



# MICRA Modernization 2022

A Sustained Era of Stability

May 23, 2022



# What Is MICRA

- + For decades, California's landmark medical malpractice laws – the Medical Injury Compensation Reform Act (MICRA) – have successfully struck a balance between compensatory justice for injured patients, while maintaining an overall health care system that is accessible and affordable for all.
- + MICRA has ensured injured patients receive appropriate compensation, while keeping liability rates affordable, accessible and predictable.





# What Is MICRA

## Seven Original Statutory Provisions of MICRA, as Enacted in 1975

1. Advance Notice of a Claim
2. Statute of Limitations
3. Binding Arbitration of Disputes
4. Evidence of Collateral Source Payments
5. Periodic Payments of Future Damages
6. \$250,000 Limit on Recovery of Non-Economic Damages
7. Tiered Attorney Contingency Fee Structure  
(Punitive Damages Statute added in 1987)

# 2022 Ballot Measure

- + Over the years, California's physician and provider communities have repeatedly defended MICRA through expensive battles at the ballot, in the courtroom and in the legislature.
- + The latest of these threats to MICRA was the so-called '**Fairness for Injured Patients Act (FIPA)**' initiative, which was slated for the November 2022 ballot before proponents withdrew it as part of the agreement.
- + If it had passed, this initiative would have effectively **eliminated MICRA's cap on non-economic damages and attorney's fees** by creating a new, broadly-defined category of "catastrophic injuries" not subject to the cap.



# 2022 Ballot Measure

- + Directly targeted physicians' personal assets
- + Would have required providers to pay attorneys fees in addition to compensation
- + Would have had a chilling effect on the entire health care system
- + Trickle-down effect would have been borne primarily by low-income patients, who would have faced higher costs and restricted access to care.



# Costs if FIPA Had Passed

- + Significant increase in litigation with unpredictably high verdicts
- + No less than doubling of malpractice insurance premiums
- + Public health care costs would have gone up by “hundreds of millions” of dollars every year, according to the non-partisan California Legislative Analyst’s Office.
- + The increased risk and burden of practicing in California would have forced providers to limit services or practice in other states.
- + Employers would have been forced to cut health care benefits or require employees to pay more to make up for higher health care premiums.





# Threat of FIPA's Passage

## Polling and Focus Groups: Consistent Findings

- + Voters have no knowledge of MICRA or the cap on non-economic damages.
- + Hearing that the cap was put in place in 1975 and not adjusted since resulted in voter support for the measure.
- + Sympathy for health care professionals did not transfer to a “no” vote on the measure.
- + Emotive stories from proponents were effective at creating sympathy and a yes vote.



# AB 35 Modernizes and Updates MICRA

- + AB 35 was a result of an agreement reached between Californians Allied for Patient Protection (CAPP) and the plaintiffs' attorneys
- + AB 35 extends the long-term predictability and affordability of medical liability insurance premiums
- + Modernized framework will keep **MICRA's essential guardrails** solidly in place for patients and providers alike.





# Who Made the Agreement?

- + Californians Allied for Patient Protection (CAPP), the large and diverse coalition working to protect MICRA, approved the agreement.
  - California Medical Association
  - California Hospital Association
  - California Dental Association
  - Medical malpractice insurance carriers
  - Community clinics
  - Planned Parenthood Affiliates of California and MANY more.



# Maintaining Important Current Protections

- + Under AB 35, important guardrails of MICRA have been maintained:
  - Option for binding arbitration
  - 90-day advance notice of claim
  - One-year statute of limitations
  - Allowing other sources of compensation to be considered in award determinations (collateral source rule)
  - Limits on plaintiff's attorney's contingency fees
  - Periodic payments



# New Protections

## Allowing Expressions of Sympathy, Apologies and Statements of Fault

- + The modernized framework establishes new evidentiary protection for all pre-litigation expressions of sympathy, regret, or benevolence, including statements of fault, by a health care provider.
- + Often, a patient's decision to file a medical malpractice lawsuit is triggered by a failure in communication, not negligence.
- + Allowing physicians and patients to have a full and open conversation after an unforeseen outcome will lead to greater accountability, patient safety and trust.

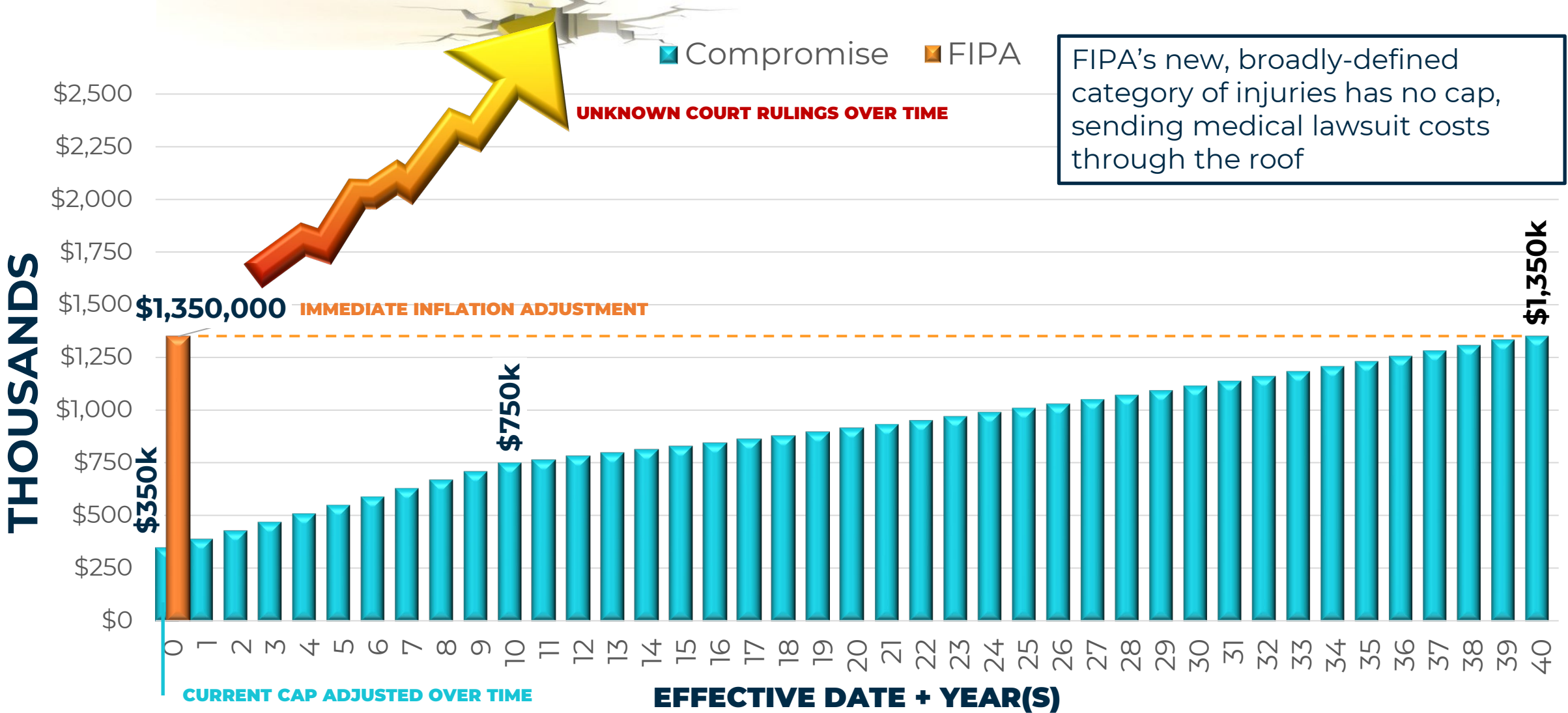


# Modernizing and Updating MICRA

- + Current limit on non-economic damages in medical malpractice cases is \$250k
- + While FIPA would have effectively eliminated the cap on non-economic damages entirely, under AB 35:
  - Cases not involving a patient death: **\$350k** as of January 1, 2023, gradually increasing over 10 years to **\$750k**
  - Cases involving a patient death: **\$500k** as of January 1, 2023, gradually increasing over 10 years to **\$1 million**
- + 2% annual inflationary adjustment after 10 years
- + Applies to cases filed and arbitration demanded on or after January 1, 2023 (not those currently pending)



# Cap Comparison: AB 35 Compromise vs. FIPA

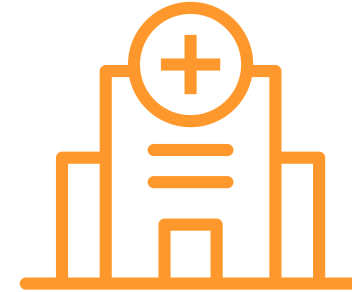




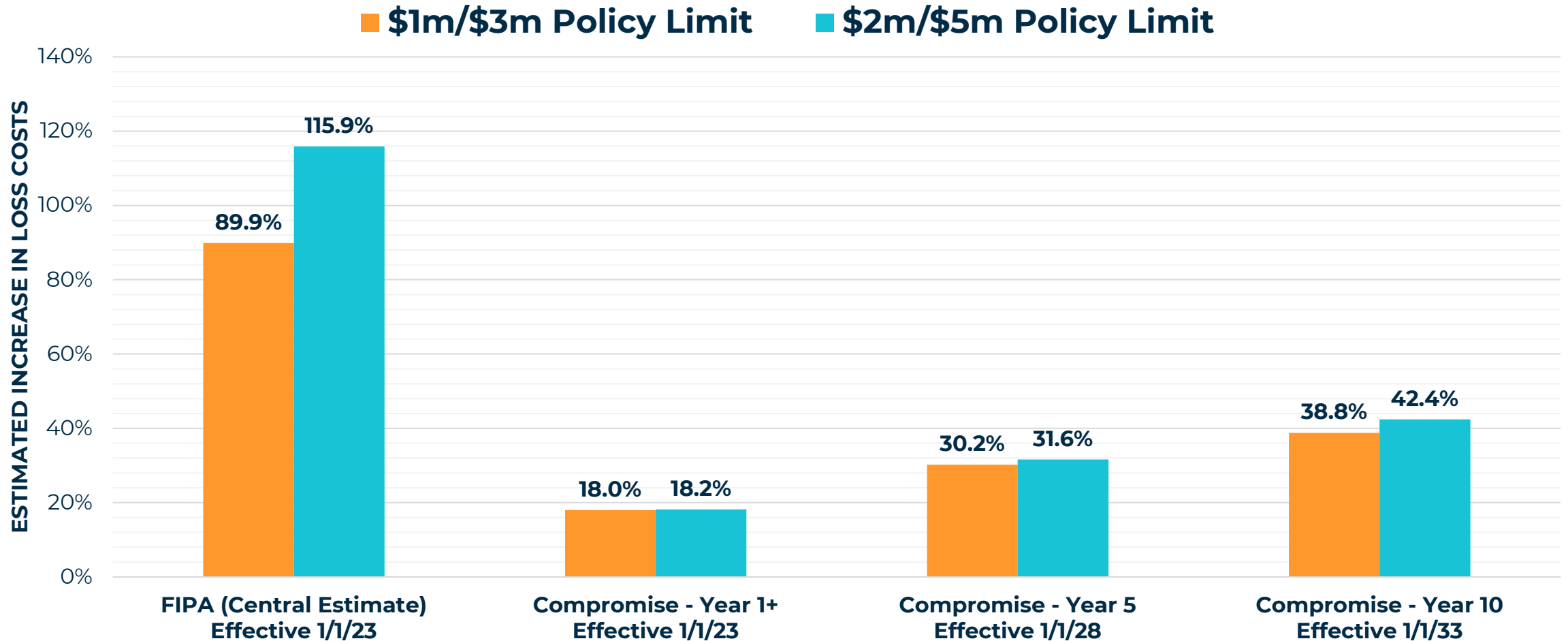
# Three New Cap Categories

AB 35 also creates three categories, which may or may not apply depending on the facts of each particular case. In all cases, a health care provider or health care institution can only be held liable for damages under **one** category regardless of how the categories are applied or combined

- + One cap for health care providers (regardless of the number of providers or causes of action)
- + One cap for health care institutions (regardless of the number of institutions or causes of action)
- + One cap for unaffiliated health care institutions or providers at that institution that commit a **separate and independent** negligent act



# Costs Due to Proposed Insurance Cap Changes



Premium estimates provided to CMA by independent third-party actuarial firm.



# Key Takeaways: MICRA Modernization vs. FIPA

Key Provision	MICRA-Mod	FIPA
Option for binding arbitration	✓	✓
90-day advance notice of claim	✓	✓
Cap on non-economic damage awards	✓	<b>UNLIMITED</b>
One-year statute of limitations	✓	<b>X</b>
Allowing other sources of compensation to be considered in awards	✓	<b>X</b>
Limits on plaintiff's attorney's contingency fees	✓	<b>X</b>
The ability to pay awards over time	✓	<b>X</b>
Discovery and evidentiary protections for all pre-litigation expressions of sympathy, regret, or benevolence, and statements of fault by a provider to a patient/family	✓	<b>X</b>
Judicial discretion to throw out frivolous lawsuits <sup>1</sup>	✓	<b>X</b>
Limits on qualifications of expert witnesses <sup>2</sup>	✓	<b>X</b>
Protections from wage garnishments, liens & levies on personal assets <sup>3</sup>	✓	<b>X</b>
Protection from paying prevailing plaintiff's attorney fees out of pocket <sup>4</sup>	✓	<b>X</b>

FOOTNOTES: 1) FIPA creates a certificate of merit process that attorney can satisfy by stating that they attempted to contact three health care providers, but they declined or didn't respond; 2) FIPA expands who can testify as an expert against a health care provider; 3) FIPA includes a new requirement that medical negligence awards be satisfied by lien, levy, & wage garnishment on health care providers' personal assets; 4) FIPA contains a new mandate that health care providers pay prevailing plaintiff's attorney's fees in addition to damages (not reciprocal)

# A National Model

- + **AB 35 has been signed** by Gov. Newsom and is now codified in law.
- + As part of the agreement, FIPA's proponents have **removed it from the November ballot**, precluding another costly and unpredictable ballot fight in November.
- + This watershed agreement ends a decades long political battle and has ushered in a new era of stability around malpractice liability in California for decades to come.





**Questions?**