California Initiative to Require Drug and Alcohol Testing of Doctors

A. Overview:

California's Medical Injury Compensation Reform Act ("MICRA"), enacted in 1975, is under threat with the introduction of California Ballot Initiative to Require Drug and Alcohol Testing of Doctors. This initiative, submitted in two nearly identical versions, #13-0011 and #13-0016, seeks to:

1. Increase California's cap on non-economic damages that can be assessed in medical negligence lawsuits from $250,000 to $1.1 million (this cap would also be adjusted in the future for inflation);
2. Require doctors and/or all health care practitioners who witness substance abuse or medical negligence to report such impropriety;
3. Implement random drug and alcohol testing of physicians as well as mandatory drug and alcohol testing of physicians after unexpected patient death or injury occurs;
4. Require the California Medical Board to suspend physicians pending investigation of positive tests and take disciplinary action of the physician under the influence while on duty;
5. Require health care practitioners to check a prescription drug tracking database, the Controlled Substance Utilization Review and Evaluation System ("CURES"), before prescribing certain controlled substances.

B. Background/History:

Bob Pack, who runs the Troy and Alana Pack foundation, is the driving force behind this ballot resolution. Following his children's deaths and his involvement with the creation of CURES, Pack teamed up with advocacy group, Consumer Watchdog, to draft the initiative. After drafting, Pack, Consumer Watchdog, and medical negligence survivors met with California legislators on May 2, 2013 in an attempt to convince them to amend MICRA, thereby making the initiative process unnecessary. This was unsuccessful.

Pack, thereafter, filed the necessary ballot measure paperwork on July 24, 2013 for #13-0011 and August 30, 2013 for #13-0016. Following the government's processing of both requests, Pack, along with Consumer Watchdog, Consumer Attorneys of California, and numerous other patient safety organizations began collecting the required voter signatures. Only with 504,760 valid signatures will the initiatives qualify for the next general election ballot in November 2014. Over the past few months Pack and supporters have raised millions of dollars and named their initiative the Troy and Alana Pack Patient Safety Act of 2014. They have until March 24, 2014 to collect and submit the necessary signatures.

Politicians have remained largely silent on the issue. Indeed, Governor Brown who signed MICRA into law in 1975, has made few public comments. But last week, Senate President Pro Tem, Darrell Steinberg (D-Sacramento), introduced SB 1429 in an effort to achieve legislative compromise on MICRA and avoid a costly initiative battle. SB 1429 is just one sentence, stating

the intent to "bring interested parties together to develop a legislative solution to issues surrounding medical malpractice injury compensation," but as a spot bill, it ensures that the Legislature can consider an amendment to MICRA at a later date.

C. Summary of Arguments

Supporters of the initiative rely on the following arguments:

1. MICRA's $250,000 cap on non-economic damages has not changed since 1975. This cap is worth merely $58,000 today in 1975 dollars. Raising the cap to $1.1 million merely adjusts the current cap for inflation.
2. Although California does not cap economic damages, it is especially difficult for injured children, senior citizens, and homemakers to demonstrate economic losses or find attorneys willing to represent them on a contingency basis.
3. There is no evidence that increasing the cap will raise total healthcare costs in the state. Indeed, studies have shown that physicians in states with caps engage in defensive medicine at higher rates.
4. Over the last 22 years, California malpractice insurers have paid out in claims an average of only 36 cents of every premium dollar collected.

Opponents of the initiative include the California Medical Association, California Hospital Association, and Civil Justice Association of California. They base their opposition on the following contentions:

1. Even with the $250,000 cap, injured patients can still be awarded unlimited economic damages.
2. Raising the cap would infinitely increase California's healthcare costs.
    a. The current cap has lowered defensive medicine-related utilization rates and increased the number of physicians in the state.
    b. If the cap were raised even to $500,000, it would result in a $9.5 billion increase in costs.
3. California is already engaged in a concerted effort to reduce healthcare costs and address patient safety.
4. The initiative battle will be extremely costly. Together, the parties anticipate raising over $40 million dollars.