

Bid to raise medical malpractice payouts blocked by the state high court

State Supreme Court denies review of case aimed at raising damages cap on medical malpractice suits

By Saul Sugarman

In yet another blow to the plaintiffs' bar, the state Supreme Court on Wednesday unanimously denied review of a case aimed at raising the damages cap on medical malpractice lawsuits.

The 6-0 decision could send proponents of changing the Medical Injury Compensation Reform Act back to the drawing board.

"The Supreme Court is not at this point, I think, interested in revisiting its earlier decisions upholding MICRA's constitutionality," said David S. Ettinger, an Encino-based partner with Horvitz & Levy LLP who is not involved in the case.

Justice Kathryn Werdegar was absent from the vote, according to the docket in the case. *Chan v. Curran*, S227950.

Ettinger thought new justices Mariano-Florentino Cuellar and Leondra Kruger might tip the scale in favor of the state high court reviewing the constitutionality of MICRA, which caps damages in medical malpractice cases at \$250,000.

But, Ettinger noted, this is the second time the Supreme Court passed over a MICRA matter since the two justices were installed.

Nora Freeman Engstrom, a tort and ethics professor at Stanford Law School who favors MICRA reform, said "it would be a mistake to read too much into this denial."

"The odds are always stacked against any petitioner in getting review from the Supreme Court," she said, citing a 2007 tally by the state's high court that showed only 5 percent of 5,500 cases submitted were certified for review.

Bruce Brusavich, a Torrance-based partner with Agnew Brusavich, said he did not think this was the right case to take to the Supreme Court.

"The main claim in the case was that victims [involved in MICRA-capped cases] can't get counsel," said Brusavich. "I think the fact that his client had counsel made that argument difficult."

Christopher B. Dolan, a San Francisco-based lawyer who represented the plaintiff, Jessica Chan, said in an email that "it's a shame that big moneyed interests get to crush little people again and again. Politicians won't stand for these people, can't be done at the ballot box, and the Supreme Court has turned a deaf ear to the people who are suffering and dying from malpractice and can't find a lawyer."

In the underlying matter, a jury in San Francisco County Superior Court decided physician Peter Curran was negligent in his care of Chan's mother, who died following heart surgery.

Chan was awarded \$1 million for pain and suffering, but those damages were later reduced under MICRA to \$250,000.

Her appeal was the latest in a series of efforts by MICRA reform proponents to get the state Supreme Court to address the issue. The court has not considered the policy's constitutionality since 1985.

In November 2014, voters also rejected a ballot initiative that would have raised the cap to \$1.1 million.

Many observers noted that, given the reaction by voters and courts, the next avenue the plaintiffs' bar should look toward is the Legislature. But opponents hope their adversaries will give up the fight, given MICRA reformers' past failures in Sacramento.

"The Legislature has spoken, the courts have spoken, and the people have spoken at the most recent proposition," said Kenneth R. Pedroza, a San Marino-based partner with Cole Pedroza LLP who defended Curran on appeal. "I think it's time to accept that MICRA is the law in California and people want it to remain the law in California."

Fred J. Hiestand, the Sacramento-based general counsel of the Civil Justice Association of California, which opposes MICRA reform, thinks the response from plaintiffs will be to file more "frivolous lawsuits."

"They'll grouse and, given their performance in the past, they'll probably keep filing frivolous lawsuits until they get slapped for filing frivolous lawsuits," he said. "I hope the plaintiffs' bar will get the message at some point."