ISSUES

1. Does MICRA apply to legal malpractice?
2. Does MICRA apply to the ambulance company's employees?
3. Is a member of the public a third-party beneficiary of a contract between a private ambulance company and Redwood County?

FACTS

Plaintiff was injured and an ambulance was called. The ambulance company's dispatcher made a mistake, and the ambulance was delayed. Plaintiff's injuries and/or recovery were adversely affected by the delay.

Plaintiff went to the law firm of Cheatham & Vanisch just before the two-year statute had run. The firm filed a complaint, but never served it, and the case was eventually dismissed. Plaintiff now sues Cheatham & Vanisch for professional negligence and breach of contract. The firm claims it has no liability because of MICRA.

DISCUSSION

1. MICRA application to law firm

No authority was found for the proposition that MICRA governs legal malpractice actions. The MICRA provisions are sprinkled throughout various code sections. As an example, Civil Code § 3333.1 applies to "health care providers" in actions for "professional negligence." It defines "health care provider" as

> any person licensed or certified pursuant to Division 2 (commencing with § 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code.

It defines "professional negligence" as

> a negligent act or omission to act ***by a health care provider*** in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.
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> (Emphasis added.)

Since lawyers are clearly not health care providers, professional negligence by a lawyer cannot be covered by MICRA.

2. MICRA application to EMS company

The ambulance company will be protected by the MICRA limitations. *Cannister v. Emergency Medical Service* (2008) 160 Cal.App.4th 388. The plaintiff

in *Cannister*, a police officer, was riding in the back of an ambulance, escorting a person under arrest to the hospital. The ambulance was in an accident, injuring the officer and ending his career. The officer sued the ambulance company for negligence. The trial court subjected the plaintiff's case to MICRA limitations by allowing evidence of collateral payments. Plaintiff appealed, arguing that EMS workers are not health care providers and that the ambulance driver was not providing health care services at the time of the accident. *Id.* at 395.

The appellate court found that EMS workers *are* health care providers and that the EMS Company is protected by MICRA even when the EMS is merely driving the ambulance. "The services that EMT's provide to patients are 'inextricably identified' with the health of patients, and an ambulance company vicariously assumes the same standing with such patients through its licensed employees." *Id.* at 404. The EMS company itself would have the same protection as its licensed employees, hence MICRA would apply to the EMS company even for its dispatcher's negligence. *Id.* at 404.

To satisfy the second prong for coverage under MICRA, the conduct complained of must constitute "professional negligence." The MICRA statutes define "professional negligence" as negligence that occurs while the health care provider is providing services that are "within the scope of services for which the provider is licensed." Civ. Code, §§ 3333.1, subd. (c)(2), 3333.2, subd. (c)(2); Code Civ. Proc., §§ 340.5, 364, subd. (f)(2), 667.7, subd. (e)(4), 1295, subd. (g)(2); Bus. & Prof. Code, § 6146, subd. (c)(3). Here, the dispatcher's negligence occurred while the health care provider (the EMTs) were providing services that were within the scope of services for which they were licensed. Indeed, the *Cannister* court held that, as a matter of law, the act of operating an ambulance to

transport a patient to or from a medical facility is encompassed within the term "professional negligence." *Id.* at 404.

3. Third-party beneficiary theory

A third-party beneficiary theory probably will not work in this situation. Civil Code § 1559 governs third-party beneficiary law:

> A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it. This section excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it. A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract. Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. ***He is not a contracting party; his right to performance is predicated on the contracting parties [sic] intent to benefit him.***
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> (Emphasis added.)

Here, the contract between Redwood County and EMS provider most likely precludes third-party beneficiary status. For instance, the contract being forwarded with this memo contains express provisions indicating that there are no third party beneficiaries to the contract. Even if these are not the exact contracts in effect when plaintiff was injured, the terms of the contract that was in effect are likely similar. In addition, a review of several other California contracts between municipalities and EMS companies contained similar language precluding third-party beneficiaries.