



Attacking MICRA through the appellate courts

Given little chance of changing MICRA legislatively under the current Sacramento administration, CAOC mounts a challenge to the in the Court of Appeal.

BY DAN MORAIN

As part of its MICRA challenge project, Consumer Attorneys of California (CAOC) launched a new attack (as of March 2009) on California's 34-year-old cap on noneconomic damages in medical malpractice cases, urging that a state court of appeal strike down the limits.

Attorney Robert S. Peck asked that the three-justice panel strike down the \$250,000 cap on noneconomic damages, contending it violates the "inviolable right" to a jury trial and equal protection, and amounts to an unconstitutional infringement by the Legislature on the judiciary.

Peck, president of the Center for Constitutional Litigation (CCL) in Washington, D.C., has successfully argued against similar caps in eight other states, and has cases pending in a dozen other states, including Florida, Illinois and Maryland.

He appeared before the California District Court of Appeal for the Fifth District in Fresno, at the behest of Consumer Attorneys of California and the American Association for Justice.

Peck said whatever "crisis" may have existed in the middle 1970s when the Legislature approved the Medical Injury Compensation Reform Act (MICRA) has long since passed. "Conditions change and the issues must be reexamined," Peck told the justices.

The case began when telephone company employee James Van Buren was diagnosed with a perianal abscess. During an operation, his surgeon severed a muscle, causing Van Buren to suffer from permanent incontinence.

Van Buren, 47, represented by Modesto attorney David M. Jamieson who also attended the argument, sued surgeon Sian Evans and Yosemite Surgery Associates. In July 2007, a jury awarded Van Buren \$2.5 million in noneconomic damages.

Superior Court Judge Ronald Hansen of Merced County reduced the award to \$250,000, the maximum authorized by MICRA, which was signed into law by then-Governor Jerry Brown in 1975. In the appeal, Van Buren's attorneys argued that Hansen's decision to slash the award violated his right to a jury trial.

Attorney Curtis Cole, representing the defense, said the Appellate Court did not have the authority to overrule the Legislature's decision to pass MICRA. "The Legislature functioned as it should – a check and balance on the courts," Cole said.

The panel included Presiding Justice James Ardaiz (appointed by Governor George Deukmejian), Justice Bert Levy (appointed by Governor Pete Wilson) and Justice Gene Gomes (appointed by Governor Gray Davis). (See *Van Buren v. Evans*, case number FO54227.)

In 1985, the California Supreme Court held in *Fein v. Permanente Medical*

Group (1985) 474 U.S. 892 that the MICRA limits did not violate the constitutional rights to due process and equal protection. But that decision did not address issues raised in the Van Buren case, Peck argued.

Californians Allied for Patient Protection contended in its amicus brief that MICRA should be sustained as a reasonable "response to a full-blown medical malpractice insurance crisis." However, any crisis now is more than three decades old, Peck argued.

Justices Levy and Ardaiz asked several questions of Peck, but none of the attorneys representing the surgeon and surgery center.

"You're basically challenging the constitutionality of MICRA?," Levy asked.

Peck replied that he was. "These are meritorious cases," Peck said, noting that people who bring medical malpractice claims are ones who suffer catastrophic injuries.

Among the cases cited by Peck was *Feltner v. Columbia Pictures* (1998) 523 U.S. 340, in which a unanimous United States Supreme Court held in 1998 that damages are facts to be determined by juries. Peck noted to the panel that the author was Justice Clarence Thomas.

Peck's Center for Constitutional Litigation (CCL) focuses its practice on access to justice issues. The American Association for Justice often retains CCL to assist state trial lawyers in challenging laws that impede that access.



MICRA continues to be a top priority for CAOC. Given the dim chances of legislative change with this Governor, CAOC formed a new committee several months ago to review, coordinate and assist in individual CAOC member state

challenges to the MICRA caps. The committee is actively looking for additional cases that would present good opportunities to challenge the cap. Contact Nancy Peverini, Senior Legislative Counsel, at nancyp@caoc.org for more information.

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