Insurance companies claimed that the costs associated with malpractice insurance were rising at such a rate that their only option was to raise health care professionals' liability premiums or to withdraw from the market altogether. In short, the stability of the health care system in California faced a grave threat.

We have learned a lot about MICRA and the insurance industry in the seventeen years since MICRA was enacted. We have even witnessed yet another insurance crisis, and found that insurance company avarice, not utilization of the legal system by injured consumers, was responsible for excessive premiums. Saddest of all, 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. For these reasons, MICRA cannot and should not be a model for national legislation.

Yet forty-two years later, MICRA remains the law of California, maiming and homiciding, a testament to a decades-old triumph of political power over public interest. What is the basis for this anomaly?

Today, the malpractice insurance companies operating in California - a tiny sub-industry - are carefully monitored, and premiums are stable (though clearly in need

⁷ Harvey Rosenfield, "Regulating Damages vs. Regulating Insurance Rates: The California Experience," Testimony before the District of Columbia Council, December 1, 2005.

⁸ *Id.* at page 11.

of further regulatory action by the California Insurance Commissioner, since California malpractice insurers projected they would have to pay out only 44 cents in claims for every premium dollar they took in during 2016⁹).

The medical community, meanwhile, is battling its erstwhile allies in the health insurance industry. At stake is the survival of the medical profession as faceless bean-counting bureaucrats usurp doctors' judgment, forcing physicians to spend less time with patients, denying or limiting the medical treatments they prescribe, and institutionalizing substandard care in Wall Street's pursuit of profits. California doctors are like most doctors in the nation: deeply disturbed at the usurpation of their professional independence.

This is not to say that some well-intentioned Golden State doctors don't remain susceptible to the threat of higher insurance premiums and related fear-mongering by the California Medical Association, which purports to speak for all California physicians, but which in reality represents only thirty percent of physicians in California and is substantially controlled by health insurance companies and HMOs.

But with Proposition 103's application of the antitrust laws to the insurance industry, a repeat of the boycott and blackmail that led to the hasty passage of MICRA in 1975 could not happen again. More importantly, the large majority of principled and safety-conscious doctors who take seriously their oath, "first do no harm," recognize that patients deserve the judicial protections and compensation that MICRA denies. That is but one reason why the state's most progressive force for worker and consumer rights, the women and men of the California Nurses Association, long ago chose to stand up for consumers and renounced MICRA.

What is left now to defend MICRA is an entrenched bureaucracy composed of malpractice insurance companies and other large corporations, and their think tanks, PR firms and lobbying organizations that favor the expansion of MICRA-like restrictions on consumers and victims' rights to credit card, cable and pharmaceutical companies, automobile and other manufacturers, chemical, oil and gas companies and other toxic polluters. Any change in MICRA threatens their insensate interest in crushing Americans' historic right to their day in court. These special interests are not worthy of your concern.

As your decades of public service come to a close, it is time to right the enduring wrong of MICRA. This is not a call to your legacy, which you have rightly dismissed as immaterial, but to your *conscience*. Unlike the lead lobbyist for medical malpractice caps in Indiana, who pushed the bill to passage in 1975 only to become a victim of medical malpractice and "from my wheelchair, rue that accomplishment,"¹⁰ you remain healthy and vigorous. But you have never confused

⁹ Countrywide Summary of Medical Professional Liability Insurance Calendar Years 2002 – 2016, National Association of Insurance Commissioners (2017).

¹⁰ Frank Cornelius, "Crushed by My Own Reform," New York Times, October 6, 1994.

your own circumstances with your humanistic and active concern for the plight of others. Sometimes a leader has no choices. But when it comes to the greater good – the safety and health of Californians – your path forward is clear.

There are many Californians who are ready to join you on that path forward, as am I. May I hear from you soon – before the new legislative session heavy with members of your own Democratic Party?

Sincerely yours,

A handwritten signature in black ink that reads "Ralph Nader". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Ralph Nader

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