PARTIES/ATTORNEYS

Plaintiff	Great American Insurance Company Everest National Insurance Company	John H. Horwitz Chen Horwitz & Franklin
Defendants[1]	Marian Regional Medical Center Dignity Health and Victor Pulido, DO	William Clinkenbeard Clinkenbeard, Ramsey, Spackman & Clark, LLP H. Thomas Watson Steven S. Fleischman Horvitz & Levy LLP
	Nicholas Slimack, MD	Michael J. Trotter, Esq. Brenda Ligorsky, Esq. Kelly, Trotter & Franzen
	Daniel Oh, MD	Dennis R. Thelen Kevin E. Thelen Lebeau-Thelen, LLP
	Nicholas King, MD	DOE 5—Added by amendment 9/29/20. POS filed 7/28/21. No answer, no dismissal, no default.

TENTATIVE RULING

The court directs the parties to be prepared to address the following:

- Submission of briefs related to the logistics of trial management (August 27, 2024, Minute Order);
- The status of Nicholas King, MD as a defendant.

(1) Motion: Determine Applicable Law

[1] The dismissed defendants include: William Wright, MD (dismissed 8/16/23); Anthony Minasaghanian, MD (dismissed 7/13/23); Alois Zaunder, MD (dismissed 3/16/22); Brian Fields, D.O. (dismissed 7/23/21), Cottage Health, Santa Barbara Cottage Hospital (dismissed 12/26/23) and Thomas Church (dismissed 9/9/24).

The court determines that Civil Code section 3333.2 (Non-economic Damages Limit of $250,000 per Underlying Plaintiff) applies to this proceeding. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 110.) Given the policy reasons of MICRA as expressed in *Western Steamship* and absence of opposition from plaintiff, the court is inclined to determine Civil Code section 3333.1 (permitting introduction of collateral source evidence) applies in this case. Finally, the court determines that Code of Civil Procedure section 667.7 section (permitting periodic payment of future damages awards) does not apply in this matter.

(2) MIL: Preclude Plaintiffs from Arguing They Are Affiliated With Or Represent The Underlying Plaintiffs

Absent any evidence such argument is likely to occur (*Kelly v. New West Fed. Sav.* (1996) 49 Cal.App.4th 659, 670), the court denies the motion. The court notes that plaintiffs are, at a minimum, affiliated with Underlying Plaintiffs to the extent they settled the underlying litigation by payment from them. There is no reason to prohibit mention of that. The court accepts plaintiff's representation that it would not engage in such conduct, and will otherwise entertain any objections during trial, should they become necessary.

(3) MIL: To Limit Evidence Of Damages To What Was Known At Time Of Settlement Between The Underlying Parties

The court finds this motion to be premature. While this evidence may indeed be admissible as impeachment evidence, the court is not yet in a position to make that ruling. The motion is denied without prejudice to its renewal before trial (if a better record on the point has been developed) or during trial.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

Adriana Velazquez was injured in a car accident on July 9, 2018, was evaluated in the emergency department at Marian Regional Medical Center (Marian,) and remained there until July 10, 2018, when she was transported to Santa Barbara Cottage Hospital for a surgery not available at Marian.

Ms. Velazquez and her spouse (sometimes referred to as "Underlying Plaintiffs") subsequently sued Corazon Del Campo, LLC, Lidia Bibiano, and Santa

Maria Farms for motor vehicle negligence, general negligence, negligence per se, and loss of consortium. (Case No. 18CV03707, Judge Beebe.) Chubb Insurance Co., Everest Insurance Co. ("Everest"), and Great American Ins. Co. ("GAIC") provided defenses for their respective insureds. On April 24, 2019, the Velazquezes resolved their claims for $20 million dollars. Pursuant to the terms of the comprehensive release negotiated between the parties, Chubb paid $3 million dollars, Everest paid $7 million dollars, and GAIC paid $10 million dollars on behalf of their insureds.

On June 11, 2020, Everest, GAIC, and Chubb Ins. Co. (plaintiffs or plaintiff insurers) filed a complaint alleging the following causes of action: (1) subrogation; (2) equitable comparative indemnity; and (3) declaratory relief. On May 15, 2023, the second cause of action for equitable indemnity was dismissed. On June 12, 2023, the court dismissed the declaratory relief cause of action. Thus, the sole remaining cause of action is for subrogation.

Trial is set to begin in this matter on February 24, 2024. The trial confirmation conference is set for January 13, 2025.

Defendants jointly move (1) for an order that the provisions of MICRA set forth in Civ. Code section §§3333.l and 3333.2 and Code Civ. Proc. §667.7 apply to this action; (2) for an order in limine to preclude plaintiffs from arguing they are affiliated with or represent the underlying plaintiffs; and (3) for an order in limine to limit evidence of damages to what was known at time of settlement between the underlying parties.

Housekeeping Matters

On August 27, 2024, the court heard argument on the motion for bifurcation and continued the matter to 9/23/24. The court ordered counsel to "to submit their Case Management statements as it relates to the logistics of the trial management prior to the 9/23/2024 hearing for the court to review." (August 27, 2024 Minute Order.) On September 16, 2024, the parties jointly stipulated to continue the trial. **Counsel has not yet submitted their statements. Counsel should be prepared to discuss this.**

Nicholas King, MD was added by substitution for DOE 5 by amendment on September 29, 2020. A proof of service was filed July 28, 2021. No answer has been filed and no default has been taken. **Plaintiff should be prepared to indicate its position on this defendant.**

1. Whether the MICRA Provisions Identified Apply to this Action

Defendants request that the court order that the MICRA statutes apply to the plaintiffs' cause of action against these healthcare provider defendants based upon their alleged professional negligence. Plaintiff characterizes this request as far

too broad and argues that since some provisions under MICRA do not apply to this action the court should reject the request entirely. However, defendants have identified three specific provisions on which it would like a ruling: (1) the non-economic damages limit of $250,000 per Underlying Plaintiff under Civ. Code §3333.2 because this action was filed in June 2020; (2) the periodicization of future damages under Code Civ. Proc. §667.7; and (3) the admissibility of collateral source evidence under Civ. Code §3333.1. The court will consider the applicability of only those provisions identified.

As these provisions impact the admissibility of evidence related to damages, the court finds it useful to discuss how those damages will be established. If damages are proven simply by evidence of how much plaintiffs paid in settlement, these rules seem to have no application. However, it does not appear that is the measure. In *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 118, the Cal. Supreme Court observed that as the indemnity plaintiff,[2] plaintiff insurers have the burden of proving not only the medical provider's negligence but the amount of the injured party's resultant damages. (Ibid.)) The court specifically held that the "Court of Appeal erred in concluding that substantial evidence of a reasonable settlement adequately established the proper amount of [indemnity plaintiff's] recovery." (*Id.*) Finally, it stated: "In this case, we need not decide under what, if any, circumstances an indemnitee may in fairness and equity, and consistent with the obvious due process implications, invoke a reasonable good faith settlement as determinative of its rights against an indemnitor. [ ] There is no dispute that the hospital was not a party to the [earlier settlement], nor does the record show that the hospital received notice of the proposed settlement. Thus, there is no basis upon which to conclude that hospital could have protected its interests in the earlier proceeding." (*Western Steamship Lines, Inc., supra*, 8 Cal.4th at 118.) Similarly, no such evidence has been presented here. The court thus concludes that plaintiff insurers have the burden of proving not only the medical provider's negligence but the amount of the injured party's resultant damages. While the amount in settlement will presumably act as a limiting factor (should it be necessary), it is not by itself the measure of damage.

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[2] As case law has established, a general liability insurer that has paid a claim to a third party on behalf of its insured may have an equitable right of subrogation against other parties who contributed to the harm suffered by the third party (joint tortfeasors) under an equitable indemnification theory. (*Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co*. (2010) 182 Cal.App.4th 23, 32; see also *Smith v. Parks Manor* (1987) 197 Cal.App.3d 872, 878—"an insurer who has paid a claim by an insured whom it is required by contract to indemnify is subrogated to its insured's right to indemnity from a third party who has contributed to the loss suffered by the insured;" and see *Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522—"The sole cause of action in Essex's second amended cross-complaint is one for indemnity based on equitable subrogation.") Thus, although the sole remaining cause of action is for subrogation, it is based on equitable indemnification and *Western Steamship's* holding seems to apply.

With this understanding as background, the court will consider each identified MICRA provision.

a. Civil Code section 3333.2 (Non-economic Damages Limit of $250,000 per Underlying Plaintiff)

For cases filed through December 31, 2022, damages for "noneconomic losses" in an injury action against a health care provider based on professional negligence cannot exceed $250,000. (Former Civ. C. § 3333.2; *Fein v. Permanente Med. Group* (1985) 38 Cal.3d 137, 157-164; *Western Steamship Lines, Inc., supra,* 8 Cal.4th at p. 107.) The court finds the Civil Code § 3333.2 damages cap also applies in an indemnity action against a health care provider brought to recoup amounts paid to a third party on account of the provider's professional negligence.

As a general observation, defendant's argument that these MICRA provisions apply is based largely on plaintiff's concession that this action is "based on medical negligence," which is covered by MICRA.[3] This oversimplifies (and thus clouds) the analysis. The court finds *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* once again to be instructive. There, a cruise ship employee fell ill on board the ship. (*Western Steamship, supra*, 8 Cal.4th at p. 104.) She was given medical attention on the ship and then transferred to a land-based hospital, where she was improperly intubated and never regained consciousness. (*Id*. at pp. 104–105.) The guardian for the injured plaintiff brought a negligence action against the cruise ship owner, who settled with the plaintiff and then sued the treating hospital for indemnification. (*Id*. at p. 105.) The question before the court was whether section 3333.2 "applies in an action for partial equitable indemnification by a concurrent tortfeasor." (*Id*. at p. 104.) The Court of Appeal held that this limitation does not apply because Western's claim for indemnity is distinct from Lennon's medical malpractice suit and seeks only economic damages resulting from its settlement payment. Thus, it does not come within the express terms of section 3333.2. However, the Cal. Supreme Court disagreed, stating:

> "This analysis misperceives the proper scope of the court's inquiry in cases of equitable indemnification. The issue here is not a narrow question of statutory construction, but a broader examination of whether Western's recovery, in whole or in part, is appropriate under all relevant circumstances. In determining the availability of equitable indemnity, each case must be evaluated in its own unique context to determine whether and to what extent one concurrent tortfeasor is permitted to recover from another."

[3] "Plaintiffs cannot take advantage of MICRA provisions to toll the statute of limitations on the one hand and, on the other hand, deny that their action against the defendants is one based upon alleged medical negligence to which MICRA applies when it suits them for other purposes. Either the provisions of MICRA apply to the action or they do not. This is not a situation in which a party can "pick and choose" some provisions of MICRA to apply to defeat a motion for summary judgment on statute of limitations grounds, but resist application of other MICRA provisions that limit the medical defendants' liability for damages." (Motion, p. 4.)

(*Western Steamship, supra*, 8 Cal.4th at p. 107.)

The court proceeded to review the principles of indemnification and stated "resolution of this case must of necessity contemplate matters beyond the four corners of section 3333.2. In assessing whether indemnity is 'appropriate,' the court's task does not begin or end with a determination that Western is entitled to full recovery because it does not seek any 'noneconomic" damages.'" (*Western Steamship, supra*, 8 Cal.4th at p. 110.) After careful review of the legislative intent underlying MICRA in general[4] and section 3333.2 in particular, we conclude that as a necessary adjunct to effectuating the statutory purpose and goals, a health care provider may invoke the $250,000 limit on noneconomic damages in an action for partial equitable indemnity based upon professional negligence. (*Id.*) The court found further support for their conclusion from the premise that against the indemnitee, the indemnitor can invoke any substantive defense to liability that would be available against the injured party. (*Western Steamship, supra*, 8 Cal.4th at p. 115.) Finally, the Cal. Supreme Court held:

> "[Civil Code section 3333.2] operates as a limitation on liability. []To the extent it precludes recovery for noneconomic damages against health care providers in excess of $250,000, it concomitantly limits their joint liability irrespective of proportionate fault. Thus, concurrent tortfeasors have no right to indemnification beyond this amount. To hold otherwise would undermine the Legislature's express limit on health care liability for noneconomic damages as well as jeopardize the purpose of MICRA to ensure the availability of medical care."
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> . . . . If, under section 3333.2, a health care provider has no liability for noneconomic damages in excess of $250,000, then a concurrent tortfeasor that . . . settles with the injured party for a greater amount has not been "compelled to pay" on behalf of another who would have otherwise incurred the loss. In other words, regardless of the relative apportionment of fault, the health care provider is not unjustly enriched by the payment of damages for which it is not legally obligated.
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> . . . . [T]he Legislature has already determined that as between a negligent health care defendant and an innocent plaintiff, the plaintiff will bear the

[4] In particular, the court observed "MICRA [] reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs. With specific reference to section 3333.2, this court has also observed that "[o]ne of the problems identified in the legislative hearings was the unpredictability of the size of large noneconomic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses. The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates." (*Western Steamship, supra*, 8 Cal.4th at p. 112.)

> loss of noneconomic damages over the statutory limit. Given the public policy considerations previously discussed, we see no unfairness in shifting this burden instead to a negligent non-MICRA defendant in the case of concurrent tortfeasors."

(*Western Steamship Lines, Inc., supra,* 8 Cal.4th at 116-117.)

Western Steamship neatly resolves this question as well as provides a roadmap for analysis of the successive requests. Plaintiff has not identified any opposition to the request for application of Civil Code section 3333.2 to this proceeding. The court determines it is applicable.

b. Civil Code section 3333.1 (Introduction of Collateral Source Evidence)

The "collateral source" rule "provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 729.) Therefore, the collateral source rule precludes a defendant from presenting evidence that an injured plaintiff's medical expenses have been paid by an independent source. (*Helfend v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 1, 9.)

Civil Code section 3333.1 modifies the rule with regard to medical malpractice cases. As pertinent, that section provides:

> "(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.
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> "(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant."

The effect of this statute has been explained as follows: "The collateral source provision before us ... is one of the provisions of MICRA which was intended to reduce the cost of medical malpractice insurance. Section 3333.1, subdivision (a) ... authorizes a defendant in a medical malpractice action to introduce evidence of a variety of 'collateral source' benefits—including health insurance, disability insurance or worker's compensation benefits. Apparently, the Legislature's assumption was that the trier of fact would take the plaintiff's receipt of such benefits into account by reducing damages." (*Barme v. Wood* (1984) 37 Cal.3d 174, 179.)

The parties have provided no independent analysis whether this particular code section should apply in an equitable indemnity case. Given the policy reasons of MICRA as expressed in *Western Steamship* and absence of opposition from plaintiff, the court is inclined to determine Civil Code section 3333.1 applies in this case.

c. Periodic Payment of Future Damages Awards (Code Civ. Proc. § 667.7)

Ordinarily, as at common law, damages awards—whether for past, present, or future damages—are compensable through a lump-sum judgment, payable in a lump-sum amount at the conclusion of trial (plus accruals of postjudgment interest. However, Code of Civil Procedure § 667.7 requires future damages awards of $50,000 or more against medical malpractice defendants to be ordered payable periodically if so requested by either party. (Former CCP § 667.7, subd. (a).)

Plaintiff specifically argues this code section does not apply to this action: "Plaintiff Insurers' damages were set on the day they settled with the Underlying Plaintiffs. They most certainly will not have, nor will they claim, compensable damages for "future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain or suffering of the judgment creditor," as future damages are defined in Subsection (e) of the statute. CCP Section 667.7 simply does not apply on the facts and posture of this case." (Opposition, p. 5, ll. 10-14.) This is contrary to the holding in *Western Steamship,* as described *infra.*

Nevertheless, as counseled by *Western Steamship*, the court must take into account the policies behind the enactment. The Legislature has helpfully announced its intent in the code itself:

> "It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs

> of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment."
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> (Code Civ. Proc., § 667.7, subd. (f).)

Code of Civil Procedure section 667.7 is thus intended to enable courts to provide for the needs of injured plaintiffs and their dependents for the length of time such monetary compensation is necessary. The goal is to prevent early dissipation of an award and ensure that when the plaintiff incurs losses or expenses in the future, the money awarded to him will be there. (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368; *Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 771–772.)

There is no need to serve that goal in this litigation. The underlying plaintiffs have settled and should these plaintiffs be successful in this litigation, the award will in no way serve to provide for the needs of the injured plaintiffs. Given these public policy considerations, the court determines that this code section will not apply in this matter.

2. Motion in Limine to Preclude Plaintiffs from Arguing They Are Affiliated With or Represent the Underlying Plaintiffs

Defendants argue the court should preclude plaintiffs Great American Insurance Company and Everest Insurance Company and their attorneys and witnesses from mentioning, arguing, or attempting to introduce evidence before the jury that said insurance companies either represent the interests of, or are affiliated with, Adriana and Miguel Velazquez. They argue the only reason plaintiffs Everest and GAIC would be so motivated would be to garner unwarranted sympathy from the jury, and to ignite the jury's passions and prejudices against the medical defendants.

Defendants provide no factual support for their motion. In limine motions lacking factual support and argument are improper. (*Kelly v. New West Fed. Sav.* (1996) 49 Cal.App.4th 659, 670.) For their part, plaintiffs take offense at the suggestion they would do any such thing, but otherwise do not oppose the motion.

Absent any evidence this is likely to occur, the court denies the motion. The court notes that plaintiffs are, at a minimum, affiliated with Underlying Plaintiffs to the extent they settled the underlying litigation with them. There is no reason to prohibit mention of that. The court accepts plaintiff's representation that it would not engage in such conduct, and will otherwise entertain any objections during trial, should they become necessary.

3. Motion in Limine to Limit Evidence of Damages to What Was Known At the Time of the Underlying Settlement

Defendant argues that any information learned after the settlement was agreed upon in April 2019, including information about Mrs. Velazquez's medical and mental conditions and treatments up through and including the present, could not have had any impact upon the decision to settle because that information wasn't known in April 2019.

As an element of their claim, plaintiffs must show defendants liability for their loss, e.g., the medical malpractice. This, of course, requires a showing of causation. They point out that in previous motions challenging causation, some defendants took the position that within an hour of the arterial occlusion, Ms. Velazquez's brain stem was effectively destroyed such that the subsequent 8-hour delay caused no further damage. Plaintiffs intend to prove this opinion to be scientifically and medically unsupportable. As part of that proof, Plaintiffs will offer evidence that there have been post-settlement improvements in Ms. Velazquez's condition. Based on that, Plaintiff's medical experts will opine that this is evidence that, even though Ms. Velazquez lost millions of brain stem cells for every hour of the delay, many cells survived well enough to keep functioning, heal, and/or re-route neural pathways to restore function. The experts will further opine that this recovery in brain stem function would have been greater but for that delay.

The court finds this motion to be premature. While this evidence may indeed be admissible as impeachment evidence, the court is not yet in a position to make that ruling. The motion is denied without prejudice to its renewal before trial (if a better record on the point has been developed) or during trial.