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California Supreme Court Adds Clarity to United States Supreme Court's Guideposts for Evaluating Constitutionality of Punitive Damages Awards in Insurance Bad Faith Case

By John K. DiMugno

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California's Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act), Welf. & Inst. Code, § 15657 et seq., creates a cause of action for "neglect" of an elder and defines "neglect" in § 15610.57, subd. (a), as "[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" (emphasis added). Stating a cause of action under the Elder Abuse Act allows a plaintiff to recover heightened remedies not available under common law theories of liability, such as attorney fees and costs, pre-death pain and suffering, and punitive damages after the elder dies.

A broad interpretation of "care or custody" of an elder therefore has the potential to convert a garden variety professional negligence or insurance bad faith action into an elder abuse cause of action with heightened remedies. Managed care entities could be subject to liability under the Elder Abuse Act for decisions to deny medical care to elders. Moreover, attempts to recover against medical personal would expose the financial incentives inherent in managed care to greater scrutiny. Plaintiffs could argue that health care providers have a duty to disclose financial incentives to deny care and a duty not to act on those incentives.

Arguably, the statute's use of the disjunctive "or" requires that the term "care" be interpreted broadly to include a variety of defendants who do not have physical custody of an elder, such as health care providers, health insurers and health maintenance organizations. The California Supreme Court, however, recently rejected this argument and equated care with

custody in *Winn v. Pioneer Medical Group*, __ Cal.4th __, 2016 WL 2941968 (May 19, 2016). The court's decision substantially limits the reach of the Elder Abuse Act.

Plaintiffs in *Winn* had argued that the defendant physicians' failure to refer an elder patient to a specialist constituted "neglect" under the Elder Abuse Act. In holding that the physicians did not satisfy the "care or custody" element of a neglect cause of action under the Elder Abuse Act, the supreme court explained that "the Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant — not the defendant's professional standing — that makes the defendant potentially liable for neglect." (Slip op., p. 2.)

The court explained that the specific examples of neglect listed in 15610.57, subdivision (b), reinforced its interpretation of the care or custody requirement in § 15610.57, subd. (a). According to the court, "[w]hat they each seem to contemplate is 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." (Id. at p. 10.) The court added that "neglect requires a caretaking or custodial relationship that arises where an elder or dependent adult depends on another for the provision of some or all of his or her fundamental needs." (Id., p. 13.)