ELDER LAW & LONG TERM CARE

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Prognosis Guarded: Emerging Insights in Elder Care Litigation

by Kippy Wroten

In 1991 the California State Legislature passed the Elder and Dependent Adult Civil Protection Act with a stated goal to encourage "attorneys to take up the cause of abused elderly persons and dependent adults."

While the underlying intent to protect an identified vulnerable class of people was noble the resulting wave of litigation has instead worked towards undermining the ability of qualified care providers to put needed resources into actual care. Instead, litigation hysteria has forced major insurers to either walk away from California's long term care industry or charge debilitating premiums that siphon needed finances away from care.

The resulting imbalance is that by encouraging litigation the government has unintentionally drained resources from qualified care providers who serve the elderly. The challenge of balancing the competing needs of the elderly is dramatically demonstrated by both caselaw and overzealous litigation practices.

The Elder and Dependent Adult Civil Protection Act provides incentives to attorneys representing plaintiffs in threeways. First, under Code of Civil Procedure Section 377.34 a decedent's estate cannot recover damages for any pre-death painand suffering experienced by the elder. Because suspicions of elder abuse often do not arise until after the elder has died, the Elder and Dependent Adult Civil Protection Act provides the legal avenue by which an elderly decedent's pain and suffering is recoverable by the family. Since generally a plaintiff attorney is paid a contingency fee based on a percentage of the actual recovery of damages, a much larger pot of money is available from which the attorney is paid. In the overall setting of the typical elder abuse case this is an enhancement that effectively serves the interest of the elderly without unfairly punishing the care provider.

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Second, the Elder and Dependent Adult Civil Protection Act provides a one-sided "winner take all" enhancement wherein the losing care provider is required to pay the fees and costs invested by the plaintiff attorney in pursuit of the litigation. This provision has acted to unfairly chill the rights of the care provider who does not share in the same right to recover their fees and costs following a successful defense. As a result of the government's effort to encourage litigation an increasing group of well financed plaintiff attorneys have ratcheted up the costs of litigation to the point of extortion. In every case of alleged abuse the well financed plaintiff attorney will "paper" the defense with an onslaught of discovery designed to invade every aspect of a corporate enterprise regardless of its relation to the claimed harm. The cost of this strategy routinely overspends the actual value of the underlying injury. An example of the disabling impact of this strategy is seen in the 1999 California Supreme Court case Delaney vs. Baker. In Delaney a jury found in favor of the plaintiff under the theory of "reckless neglect." Recklessness is something more than mere professional negligence but also something less than "abuse." Damages awarded by the jury for the wrongful conduct of the caregiver were $150,000. The Plaintiff's attorney received $185,723.50 for fees and an additional $32,291.24 in costs. The result being that the attorney received $218,014.74 in fees and costs despite only proving $150,000 of damages.

Third, the Elder and Dependent Adult Civil Protection Act provides a vehicle directly to a claim for punitive damages. The mere exposure to such damages carries enough of a threat such that settlements occur despite the defensibility of the underlying claim. Taking the chance that a jury will find in favor of the care giver where punitive damage exposure exists has resulted in the bankruptcy of well qualified healthcare providers and an exodus of insurers willing

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to bear the liability risk. This fact is well known to plaintiff counsel who often times files cases with boiler plate language in "cut and paste" volume without regard to the actual value of an individual claim. The carrot initially envisioned by our state legislators has been distorted such that in every case of alleged elder neglect or abuse settlement demands are doubled in order to accommodate the plaintiff attorney's appetite to collect enhanced fees from an industry besieged by litigation and unable to financially afford pursuing a costly defense through trial despite the defensibility of most actions.

The mere threat of an allegation of "abuse" has unprecedented value given the lack of protection from spurious claims made under the guise of protection of the elderly. The unwitting result is that needed financial resources have been diverted from care to those attorneys who have successfully created a template from which the state legislators have been too slow to respond.

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