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Elder Abuse and Dependent Adult Civil Protection Act – Litigation 101

UNDERSTANDING THE BASICS AND AVOIDING THE PITFALLS IN LITIGATING CLAIMS OF NEGLECT AND ABUSE FOR ELDERLY AND DEPENDENT ADULTS

The Elder Abuse and Dependent Adult Civil Protection Act

History

In 1982, the California legislature set out to protect the elderly and dependent adults from abuse, neglect and abandonment by enacting the Elder Abuse and Dependent Adult Civil Protection Act. The legislature acknowledged the risk that the elderly and dependent adults would be subject to abuse and neglect simply because of their standing as a vulnerable class. The Act established requirements and procedures for mandatory and nonmandatory reporting, investigation and criminal prosecutions. (Welf. & Inst. Code, § 15600, et seq.)

Additional measures were taken in 1991 to encourage victims and attorneys to prosecute claims of egregious abuse in a civil forum. These measures included adding a section to the Act which provided a plaintiff certain remedies "in addition to all other remedies otherwise provided by law." (Welf. & Inst. Code, § 15657.) Section 15657 provides that a plaintiff may recover attorney fees, costs and punitive damages, as well as pain and suffering in survival actions, if the plaintiff proved by clear and convincing evidence that the defendant was liable for physical abuse, neglect, or financial abuse and that the defendant was guilty of recklessness, oppression, fraud, or malice in the commission of the abuse. (Welf. & Inst. Code, § 15657, subd. (a).) These enhanced remedies will only be awarded to a plaintiff who is able to prove egregious abuse and neglect at this higher standard of proof.

Statutory definitions

The Act defines abuse as "[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" or "[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering." (Welf. & Inst. Code, §§ 15610.07, subd. (a), 15610.07, subd. (b).) As you will see, the Act ascribes very specific definitions to each type of abuse.

"Physical abuse," within the meaning of the Act, includes criminal conduct, the deprivation of food or water for extended periods, and the misuse of psychotropic medication. More specifically, "physical abuse" is defined as "(a) Assault, as defined in Section 240 of the Penal Code; (b) Battery, as defined in Section 242 of the Penal Code; (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code; (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water; (e) Sexual assault…; (f) Use of a physical or chemical restraint or psychotropic medication under any of the following

conditions: (1) For punishment …" (Welf. & Inst. Code, § 15610.63.)

As defined by the Act, "neglect" is "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57.) "Neglect" refers "to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404-405, quoting *Delaney v. Baker* (1999) 20 Cal.4th 23, 34.) Further, "the statutory definition of 'neglect' speaks not of the undertaking of medical services, but of the failure to provide medical care" for physical and mental health needs. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783, 786.)

The Act provides the following examples of "neglect": "[f]ailure to provide medical care for physical and mental health needs" (Welf. & Inst. Code, § 15610.57(b)(2)), "[f]ailure to protect from health and safety hazards" (Welf. & Inst. Code, § 15610.57, subd. (b)(3), and "[f]ailure to prevent malnutrition or dehydration" (Welf. & Inst. Code, § 15610.57, subd. (b)(4).)

Pleading claims under the Act

An attorney cannot, and should not, bring an elder abuse claim under the Act simply because seemingly neglectful conduct involved an elderly person. Being able to properly identify conduct which falls under "neglect" or "physical abuse" as envisioned by the Act is key.

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Knowing when to plead them

Attorneys may be enticed to bring claims under the Act because of the enhanced remedies. However, if the victim survives the abuse, a seasoned practitioner may opt to move forward with a lawsuit that does *not* allege claims under the Act. The reasoning is as follows. The plaintiff is no longer entitled to pre-death pain and suffering damages. The remaining enhanced remedies (e.g., attorney fees, costs and punitive damages) will only be awarded if the plaintiff proves by clear and convincing evidence that the defendant acted with oppression, fraud, malice or recklessness. On the other hand, if the conduct is egregious enough to substantiate an award for punitive damages pursuant to California Civil Code section 3294 under an intentional tort theory (e.g., battery, sexual assault), and the attorney believes she/he will be able to marshal evidence that will meet that higher standard of proof, a claim under the Act should be pursued.

A common pitfall is the misclassification of tortious conduct as "neglect" within the meaning of the Act. At first glance, the definition of "neglect" appears pretty straightforward: "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57.) However, in order for conduct to constitute "neglect" within the meaning of the Act and thereby trigger the enhanced remedies, a plaintiff must prove by clear and convincing evidence that the defendant (1) had responsibility in meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury (if the plaintiff alleges recklessness). (*Carter, supra,* 198 Cal.App.4th 396, 406-407.)

A go-to case which assists in making this important distinction between conduct that is negligent and conduct that falls under "neglect" is *Carter v. Prime Healthcare Paradise Valley LLC,* 198 Cal. App.4th 396. The *Carter* court catalogued factual allegations which it held sufficient to satisfy the Act's culpability standard of oppression, fraud, malice or recklessness:

—A skilled nursing facility (1) *failed to provide an elderly man suffering from Parkinson's disease with sufficient food and water and necessary medication*; (2) left him unattended and unassisted for long periods of time; (3) left him in his own excrement so that ulcers exposing muscle and bone became infected; and (4) *misrepresented and failed to inform his children of his true condition*. (*Covenant Care, supra,* 32 Cal.4th at p. 778.)

—An 88-year-old woman with a broken ankle "was frequently left lying in her own urine and feces for extended periods of time" and she developed pressure ulcers on her ankles, feet and buttocks that exposed bone, "despite plaintiff's persistent complaints to nursing staff, administration, and finally, to a nursing home ombudsman." (*Delaney, supra*, 20 Cal.4th at pp. 27, 41.)

—A facility caring for a dependent adult with a known condition causing progressive dementia, requiring nutrition and hydration through a gastrostomy tube, and subjecting her to skin deterioration, *ignored a medical care plan requiring the facility to check the dependent adult's skin on a daily basis* and failed to notify a physician when pressure ulcers and other skin lesions developed. (*Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 83-87.)

—A 78-year-old man admitted to a skilled nursing facility "was abused, beaten, unlawfully restrained, and denied medical treatment." (*Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1512.)

—The staff of a nursing home (1) failed to assist a 90-year-old, blind and demented woman with eating; (2) used physical and chemical restraints to punish the elder and prevent her from obtaining help; and (3) physically and emotionally abused the elder by bruising her, "withholding food and water, screaming at her, and threatening her." (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 116-117.)

—A skilled nursing facility (1) failed to provide adequate pressure relief to a 76-year-old woman with severe pain in her left leg and identified as at high risk for developing pressure ulcers; (2) dropped the patient; (3) left "her in filthy and unsanitary conditions"; and (4) *failed to provide her the proper diet, monitor food intake and assist her with eating.* (*Country Villa Claremont Healthcare Center, Inc. v. Superior Court* (2004) 120 Cal.App.4th 426, 430, 434-435.)

—A physician "conceal[ed] the existence of a serious bedsore on a nursing home patient under his care, oppose[d] her hospitalization where circumstances indicate[d] it [was] medically necessary, and then abandon[ed] the patient in her dying hour of need." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 973.)" (*Carter, supra,* 198 Cal.App.4th 396, 405-406 (emphasis added).)

Knowing how to plead them

There is a split in authority regarding whether claims under the Act are separate causes of action or if the Act is remedial (i.e., not adding a cause of action or theory of relief). (*Perlin v. Fountain View Management, Inc*. (2008) 163 Cal.App.4th 657.) The better practice is to plead elder abuse as a separate cause of action and also seek its remedies on each of the other causes of action that support allegations of "neglect" or "physical abuse."

Section 15657 is instrumental in this regard. Section 15657 provides that the following elements in a civil action under the Act must be pled: (1) whether the victim was an "elder" (Welf. & Inst. Code, § 15610.27) or a "dependent adult" (Welf. & Inst. Code, § 15610.23); (2) plead facts amounting to "neglect" (Welf.

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& Inst. Code, § 15610.57) or "physical abuse" (Welf. & Inst. Code, § 15610.63); (3) in carrying out the "neglect" or "physical abuse" the defendant acted with requisite culpability, i.e., recklessness, oppression, fraud or malice. If the claim is for "neglect" then an additional element must be pled, i.e., the defendant had "care or custody" of the elder or dependent adult. (See *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 158). After *Winn*, a plaintiff bringing a claim of "neglect" must plead the "existence of a robust caretaking or custodial relationship – that is, a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Ibid*.) Causation must also be pled with specificity. A plaintiff must plead specific facts that a breach of a duty caused the injury or harm. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 528.)

There are multiple theories which can be pursued to establish "neglect" under the Act. Under the "failure to provide care" theory, a defendant will be liable if there exists a significant pattern of withholding of the care showing a deliberate indifference. (*Sababin, supra*, 144 Cal.App.4th 81.) Inadequate staffing can be proved by the plaintiff identifying a specific staffing regulation that the facility allegedly violated and then showing a known pattern of violating the staffing regulation constituting recklessness. (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339.)

A presumption of "neglect" per se under California Evidence Code section 669 may be supported by establishing a standard of care through regulations and statutes. Commonly relied-upon statutes and regulations include the California Code of Regulations (22 CCR § 72301, et seq.); the Code of Federal Regulations (42 CFR § 483.1, et seq.); state statutes governing nursing facilities (Health & Saf. Code §§ 1417, et seq., 1599.65 et seq); and federal statutes (42 USC § 1395i-3). Violation of criminal statutes, such as the California Penal Code, may also be the basis of "neglect" per se. Here are some examples of common deficiencies and their corresponding regulations: pressure injuries (42 CFR § 483.25(c)); accidents/hazards (43 CFR § 483.25(h)); malnutrition (42 CFR § 483.25(i)); dehydration (42 CFR § 483.25(j)); medication errors (42 CFR § 483.25(m)); periodic and comprehensive resident assessment (42 CFR § 483.20); comprehensive care plan to ensure resident's highest practicable well-being (42 CFR § 483.20(k); sufficient nursing staff (42 CFR § 483.30); maintenance of clinical records in accordance with accepted professional standards of care (42 CFR § 483.75).

Standards of culpability

There are four standards of culpability in claims of "neglect" and "physical abuse" under the Act. These standards are recklessness, oppression, fraud, or malice. The standards must be pled accordingly: "recklessness" is the deliberate disregard of the high degree of probability that an injury will occur or "the conscious choice of a course of act with knowledge of the serious danger to others involved in it" (Civ. Code, § 3294, subd. (c); *Delaney, supra*, 20 Cal.4th 23); "malice" is an intended course of conduct carried on to cause injury or "despicable conduct" carried on in conscious disregard of the probability of injury with "despicable conduct" being conduct which is "vile" or "contemptible" (Civ. Code, § 3294, subd. (c); *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704); "oppression" is despicable conduct that subjects the victim to cruel and unjust hardship (Civ. Code, § 3294, subd. (c)); and "fraud" is defined as actual intent to trick or deceive, intent to induce reliance, and intent to deprive the victim of property, legal rights or otherwise cause injury. (Civ. Code, § 3294, subd. (c); *College Hospital, supra*, 8 Cal.4th 704).)

Identifying defendants

These cases typically involve multiple defendants with joint responsibility. For example, a case arising from "neglect" against a resident at a skilled-nursing facility may involve the following defendants: the facility, the resident's physician, the director of nursing, the administrator, a charge nurse, or even the medical group that the physician belongs to. Comparative-fault principles apply in claims brought under the Act, making it all the more important to identify all culpable defendants. If a culpable party is not joined, and a defendant is able to point to that empty chair during trial, a plaintiff's award may be drastically reduced by the proportionate share of the culpable party who was never joined in the action.

A defendant may also be the corporate parent of the nursing facility (i.e., the person(s) who control(s) the operation of the facility). A corporate parent may be directly liable for its own conduct, as opposed to an alter ego theory of liability, if the corporate parent exercises some degree of control over the operations of the facility. (See 22 CCR § 72501.) A licensed administrator can be liable for failure to properly administer the facility (e.g., inadequate staffing).

You should exercise great caution when you name the corporate employer as a defendant. There is no vicarious liability for claims under the Act; rather, the plaintiff must satisfy the culpability as to each defendant, as set forth in California Civil Code section 3294(b). For claims of "neglect" or "physical abuse" against a principal or an employer, you must prove the elements set forth in California Civil Code section 3294 by establishing that a "managing agent" of the corporate employer either (1) employed an employee with advance knowledge of

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the employee's unfitness (e.g., past violations imputing knowledge to the corporate employer); (2) authorized or ratified the wrongful conduct; or (3) was personally guilty of oppression, fraud or malice on part of an employee. "Managing agents" include directors of nursing, administrator, and charge nurses if they are involved in the decision-making at the facility. (See 22 CCR §§ 72327(c); 72501(c).) The case which has proven instrumental to many practitioners in gaining a meaningful understanding of managing agent liability is *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.

In addition to authorization and ratification, employers may be liable for the acts of unfit employees the employer hired when there is advance knowledge of the employee's unfitness but nevertheless the employer, in conscious disregard of the rights or safety of the residents/patients, hires the employee. Failure to discharge a known "unfit employee" is evidence of ratification. (*C.R. v. Tenet Healthcare Corp*. (2009) 169 Cal.App.4th 1094, 1110-1111.)

Identifying case-supporting documents

Although the focus of this article is not discovery, it is important for attorneys to understand the universe of documents that may exist in elder/dependent adult abuse cases. There are several key documents that will assist an attorney in establishing that the conduct at issue indeed falls within the definitions of "neglect" and "physical abuse" and that the conduct meets the heightened culpability standards.

At the onset of the case, the attorney should set out to secure the following key documents: (1) state investigation (both through the State of California and through an FOIA request); (2) medical records, including pre-admission assessments, admission assessments, care plans, progress notes, doctor orders and notes; (3) the Medication Administration Record (MAR) and Treatment Administration Record (TAR); (4) Minimum Data Set (MDS); (5) documents which will assist you in measuring facility performance, including quality measure reports, previous surveys, and previous complaints; (6) cost reports including reports from Medicaid, patient revenues, net expenses, staff salaries, salaries of others, travel and entertainment and cash on hand. The cost report will also alert you as to whether money is going to the parent organization; often this is earmarked as "administrative" costs. Lastly, staffing documents are important to determine identities of individuals charged with care of resident, schedules, task-time, workload, labor analysis, acuity, turnover, and other patient MDS.

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