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## WHITE PAPER ALERT

### Punitive Damages

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## **CALIFORNIA SUPREME COURT ANNOUNCES DECISION IN COVENANT CARE V. SUPERIOR COURT**

The California Supreme Court announced its decision in Covenant Care v. Superior Court on March 25, 2004, declaring that California Code of Civil Procedure section 425.13, which provides health care providers with special protections against punitive damages, does not apply to claims brought under the Elder Abuse Act.

The Court stated, "we find nothing in the text, legislative history, or purposes of either section 425.13(a) or the Elder Abuse Act to suggest the Legislature intended to afford health care providers that act as elder custodians, and that egregiously abuse the elders in their custody, the special protections against exemplary damages they enjoy when accused of negligence in providing health care." This decision renders authority previously relied in the defense of elder abuse cases (allowing the protections of 425.13 when the gravamen of the action was professional negligence) ineffective, and presents serious issues of great concern to the skilled nursing industry, insurance carriers and defense counsel.

### **BASIS FOR THE SUPREME COURT'S DECISION**

The California Supreme Court articulated three reasons for its decision;

1. The Court examined the plain language of section 425.13 and the Elder Abuse Act and determined that the two were never meant to be linked. The Court indicated that only Elder Abuse Causes of Action are included within its ruling due to the heightened standard of proof (clear and convincing evidence). However, the court did not specifically address the fact that other causes of action may seek the heightened civil remedies provided for under the Elder Abuse Act, including "neglect".
2. The Court drew a distinction between the definition of "neglect" as it is used in the Elder Abuse Act, versus its use in professional negligence cases. The court stated, "neglect" within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from "professional negligence." As used in the Act, **neglect refers not to the substandard performance of medical services but, rather, 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."** The court appears to be saying the statutory definition of

**neglect speaks not to the *undertaking* of medical services, but of the failure to *provide* medical care.**

3. The Court also looked at the Legislative history of both section 425.13 and the Elder Abuse Act and found further support for its decision that the two were never meant to be linked. The Court said the Legislative history of section 425.13 makes it clear that the Legislature intended to protect health care providers in their professional capacity as medical providers. There was no intent to protect health care providers in any other capacity. The Court stated, "Without question, health care provider and elder custodian "capacities" are conceptually distinct. "Health care provider" means any person licensed or certified pursuant to specified licensing provisions. Neglect based elder abuse, by contrast, seems to now be defined by the court as "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."
4. Perhaps most importantly, the Court concluded that the standard imposed by section 15657 of the Elder Abuse Act, which requires clear and convincing evidence of liability coupled with recklessness, malice, oppression or fraud, "adequately protects health care providers from liability under the statute for acts of simple or even gross negligence."

The Court dispelled the argument that the Legislature's failure to expressly exempt Elder Abuse actions from section 425.13 obligates the construction that such actions are included, and provided three reasons why this argument failed;

- "[S]ection 425.13, which references "professional negligence," is not facially applicable to claims for heightened civil remedies under the Elder Abuse Act, which entail "recklessness, oppression, fraud or malice."
  - Elder abuse, even when committed by a health care provider, is not an injury that is "directly related" to the provision of professional services by that provider. The Court stated specifically, "As a failure to fulfill custodial duties owed by a custodian who happens also to be a health care provider, such abuse is at most incidentally related to the provider's professional health care services."
  - Finally, the Court held that the Central Pathology decision was simply inapplicable to the present inquiry, as it was decided in 1992, after both section 425.13 and the Elder Abuse Act were enacted. Central Pathology has been relied on as support for the argument that section 425.13 applies to elder abuse actions because the liability arose out of the professional negligence of a health care provider. This argument is no longer available in elder abuse actions due to this Court's specification that the rule in Central Pathology is limited to its facts, which are in the context of medical malpractice.
4. Finally, the Court concluded that linkage of 425.13 and the Elder Abuse Act would undermine the purpose of the Elder Abuse Act. The Court stated that the purpose of the Elder Abuse Act was to protect vulnerable populations from mistreatment, and the heightened civil remedies were designed to "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." To allow the protections of 425.13, would be to "undermine the Legislature's intent to foster such actions by providing litigants and attorneys with **incentives** to bring them." The Court went so far as to say, "[M]aking it more difficult for Elder Abuse Act plaintiffs to plead punitive damages would, as a general matter, likely diminish the willingness of attorneys to undertake such cases on a contingency basis."

The court reiterated that the requirement of section 15657 of pleading and proving "recklessness, oppression, fraud or malice" by clear and convincing evidence is enough, since a health care provider sued under the Elder Abuse Act must defend against allegations of egregious conduct anyway. The court quoted Central Pathology when it stated that in the medical malpractice context, "there may be considerable overlap of intentional and negligent causes of action." The Court further stated that no such overlap occurs in the context of Elder Abuse, because the legislature has expressly excluded negligence claims from treatment under the Elder Abuse Act.

Finally, the Court discussed the timing requirements under section 425.13, stating that any motion under the statute must be "filed within two years after the complaint or initial pleading is filed." The purpose of this timing requirement is to provide health care providers with adequate notice of punitive damage claims, in order to prevent last minute insertion of punitive damages issues. Additionally, the Court noted the absence of timing issues in actions brought under the Elder Abuse Act is not problematic because by definition, issues of egregious conduct are present **from the onset**, thus defendants are on notice from the first pleading.

### **WHAT DOES THIS MEAN FOR THE DEFENSE OF ELDER ABUSE CASES?**

Every elder abuse case is a potential punitive damage case now. It is ever more important for defense counsel to be on the offensive and move to strike or summarily adjudicate Elder Abuses claims prior to trial. New strategies must be discussed to effectively limit liability exposure, address insurance coverage questions and defend against a likely backlash of new case filings and heightened settlement demands.

If you have any questions or desire further information on this, or any other topic, please contact:

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