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## NOTE

# Expeditious Efforts for the Elderly: *Covenant Care, Inc. v. Superior Court*

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## INTRODUCTION

Helen Love, a 75-year-old mother and widow of a veteran, lay in her bed at a California nursing home.<sup>1</sup> Tim Saelee, the certified nursing assistant in charge of her care, entered her room and found her bed sheets soiled. He then beat the frail, 95-pound woman on her neck, chin, and legs and choked her. Helen's son found out that a staff member had attacked his mother only after calling the home to check on her. The nursing home informed him of Helen's condition but told him not to worry about her injuries: the doctor's report indicated that Helen's medical illnesses caused her visible bruising. The nursing home finally sent Helen to the hospital after threats from her son. Emergency room doctors found a dislocated neck, a broken wrist, and a bruise-covered body. Helen died shortly after the incident. The nursing home denied fault, and Tim Saelee received only one year in a county jail.

Unfortunately, this tragic situation occurs all too often.<sup>2</sup> Though silently present for many years, the abuse and neglect of the elderly only recently emerged as a social dilemma.<sup>3</sup> This type of abuse now commands public concern.<sup>4</sup>

As a result, California law developed to advance the cause of the

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<sup>1</sup> This story was featured on the *CBS Evening News: Tracking Abuse in Nursing Homes* (CBS television broadcast July 30, 2001), available at <http://www.cbsnews.com/stories/2000/02/25/eveningnews/main165186.shtml>.

<sup>2</sup> Laura Randles, *Crimes: An Act to Increase Penalties for Crimes of Elder Abuse*, 34 *MCGEORGE L. REV.* 398, 398 (2003); see also Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 *STAN. L. & POL'Y REV.* 175, 175 (2003) (citing examples similar to that of Love's experience); Anastasia Dodson, *Delaney v. Baker: A Victory of Value for Elder and Dependent Adults* 8 (Dec. 7, 1999) (unpublished manuscript, on file with author) (documenting numerous abuse citations in California nursing homes).

<sup>3</sup> See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect — The Legal Framework*, 31 *CONN. L. REV.* 77, 89 (1998) (noting steady increase in number of cases being reported); Martin Ramey, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California's Elder Abuse Act*, 39 *SAN DIEGO L. REV.* 599, 615-16 (2002) (describing various programs sprouting up nationwide to alleviate elder abuse); *CBS Evening News: Tracking Abuse*, *supra* note 1 (quoting elder abuse investigator who stated that elder abuse is fast becoming greatest law enforcement challenge of next century).

<sup>4</sup> Moskowitz, *supra* note 3, at 83; see Steven G. Mehta, *Respecting Our Elders*, 23 *L.A. LAW.* 35, 35 (2000) (commenting that not until *Delaney v. Baker* in 1999 did eyes open to elder abuse); Ramey, *supra* note 3, at 601-02 (noting that both federal and state governments have attempted to target institutional abuse, although instances of abuse continue at alarming rates); see also Gary N. Stern, Editorial, *Perspective on Elder Abuse: State Looks to Lawyers to Reform Nursing Homes*, *L.A. TIMES*, Sept. 19, 1999, at B17 (stating America is finally waking up to horror of nursing home neglect and abuse of elderly).

elderly both judicially and legislatively.<sup>5</sup> The California Supreme Court's decision in *Covenant Care, Inc. v. Superior Court* underscored this solicitude for those elderly who suffer abuse and neglect.<sup>6</sup> In *Covenant Care*, the court held that procedural requirements for alleging punitive damages in malpractice actions did not apply in elder abuse claims.<sup>7</sup>

This Note argues that, in deciding *Covenant Care*, the California Supreme Court helped achieve the goals of protecting the elderly as affirmed by the California legislature.<sup>8</sup> Part I first explores the civil statutory background enjoining elder abuse.<sup>9</sup> It then describes how civil case law has applied these particular statutes in elder abuse situations.<sup>10</sup> Part II discusses the facts, rationale, and holding of *Covenant Care*.<sup>11</sup> Part III argues that the *Covenant Care* decision offers incentives to attorneys to take on elder abuse cases. First, the decision eliminates a defensive barrier protecting healthcare facilities that engage in elder abuse.<sup>12</sup> The decision also eliminates a superfluous procedural hurdle for elder abuse attorneys.<sup>13</sup> Second, *Covenant Care* provides impetus for further line-drawing between elder abuse and medical malpractice cases.<sup>14</sup> Finally, Part III concludes that *Covenant Care* necessarily expands the boundaries for punitive damages in elder abuse situations to deter facilities from practicing poor care and engaging in abuse.<sup>15</sup>

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<sup>5</sup> Christina Matias, *Domestic Violence: Elder Abuse as Domestic Violence in California*, 11 J. CONTEMP. LEGAL ISSUES 76, 78-79 (2000); see Dodson, *supra* note 2, at 7 (referring to report that drew attention to nursing home issues and brought political pressures for improved care); Ramey, *supra* note 3, at 603, 613 (stating that California has one of most proactive elder abuse statutes and spends more money investigating complaints than any other state).

<sup>6</sup> *Covenant Care, Inc. v. Superior Court*, 86 P.3d 290, 290 (Cal. 2004).

<sup>7</sup> *Id.* at 301-02.

<sup>8</sup> *Id.* at 297.

<sup>9</sup> See discussion *infra* Part I.A.1-3 (detailing statutory background arising in elder abuse cases).

<sup>10</sup> See discussion *infra* Part I.B.1-2 (describing cases that deal with elder abuse claims).

<sup>11</sup> See discussion *infra* Part II (analyzing recent elder abuse case).

<sup>12</sup> See discussion *infra* Part III.A.1 (stating reasons why defense barrier protected healthcare providers).

<sup>13</sup> See discussion *infra* Part III.A.2 (stating reasons why procedural requirement in elder abuse cases was not necessary).

<sup>14</sup> See discussion *infra* Part III.B (establishing differences between two statutory schemes).

<sup>15</sup> See discussion *infra* Part III.C (demonstrating deterrent effect of *Covenant Care*).

## I. BACKGROUND

A brief understanding of the historical setting of the elder abuse dilemma clarifies *Covenant Care's* implications. The elderly are the fastest growing segment of the U.S. population.<sup>16</sup> In 1990, persons over sixty-five comprised 12.5 % of the United States population.<sup>17</sup> Studies project that this group will make up 17.7 % of the American population by 2020 and 25 % by 2050.<sup>18</sup> Elder abuse has accompanied this growth in the elderly population.<sup>19</sup> Experts estimate that between one and two million cases of elder mistreatment occur every year.<sup>20</sup> Despite federal attempts to fund elder abuse prevention services, the primary responsibility for protecting the rights of the elderly rests with the states.<sup>21</sup> California provides an example of the problems of elder abuse and committed efforts to address them.<sup>22</sup>

### A. Statutory Background

The California legislature has sought redress for elder abuse through

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<sup>16</sup> Moskowitz, *supra* note 3, at 78; see Kohn, *supra* note 2, at 175 (noting that there is little time to spare if America is going to meet needs of growing elder population); Sarah S. Sandusky, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 ELDER L.J. 459, 466 (2003) (noting that persons over 65 are fastest growing segment of U.S. population).

<sup>17</sup> Moskowitz, *supra* note 3, at 78; Sandusky, *supra* note 16, at 466.

<sup>18</sup> Moskowitz, *supra* note 3, at 78; see Selket Nicole Cottle, "Big Brother" and Grandma: *An Argument for Video Surveillance in Nursing Homes*, 12 ELDER L.J. 119, 122 (2004) (giving numbers of those elders who will be in nursing homes in future).

<sup>19</sup> Moskowitz, *supra* note 3, at 87; see Senator John B. Breaux & Senator Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207, 208 (2003) (stating that elder abuse continues to be enormous problem); Jill C. Skabronski, *Elder Abuse: Washington's Response to a Growing Epidemic*, 31 GONZ. L. REV. 627, 629 (1996) (noting that elder abuse is one of most unrecognized and underreported social problems today).

<sup>20</sup> Moskowitz, *supra* note 3, at 78. Every 19 seconds an elderly person becomes a victim of abuse in the United States. Ramey, *supra* note 3, at 602. Seven out of every eight instances are never reported. *Id.*

<sup>21</sup> Matias, *supra* note 5, at 76; Sandusky, *supra* note 16, at 464; see Breaux & Hatch, *supra* note 19, at 213-15 (chronicling various federal attempts to implement nationwide elder abuse policies and programs); Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 808 (2000) (describing federal reports that called for funds to help aid states to prevent and treat elder abuse).

<sup>22</sup> Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 595 (2003); see Stern, *supra* note 4 (stating that today victims of nursing home abuse can fight back thanks to legal system that pays attention).

statutory law.<sup>23</sup> The following section describes various statutory schemes that either specifically address elder abuse or arise in elder abuse claims. One such statute, the Elder Abuse and Dependent Adult Civil Protection Act (“Elder Abuse Act”), responds directly to the state’s growing elder population and the concurrent increase in elder abuse.<sup>24</sup>

### 1. The Elder Abuse Act

In 1981, a federal congressional committee issued a report estimating that 4% of the American elder population suffered mistreatment annually.<sup>25</sup> Recognizing this susceptibility of the elderly, the California legislature acted to protect its citizenry with an elder abuse act in 1982.<sup>26</sup> Nine years later, another federal congressional committee report similarly determined that approximately 5% of elderly persons suffered abuse yearly.<sup>27</sup> Thereafter, in 1991, California passed laws that created civil remedies against individuals and entities that committed elder abuse.<sup>28</sup> The 1991 amendments and original 1982 enactments comprise the Elder Abuse Act.<sup>29</sup>

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<sup>23</sup> See CAL. WELF. & INST. CODE § 15600(j) (Deering 2004) (stating legislature’s intent to encourage interested persons to engage attorneys to take up cause of elderly persons); see also *id.* §§ 15600-15660 (detailing Elder Abuse Act).

<sup>24</sup> *Id.* §§ 15600-15660; see also *id.* § 15600(b) (stating legislature’s desire to direct special attention to needs and problems of elderly, recognizing that they constitute significant and identifiable portion of population and that they are more subject to abuse, neglect, and abandonment).

<sup>25</sup> HOUSE SELECT COMM. ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM 42, 123-24 (Comm. Print 1981) (indicating that every year approximately one million American elders experience abuse); Moskowitz, *supra* note 3, at 83.

<sup>26</sup> CAL. WELF. & INST. CODE § 15600; Mehta, *supra* note 4, at 35. In 1982, the legislature added Chapter 11, entitled “Abuse of the Elderly and Other Dependent Adults,” to the California Welfare and Institutions Code. Dodson, *supra* note 2, at 6 n.17.

<sup>27</sup> SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 101ST CONG., ELDER ABUSE: A DECADE OF SHAME AND INACTION, at xi (Comm. Print 1990); Moskowitz, *supra* note 22, at 592.

<sup>28</sup> Mehta, *supra* note 4, at 35. Simultaneous to the federal congressional report, the Commission on California State Government Organization and Economy, known as the Little Hoover Commission, released a report entitled *Skilled Nursing Homes: Care Without Dignity*. Dodson, *supra* note 2, at 7. This report chronicled the pain and suffering endured by too many of California’s 120,000 residents of nursing home facilities. *Delaney v. Baker*, 971 P.2d 986, 994 (Cal. 1999). The report also generated the political pressure necessary for improved nursing home care. Dodson, *supra* note 2, at 7. By 1985, 44 states had a comparable statute, and presently, all 50 states have one. Moskowitz, *supra* note 3, at 85.

<sup>29</sup> Mehta, *supra* note 4, at 35; see also CAL. WELF. & INST. CODE §§ 15600-15660 (detailing Elder Abuse Act). Though the Elder Abuse Act addresses abuse of both the elderly and dependent adults, this Note will focus solely on elder abuse.

The Elder Abuse Act defines an "elder" as a California resident sixty-five years or older.<sup>30</sup> It also broadly defines "abuse" as physical abuse, neglect, fiduciary abuse, abandonment, isolation, or other treatment resulting in physical harm or mental suffering.<sup>31</sup> Out of this definition of "abuse," proof of fiduciary abuse, physical abuse, or neglect allows for enhanced statutory remedies.<sup>32</sup>

The 1991 amendments to the Elder Abuse Act provide for enhanced remedies to encourage attorneys to take on elder abuse cases.<sup>33</sup> The legislature stipulated that the enhanced remedies supplement existing remedies otherwise provided by law.<sup>34</sup> A plaintiff may recover enhanced remedies by first presenting clear and convincing evidence of recklessness, oppression, fraud, or malice in the commission of fiduciary or physical abuse or neglect.<sup>35</sup> A plaintiff has to further demonstrate advance knowledge or conscious disregard on the part of the licensed facility with respect to an employee's inappropriate actions.<sup>36</sup> The enhanced remedies include economic, noneconomic, and punitive damages.<sup>37</sup>

Economic damages, or special damages, are out-of-pocket costs directly resulting from an injury.<sup>38</sup> These include expenses such as

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<sup>30</sup> CAL. WELF. & INST. CODE § 15610.27.

<sup>31</sup> See *id.* § 15610.07 (addressing deprivation by care custodian of goods or services).

<sup>32</sup> *Id.* § 15657; Mehta, *supra* note 4, at 35; Ramey, *supra* note 3, at 615-16; see CAL. WELF. & INST. CODE § 15610.30 (defining "financial abuse"); *id.* § 15610.57 (defining "neglect"); *id.* § 15610.63 (defining in detail "physical abuse"). The other acts that do not give rise to enhanced remedies provide grounds for a negligence per se violation. They also constitute a violation under California Business and Professions Code section 17200. Mehta, *supra* note 4, at 35.

<sup>33</sup> See CAL. WELF. & INST. CODE § 15600(h) (stating that few cases are brought on behalf of elders because of lack of incentives to prosecute suits).

<sup>34</sup> See *id.* § 15657 (detailing enhanced remedies).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; Telephone Interview with Russell Balisok, Partner, Houck & Balisok in Glendale, Cal. (Feb. 9, 2005) (on file with author); CAL. DEP'T OF HEALTH SERVS. LICENSING & CERTIFICATION PROGRAM, LIABILITY INSURANCE FOR CALIFORNIA LONG-TERM CARE PROVIDERS 1, 55 (2004), available at <http://www.dhs.ca.gov/lnc/ltcliab/default.htm>.

<sup>37</sup> CAL. WELF. & INST. CODE § 15657 (describing remedies allowable under Elder Abuse Act). For a general idea of California's liberality for claims under the Elder Abuse Act, see *Marron v. Superior Court*, 108 Cal. App. 4th 1049 (Ct. App. 2003). The court held that attorney's fees, costs, and noneconomic damages sought against a state hospital under the Elder Abuse Act were not damages usually barred when suing a state entity. *Id.* at 1064. The legislature intended the Act to encourage attorneys to take on cases of elder abuse and dependent adult abuse. *Id.* at 1065.

<sup>38</sup> LAW.COM DICTIONARY, <http://dictionary.law.com/default2.asp?selected=423> (last visited Oct. 31, 2005).

medical and hospital bills, ambulance charges, and loss of wages.<sup>39</sup> Under the Elder Abuse Act, the legislature sought to enhance common law economic damages by providing for attorney's fees and court costs.<sup>40</sup> A court may award an elder abuse plaintiff reasonable attorney's fees and costs.<sup>41</sup> Furthermore, if a victim dies before a lawsuit comes to a close, the heirs can receive these costs and fees.<sup>42</sup> Determining the value of attorney's fees requires consideration of several factors. First, the court looks at the value of the litigation in terms of the elder's quality of life and the results obtained.<sup>43</sup> Second, the court considers whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability.<sup>44</sup> Finally, the court examines the reasonableness and timeliness of any written offer of compromise made by a party to the action.<sup>45</sup> After a consideration of these factors, a court may award an Elder Abuse Act plaintiff reasonable attorney's fees and court costs.

Noneconomic fees, or general damages, are subjective both in their nature and how they are valued.<sup>46</sup> Noneconomic damages include damages for pain and suffering, loss of ability to perform various acts, and shortening of lifespan.<sup>47</sup> The death of a plaintiff typically eliminates any recovery of noneconomic damages.<sup>48</sup> In an Elder Abuse Act case, however, a court may award noneconomic damages of up to \$250,000, even if the victim dies during litigation.<sup>49</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> CAL. WELF. & INST. CODE § 15657(a).

<sup>41</sup> Mehta, *supra* note 4, at 36; *see* CAL. WELF. & INST. CODE § 15657(a) (allowing for fees of conservator); *id.* § 15657.3(c) (stating that death of elder does not cause court to lose jurisdiction of claims for relief); *see also id.* § 15657.3(d) (stating that after death of elder, right to maintain action passes to personal representative or to successors of estate).

<sup>42</sup> Moskowitz, *supra* note 22, at 606. In determining these fees, the court can consider such factors as the value of the litigation in terms of the quality of life of the elder and the reasonableness and timeliness of the defendant's determination of liability. Mehta, *supra* note 4, at 36; *see* CAL. WELF. & INST. CODE § 15657.1 (listing factors to be considered in awarding attorney's fees).

<sup>43</sup> CAL. WELF. & INST. CODE § 15657.1; Mehta, *supra* note 4, at 36; Moskowitz, *supra* note 22, at 607.

<sup>44</sup> CAL. WELF. & INST. CODE § 15657.1; Mehta, *supra* note 4, at 36.

<sup>45</sup> Sources cited *supra* note 44.

<sup>46</sup> LAW.COM DICTIONARY, *supra* note 38.

<sup>47</sup> *Id.*

<sup>48</sup> *See* CAL. CIV. PROC. CODE § 377.34 (Deering 2004) (stating that recoverable damages are limited to losses or damages decedent sustained or incurred before death); *see also* CAL. WELF. & INST. CODE § 15657(b) (stating that damages are not limited by death of decedent, but may not exceed \$250,000).

<sup>49</sup> CAL. WELF. & INST. CODE § 15657(b); Mehta, *supra* note 4, at 36. Previously, the



Generally, a court may award punitive damages, or exemplary damages, to punish a defendant for willful acts that are malicious, violent, oppressive, fraudulent, or grossly reckless.<sup>50</sup> Imposing punitive damages in civil lawsuits usually requires proof by clear and convincing evidence.<sup>51</sup> The Elder Abuse Act also allows an award for punitive damages.<sup>52</sup> Elder abuse attorneys, however, must already meet this higher burden of proof to recover any form of enhanced remedies under the Elder Abuse Act.<sup>53</sup> Therefore, the burden of proof for enhanced economic, noneconomic, and punitive damage awards under the Elder Abuse Act is the same.<sup>54</sup>

The Elder Abuse Act stipulates enhanced remedies for reckless, fraudulent, oppressive, and malicious acts of abuse and neglect by individuals and entities.<sup>55</sup> Many elder abuse cases involve defendant nursing homes, physicians, or other licensed healthcare providers.<sup>56</sup> Such defendants routinely fall under the protections of the Medical Injury Compensation Reform Act ("MICRA").<sup>57</sup>

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unavailability of noneconomic damages after a patient's death made attorneys apprehensive about taking elder abuse cases for fear that the plaintiff would die during litigation. Sande L. Buhai & James W. Gilliam, Jr., *Honor Thy Mother and Father: Preventing Elder Abuse Through Education and Litigation*, 36 LOY. L.A. L. REV. 565, 570 (2003); see also CAL. CIV. CODE § 3333.2 (Deering 2004) (limiting damages recoverable to \$250,000); Denton v. Superior Court, 945 P.2d 1283 (Ariz. 1997) (en banc). In civil actions for elder abuse, pain and suffering may be the only compensable damages a victim may recover. *Id.* at 1287. Since elder adults are not employed, they cannot recover damages for lost earnings or diminished earning capacity. *Id.* Moreover, because they generally have Medicare, Medicaid, or other insurance coverage, they may not recover for medical expenses. *Id.*

<sup>50</sup> LAW.COM DICTIONARY, *supra* note 38.

<sup>51</sup> See CAL. CIV. CODE § 3294 (stating that in action for breach of obligation not arising from contract, where plaintiff proves fraud, oppression, or malice by clear and convincing evidence, court may award damages to punish or for sake of example).

<sup>52</sup> Buhai & Gilliam, *supra* note 49, at 570.

<sup>53</sup> CAL. WELF. & INST. CODE § 15657; Buhai & Gilliam, *supra* note 49, at 571. In contrast, proving noneconomic and economic damages in civil suits requires proof by a preponderance of the evidence. CONSUMER ATTORNEYS OF CAL., QUESTIONS AND ANSWERS ABOUT MICRA 1 (on file with author).

<sup>54</sup> CAL. WELF. & INST. CODE § 15657. A trier of fact may triple a damages amount for unfair treatment of the elderly. CAL. CIV. CODE § 3345 (stating that court may award treble damages on behalf of or for benefit of senior citizens to redress unfair or deceptive acts or practices or unfair methods of competition); see Russell S. Balisok, *Medical Malpractice Actions for the Elderly Go Ballistic While the Plaintiff's Bar Bemoans MICRA*, CTLA F., Jan.-Feb. 1994, at 23, 24 (noting that court may treble damages in Elder Abuse Act case).

<sup>55</sup> Balisok, *supra* note 54, at 26.

<sup>56</sup> Mehta, *supra* note 4, at 36.

<sup>57</sup> *Id.*

## 2. MICRA

Against the backdrop of the Elder Abuse Act lies MICRA. The California legislature passed MICRA in 1975 to stabilize liability insurance premiums and reduce malpractice litigation overall.<sup>58</sup> MICRA refers to several statutes that restrict or place conditions upon causes of actions and remedies directed at healthcare providers for professional negligence.<sup>59</sup>

One such MICRA statute, California Civil Code section 3333.2(b), limits noneconomic damages recovery.<sup>60</sup> Under section 3333.2, a plaintiff alleging professional negligence may recover only up to \$250,000 in noneconomic damages.<sup>61</sup> In 1991, the legislature extended the MICRA noneconomic damages cap to the Elder Abuse Act when it simultaneously created enhanced remedies for elder abuse allegations.<sup>62</sup> Thus, the noneconomic damages cap of \$250,000 applies under both MICRA and Elder Abuse Act causes of action.<sup>63</sup>

Other MICRA provisions provide further boundaries for a plaintiff's recovery against healthcare providers.<sup>64</sup> MICRA restricts recovery of attorney's fees and costs and prohibits noneconomic damages once a patient dies.<sup>65</sup> Under MICRA, the family of a deceased patient can only recover economic damages such as medical expenses or lost wages.<sup>66</sup> Furthermore, MICRA allows evidence of collateral sources to reduce a jury award and allows defendants to make periodic payments for awards in excess of \$50,000.<sup>67</sup>

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<sup>58</sup> *Delaney v. Baker*, 971 P.2d 986, 989 n.2, 992 (Cal. 1999); Ramey, *supra* note 3, at 600; Mark Reagan, *Elder Abuse Cases Exempt From Protections Against Frivolous Claims*, HEALTH L. PERSP. (Hooper Lundy & Bookman, Inc., L.A., Cal.), May 2004, available at [http://www.health-law.com/publications/hlp/hlp\\_2004\\_05.shtml](http://www.health-law.com/publications/hlp/hlp_2004_05.shtml).

<sup>59</sup> *Delaney*, 971 P.2d at 992; Mehta, *supra* note 4, at 36.

<sup>60</sup> CAL. CIV. CODE § 3333.2(b) (Deering 2004).

<sup>61</sup> *Id.*

<sup>62</sup> 1991 Cal. Adv. Legis. Serv. 774 (Deering); *Delaney*, 971 P.2d at 992 (stating purposes of Elder Abuse Act); Ramey, *supra* note 3, at 600; see Dodson, *supra* note 2, at 7.

<sup>63</sup> CAL. CIV. CODE § 3333.2(b); CAL. WELF. & INST. CODE § 15657 (Deering 2004).

<sup>64</sup> CAL. BUS. & PROF. CODE § 6146 (Deering 2004); CAL. CIV. CODE § 3333.1(a); CAL. CIV. PROC. CODE §§ 377.34, 667.7 (Deering 2004).

<sup>65</sup> CAL. BUS. & PROF. CODE § 6146; CAL. CIV. PROC. CODE § 377.34; Dodson, *supra* note 2, at 8; Marc Katz & Richard Nakamura, *California Supreme Court Eliminates Screening Process for Requests for Punitive Damages in Elder Abuse Cases*, A STEP AHEAD IN LONG TERM CARE (Morris Polich & Purdy Quarterly Newsletter), Spring 2004, at 1, 7, available at <http://www.mpplaw.com/pdf/ltc-spring-newsltr-2004.pdf>; Reagan, *supra* note 58.

<sup>66</sup> CAL. CIV. PROC. CODE § 377.34.

<sup>67</sup> CAL. BUS. & PROF. CODE § 6146; CAL. CIV. CODE § 3333.1(a); CAL. CIV. PROC. CODE §

### 3. California Code of Civil Procedure Section 425.13

California Code of Civil Procedure section 425.13 provides another procedural limitation in favor of healthcare providers.<sup>68</sup> Section 425.13 seeks to prevent unsubstantiated punitive damages claims from being included in claims against healthcare providers.<sup>69</sup> Section 425.13 establishes a procedure for the trial court to determine whether a plaintiff may allege punitive damages against a healthcare provider for actions arising out of professional negligence.<sup>70</sup> As provided by section 425.13, a party must first obtain a court order before alleging punitive damages.<sup>71</sup> The party must do so within two years of the complaint or nine months before the trial date, whichever comes first.<sup>72</sup> A court will allow a punitive damages claim only if the plaintiff establishes a substantial probability of prevailing on the claim.<sup>73</sup>

The legislature designed section 425.13 to prevent two problems. First, it sought to require greater certainty for imposing punitive damages.<sup>74</sup> As a result, the statute requires clear and convincing evidence of fraud,

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667.7; Mehta, *supra* note 4, at 36; Moskowitz, *supra* note 22, at 620.

<sup>68</sup> See CAL. CIV. PROC. CODE § 425.13(a) (describing requirements for alleging punitive damages against healthcare provider); *Coll. Hosp., Inc. v. Superior Court*, 882 P.2d 894, 896 (Cal. 1994) (stating that prophylactic purpose of section 425.13 is to relieve healthcare providers of onerous burden of defending against meritless punitive damages claims); *Cooper v. Superior Court*, 56 Cal. App. 4th 744, 749 (Ct. App. 1997) (stating that legislature sought to provide additional protection to healthcare providers through section 425.13).

<sup>69</sup> See *Coll. Hosp., Inc.*, 882 P.2d at 896 (stating that prophylactic purpose of section 425.13 is to relieve healthcare providers of onerous burden of defending against meritless punitive damages claims); *Goodstein v. Superior Court*, 42 Cal. App. 4th 1635, 1642 (Ct. App. 1996) (stating legislature enacted section 425.13 amid concern over routine inclusion of sham punitive damage claims in medical malpractice actions); *Looney v. Superior Court*, 16 Cal. App. 4th 521, 532 (Ct. App. 1993) (stating legislative purpose behind section 425.13 was to shelter healthcare providers from need to defend against punitive damages claims).

<sup>70</sup> *Coll. Hosp., Inc.*, 882 P.2d at 896; *Goodstein*, 42 Cal. App. 4th at 1642; *Looney*, 16 Cal. App. 4th at 532.

<sup>71</sup> CAL. CIV. PROC. CODE § 425.13(a). See generally *Goodstein*, 42 Cal. App. 4th at 1635 (addressing section 425.13's requirements); *Aquino v. Superior Court*, 21 Cal. App. 4th 847 (Ct. App. 1993) (same); *Looney*, 16 Cal. App. 4th at 521 (same).

<sup>72</sup> CAL. CIV. PROC. CODE § 425.13(a); see *Looney*, 16 Cal. App. 4th at 533 (stating that legislature provided for nine-month trial limitation: (1) to provide healthcare defendant with adequate notice of claim and ample period to conduct appropriate discovery and (2) to prevent "last minute" insertion of punitive damage claim into case prepared for trial without consideration of that issue).

<sup>73</sup> CAL. CIV. PROC. CODE § 425.13(a).

<sup>74</sup> See *Aquino*, 21 Cal. App. 4th at 853 (stating that pretrial mechanism was designed to prevent unsubstantiated claims).

malice, or oppression.<sup>75</sup> Second, the legislature sought additional protection for healthcare providers.<sup>76</sup> The statute allows a court to control whether an action for punitive damages can proceed.<sup>77</sup> Thus, the legislature provided that a trial court should serve as a gatekeeper by assessing whether there is enough evidence to plead punitive damages.<sup>78</sup>

The California legislature did not include section 425.13 as part of MICRA.<sup>79</sup> MICRA and section 425.13 operate concurrently, however, since section 425.13 establishes barriers for medical malpractice cases and frequently arises in MICRA cases.<sup>80</sup> Moreover, section 425.13 arises in Elder Abuse Act claims.<sup>81</sup> Case law has attempted to establish the distinctions between the various statutory schemes.<sup>82</sup>

### B. Case Law

The California legislature designed the Elder Abuse Act, MICRA, and section 425.13 to accomplish divergent purposes.<sup>83</sup> Despite this, the statutes potentially overlap in elder abuse cases.<sup>84</sup> The California

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<sup>75</sup> *Id.* at 854-55 (stating that entitlement to punitive damages requires clear and convincing evidence).

<sup>76</sup> See *Cooper v. Superior Court*, 56 Cal. App. 4th 744, 748 (Ct. App. 1997) (citing *Cent. Pathology Serv. Med. Clinic, Inc. v. Superior Court*, 832 P.2d 924 (Cal. 1992)).

<sup>77</sup> *Id.*

<sup>78</sup> See *Aquino*, 21 Cal. App. 4th at 856 (describing gatekeeping function of trial courts); *Looney*, 16 Cal. App. 4th at 539 (same).

<sup>79</sup> Jeff Chorney, *Court Clears Way for Punitives in Elder Abuse*, RECORDER, Mar. 26, 2004, at 1; see *Cent. Pathology*, 832 P.2d at 928 n.3 (describing differences between MICRA and section 425.13). MICRA statutes typically apply to actions "based on" professional negligence. *Id.* Section 425.13 applies to actions "arising out of" professional negligence. *Id.* However, the legislative history of section 425.13 reveals that the legislature did not intend to distinguish the two terms. *Id.*; see also *Cnty. Care & Rehab. Ctr. v. Superior Court*, 79 Cal. App. 4th 787, 791 n.6 (Ct. App. 2000) (stating that section 425.13 is clearly conceptually related to statutes enacted under MICRA).

<sup>80</sup> *Cent. Pathology*, 832 P.2d at 924; *Cnty. Care*, 79 Cal. App. 4th at 787.

<sup>81</sup> See *Covenant Care, Inc. v. Superior Court*, 86 P.3d 290 (Cal. 2004) (holding that party alleging elder abuse under Elder Abuse Act did not have to abide by section 425.13's procedural mandates); *Country Villa Claremont Healthcare Ctr., Inc. v. Superior Court*, 120 Cal. App. 4th 426 (Ct. App. 2004) (holding that party alleging elder abuse under Elder Abuse Act must abide by section 425.13's procedural mandates). See generally *Benun v. Superior Court*, 123 Cal. App. 4th 113 (Ct. App. 2004) (applying *Covenant Care's* rationale for statute of limitations in elder abuse cases).

<sup>82</sup> See discussion *infra* Parts I.B.1-2, II (describing cases addressing MICRA, section 425.13, and Elder Abuse Act).

<sup>83</sup> See discussion *supra* Part I.A.1-3 (detailing statutes involved in elder abuse cases).

<sup>84</sup> See discussion *infra* Parts I.B.1-2, II (describing cases addressing MICRA, section 425.13, and Elder Abuse Act).

Supreme Court attempted to make sense of this overlap in the following two cases. In *Central Pathology Service Medical Clinic, Inc. v. Superior Court*, the court expanded protection for healthcare providers by applying section 425.13's requirements to intentional tort allegations.<sup>85</sup> In contrast, in *Delaney v. Baker*, the court narrowed MICRA protections by holding a healthcare facility liable for reckless neglect and subject to Elder Abuse Act heightened remedies.<sup>86</sup>

1. *Central Pathology Service Medical Clinic, Inc. v. Superior Court*

In *Central Pathology*, the California Supreme Court considered whether section 425.13 applied to a case against healthcare providers that alleged both professional negligence and intentional torts.<sup>87</sup> Plaintiffs Constance Hull and her husband initially brought suit against healthcare providers alleging medical malpractice for their failure to promptly alert her of the onset of cancer.<sup>88</sup> Two months before trial, the Hulls sought to amend their complaint to allege intentional torts and punitive damages.<sup>89</sup> The healthcare providers opposed the motion, claiming that the amendment was untimely and that the Hulls would be unable to prevail on a punitive damages claim.<sup>90</sup> The trial court allowed the Hulls to amend their complaint and stated that section 425.13 did not bar the intentional torts and punitive damages claims.<sup>91</sup>

The California Supreme Court held that the trial court erred in allowing the Hulls to amend their complaint.<sup>92</sup> The court maintained that section 425.13 requires a party to obtain a court order before alleging intentional torts against a healthcare provider.<sup>93</sup> It reasoned that holding otherwise would allow plaintiffs seeking punitive damages for

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<sup>85</sup> 832 P.2d 924 (Cal. 1992).

<sup>86</sup> 971 P.2d 986 (Cal. 1999).

<sup>87</sup> *Id.*; Mehta, *supra* note 4, at 40.

<sup>88</sup> *Cent. Pathology*, 832 P.2d at 926. The Hulls alleged that the healthcare providers failed to notify Constance Hull of the presence of cancer cells in a Pap smear. *Id.*

<sup>89</sup> *Id.* Despite an order to retest all persons tested in the last five years, Central Pathology failed to notify Mrs. Hull of a necessary retest, thus leading to the added claims. *Id.*

<sup>90</sup> *Id.*; see CAL. CIV. PROC. CODE § 425.13 (Deering 2004) (stating that court will not grant motion allowing amended pleading to include punitive damages if plaintiff does not file motion within two years after complaint or not less than nine months before set trial date, whichever is earlier).

<sup>91</sup> *Cent. Pathology*, 832 P.2d at 927.

<sup>92</sup> *Id.* at 931.

<sup>93</sup> *Id.*

professional negligence to artfully plead an intentional tort rather than professional negligence and thus avoid section 425.13's requirements.<sup>94</sup> The court explained that such a reading would contravene the legislature's goal of protecting healthcare providers from frivolous claims.<sup>95</sup> It concluded that when any claim directly emanates from professional services by a healthcare provider, a party must comply with section 425.13.<sup>96</sup> As a result, *Central Pathology* expands the scope of

section 425.13 to cover intentional torts arising out of a healthcare provider's professional services.<sup>97</sup>

## 2. *Delaney v. Baker*

*Delaney v. Baker* narrows the scope of MICRA protections for healthcare providers, addressing the connection between these protections and the Elder Abuse Act.<sup>98</sup> The California Supreme Court grappled with whether a healthcare provider who recklessly neglects an elder is liable for Elder Abuse Act enhanced remedies.<sup>99</sup> *Delaney* establishes that a facility can indeed be liable for both Elder Abuse Act attorney's fees and damages for pain and suffering if found to be recklessly negligent.<sup>100</sup>

In *Delaney*, the family of decedent Rose Wallien alleged reckless neglect under the Elder Abuse Act against a nursing facility.<sup>101</sup> The trial court found the nursing home and its administrators liable by clear and convincing evidence.<sup>102</sup> It awarded heightened remedies pursuant to the

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<sup>94</sup> *Id.* at 929, 931.

<sup>95</sup> *Id.* at 930.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Delaney v. Baker*, 971 P.2d 986 (Cal. 1999); Mehta, *supra* note 4, at 35-36; see Christine V. Williams, *The Nursing Home Dilemma in America Today: The Suffering Must Be Recognized and Eradicated*, 41 SANTA CLARA L. REV. 867, 882 (2001) (noting that *Delaney* provided workable definitions to ambiguous parts of Elder Abuse Act).

<sup>99</sup> Mehta, *supra* note 4, at 38.

<sup>100</sup> *Delaney*, 971 P.2d at 988.

<sup>101</sup> *Id.* Ms. Wallien had fallen and fractured her right ankle. *Id.* Less than four months later, she died as a resident of the nursing facility. *Id.* At the time of her death, she suffered from stage III and IV pressure ulcers on her ankles, feet, and buttocks. *Id.* A stage IV bedsore means that her tissue had been eaten away down to the bone. *Id.* The evidence indicated that staff members had frequently left her lying in her own urine and feces for long periods of time. *Id.*

<sup>102</sup> *Id.* at 989.

Elder Abuse Act.<sup>103</sup> The Court of Appeals upheld the decision.<sup>104</sup>

On appeal to the California Supreme Court, the nursing home invoked the Elder Abuse Act and argued that it does not permit enhanced remedies for a healthcare provider's professional negligence.<sup>105</sup> The nursing home thus maintained that professional negligence includes reckless neglect.<sup>106</sup> The *Delaney* court, however, held that reckless neglect under the Elder Abuse Act is distinct from actions based on professional negligence.<sup>107</sup>

According to the court, the professional negligence exempted from elder abuse enhanced remedies consists of negligent acts or omissions while rendering professional services.<sup>108</sup> In contrast, obtaining enhanced remedies under the Elder Abuse Act requires proof of a reckless, malicious, oppressive, or fraudulent act by clear and convincing evidence.<sup>109</sup> The court reasoned that in instances in which a healthcare facility committed egregious acts against an elder, the Elder Abuse Act governs and provides for appropriate sanctions.<sup>110</sup>

*Delaney* resolves the question of whether healthcare providers protected under MICRA can be liable under the Elder Abuse Act for their egregious conduct.<sup>111</sup> Thus, *Delaney* narrows protections for healthcare providers that engage in reckless neglect of elders.<sup>112</sup> Following *Delaney*, the California Supreme Court addressed section 425.13's applicability to Elder Abuse Act cases in *Covenant Care, Inc. v.*

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Dodson, *supra* note 2, at 10; see CAL. WELF. & INST. CODE § 15657.2 (Deering 2004) (establishing that any cause of action based on healthcare provider's professional negligence is exempt from purview of Elder Abuse Act). The statute provides that any cause of action for injury or damage against a healthcare provider as defined in section 340.5 of the California Code of Civil Procedure, based on the healthcare provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action. *Id.* The statute also makes clear that acts proscribed by section 15657 do not include acts of simple professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence. *Delaney*, 971 P.2d at 991.

<sup>106</sup> *Id.* at 988.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 991; see CAL. WELF. & INST. CODE § 15657.2 (exempting causes of action against healthcare providers for alleged professional negligence from Elder Abuse Act scope).

<sup>109</sup> *Delaney*, 971 P.2d at 1000.

<sup>110</sup> *Id.* at 993.

<sup>111</sup> *Id.*; Russell Balisok & Carol Jimenez, *Supreme Court Carves a Firm Niche for Elder Abuse Cases*, CTLA F., May 2004, at 24, 25.

<sup>112</sup> See *supra* text accompanying notes 101-110 (illustrating *Delaney* case).

*Superior Court.*<sup>113</sup>

## II. COVENANT CARE, INC. V. SUPERIOR COURT

The California Supreme Court confronted the debate between professional negligence cases and Elder Abuse Act cases in *Covenant Care*.<sup>114</sup> The court answered the question of whether section 425.13's requirements apply to Elder Abuse Act cases, but left the issue of MICRA applicability unsettled.<sup>115</sup>

In *Covenant Care*, Juan A. Inclan allegedly suffered numerous abuses while a resident at Covenant Care's skilled nursing facility in Los Angeles.<sup>116</sup> The Inclan family sued Covenant Care for damages caused by the facility's treatment of Juan during the eight weeks he resided there.<sup>117</sup> More than two years after the original complaint, the Inclans sought a motion to plead punitive damages.<sup>118</sup> Covenant Care opposed the motion, arguing that section 425.13 requires a party to file such a motion within two years of filing the complaint or initial pleading.<sup>119</sup> The

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<sup>113</sup> *Covenant Care, Inc. v. Superior Court*, 86 P.3d 290 (Cal. 2004); see discussion *infra* Part II (detailing *Covenant Care*).

<sup>114</sup> *Covenant Care*, 86 P.3d at 290.

<sup>115</sup> *Id.* at 292; Balisok & Jimenez, *supra* note 111, at 24. The court did not address MICRA in its opinion. *Covenant Care*, 86 P.3d at 290. The court refused to apply section 425.13 to actions under the Elder Abuse Act, overturning in part *Community Care & Rehabilitation Center v. Superior Court*, 79 Cal. App. 4th 787 (Ct. App. 2000). In *Community Care*, a family brought a wrongful death suit against Community Care & Rehabilitation Center ("CCRC"), including a claim for punitive damages. *Id.* at 790. The family argued that the wrongs done fell under the Elder Abuse Act. *Id.* CCRC argued that the procedural requirements of section 425.13 applied. *Id.* The appellate court agreed with CCRC. *Id.* at 792. It noted that the plaintiffs could not circumvent section 425.13's requirements simply by artfully pleading abuse or neglect rather than malpractice. *Id.* at 797. The court held that the procedural protections of section 425.13 applied to causes of action under the Elder Abuse Act. *Id.* at 793.

<sup>116</sup> *Covenant Care*, 86 P.3d at 292-93. Mr. Inclan's children alleged that the nurses' aides left decedent for long periods without food or water. *Id.* at 293. The nurses' aides also failed to change his soiled linens, thus leaving him to lie in his excrement. *Id.* He developed ulcers on his body that exposed muscle and bone and became "septic." *Id.* Septic refers to a toxic condition resulting from the spread of bacteria or their products from a focus of infection. MERRIAM-WEBSTER MEDICAL DICTIONARY (2002) (defining "septic"). Mr. Inclan also became dehydrated. *Covenant Care*, 86 P.3d at 293. Moreover, as decedent's condition worsened, Covenant Care failed to report the incidents to the authorities as well as the family. *Id.*

<sup>117</sup> *Id.* at 292.

<sup>118</sup> *Id.* at 293.

<sup>119</sup> *Id.*; see CAL. CIV. PROC. CODE § 425.13(a) (Deering 2004) (describing requirements for alleging punitive damages against healthcare provider).



trial court granted the motion because the allegations in the complaint went beyond simple professional negligence and thus did not trigger section 425.13's requirements.<sup>120</sup> The California Supreme Court granted review of the case because of a split of authority in two appellate districts regarding section 425.13's application to elder abuse claims.<sup>121</sup>

The Inclans argued that *Delaney's* reasoning precluded application of section 425.13 to the Elder Abuse Act.<sup>122</sup> They maintained that their claims of intentional, egregious elder abuse went beyond the scope of professional negligence.<sup>123</sup> *Covenant Care*, however, argued that *Central Pathology Service Medical Clinic, Inc. v. Superior Court* interpreted professional negligence broadly under section 425.13.<sup>124</sup> *Covenant Care* maintained that even egregious elder abuse arises out of professional negligence if it is directly related to a healthcare provider's services.<sup>125</sup> Therefore, a party alleging egregious elder abuse for actions arising out of a healthcare provider's professional services must abide by section 425.13's requirements.<sup>126</sup> To resolve the issue, the court compared the plain languages, legislative histories, and purposes of the Elder Abuse Act and section 425.13.<sup>127</sup>

The court first found that nothing in the plain languages of the Elder Abuse Act and section 425.13 suggests the legislature meant to conjoin them.<sup>128</sup> Neither statute references the other.<sup>129</sup> Whereas section 425.13 applies only to causes of action arising out of professional negligence,<sup>130</sup> an Elder Abuse Act case arises out of recklessness, oppression, fraud, or malice.<sup>131</sup> Moreover, the court held that neglect and abuse under the Elder Abuse Act correspond to an area of misconduct distinct from

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<sup>120</sup> *Covenant Care*, 86 P.3d 290 at 293.

<sup>121</sup> *Id.* at 293; see *Cnty. Care & Rehab. Ctr. v. Superior Court*, 79 Cal. App. 4th 787 (Ct. App. 2000) (holding that section 425.13's procedural requirements apply to elder abuse claims).

<sup>122</sup> *Covenant Care*, 86 P.3d at 295.

<sup>123</sup> *Id.*; see CAL. WELF. & INST. CODE § 15657.2 (Deering 2004) (exempting acts of simple professional negligence from Elder Abuse Act's purview).

<sup>124</sup> *Covenant Care*, 86 P.3d at 296; see *Cent. Pathology Serv. Med. Clinic, Inc. v. Superior Court*, 832 P.2d 924 (Cal. 1992) (holding that party alleging any claim arising out of professional services rendered must abide by section 425.13's requirements).

<sup>125</sup> *Covenant Care*, 86 P.3d at 296.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 296-301.

<sup>128</sup> *Id.* at 296.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

professional negligence under section 425.13.<sup>132</sup> The court determined that misconduct under the Elder Abuse Act is a failure to fulfill custodial obligations that becomes reckless, oppressive, fraudulent, or malicious.<sup>133</sup> Therefore, the Elder Abuse Act sanctions egregious acts of misconduct that are distinct from professional negligence.<sup>134</sup>

Furthermore, the court noted that nothing in the legislative history of either statute suggests a link between the Elder Abuse Act and section 425.13.<sup>135</sup> The court pointed out that the legislature enacted section 425.13 to protect healthcare providers only in their professional capacity as providers.<sup>136</sup> The court maintained that a conceptual distinction exists between a healthcare provider and an elder custodian.<sup>137</sup> The court noted that a healthcare provider is a person or facility licensed pursuant to specific licensing provisions.<sup>138</sup> In contrast, an elder custodian must carry out his or her obligations regardless of professional standing.<sup>139</sup> The court reasoned that a plaintiff alleging elder abuse brings a claim against a healthcare provider in its capacity as a custodian and not as a provider.<sup>140</sup> Thus, the court concluded that Elder Abuse Act violations in this case were not injuries directly related to the provider's professional services.<sup>141</sup> Therefore, section 425.13 did not apply.<sup>142</sup>

Finally, the court determined that implying a link between section 425.13 and the Elder Abuse Act would undermine the purpose of the latter.<sup>143</sup> According to the court, the legislature intended the Elder Abuse Act to protect the elderly from gross mistreatment in the form of abuse and neglect.<sup>144</sup> The legislature then added the heightened remedies for egregious elder abuse to encourage attorneys to take up the cause of abused elderly persons.<sup>145</sup> The court noted that burdening any Elder

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 297.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 298 (citing *Cent. Pathology Serv. Med. Clinic, Inc. v. Superior Court*, 832 P.2d 924, 929 (Cal. 1992)).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (citing *Delaney v. Baker*, 971 P.2d 986, 993 (Cal. 1999)).

<sup>140</sup> *Id.* at 298-99.

<sup>141</sup> *Id.* at 298.

<sup>142</sup> *Id.* at 299.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

Abuse Act claim with section 425.13's requirements for punitive damages would undermine this intent.<sup>146</sup> The court concluded that laws impeding Elder Abuse Act plaintiffs from pleading punitive damages would likely diminish an attorney's willingness to undertake such cases.<sup>147</sup> Thus, applying section 425.13 to elder abuse cases would hinder the legislature's purpose defined in the Elder Abuse Act.<sup>148</sup>

The *Covenant Care* court declined to apply section 425.13 to the Elder Abuse Act.<sup>149</sup> The court established section 425.13's purposes as distinct from those of the Elder Abuse Act.<sup>150</sup> Consequently, the court determined that burdening the cause of the elderly, as inscribed in the Elder Abuse Act, would undermine its purposes of encouraging litigation.<sup>151</sup> Therefore, section 425.13 does not apply to claims alleged under the Elder Abuse Act.

### III. ANALYSIS

The California Supreme Court correctly decided *Covenant Care* for several reasons. First, the decision encourages attorneys to take on elder abuse cases in two ways. *Covenant Care* eliminates section 425.13's procedural barrier that had been strategically employed by defendant healthcare providers.<sup>152</sup> In addition, the decision eliminates section 425.13's superfluous procedural hurdle that potentially hindered elder abuse attorneys from pursuing elder abuse claims.<sup>153</sup> Second, the decision ensures that the Elder Abuse Act and MICRA maintain distinct

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<sup>146</sup> *Id.* In a parallel case to *Covenant Care*, *Guardian North Bay v. Superior Court*, 94 Cal. App. 4th 963 (Ct. App. 2001), the court looked at the legislature's intent in enacting California Penal Code section 368, the corresponding criminal code for elder abuse. *Id.* The court noted that the legislature wished to protect a vulnerable class of people from abusive situations likely to cause serious death or injury. *Id.* at 977. Moreover, criminal responsibility under the code reflects a more egregious form of misconduct with a more culpable level of mens rea. *Id.* Therefore, the court ruled that the more lenient statute of limitations for civil actions based on a felony conviction trumped the less lenient MICRA statutes. *Id.* at 978. Citing *Delaney*, the court drew the line between the more egregious acts against the elderly versus those contemplated by MICRA. *Id.*

<sup>147</sup> *Covenant Care*, 86 P.3d at 299.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 301.

<sup>150</sup> See *supra* text accompanying notes 128-148 (detailing court's rationale).

<sup>151</sup> *Id.*

<sup>152</sup> See discussion *infra* Part III.A.1 (describing how section 425.13 provided defense barrier).

<sup>153</sup> See discussion *infra* Part III.A.2 (stating why section 425.13 is superfluous).

boundary lines.<sup>154</sup> Finally, as a matter of public policy, the decision offers a much-needed deterrent to those healthcare providers that repeatedly abuse elders.<sup>155</sup> Therefore, *Covenant Care* provides needed relief for elder abuse victims and their attorneys.

A. *Covenant Care Offers Incentives to Attorneys to Take on Elder Abuse Claims*

When the California legislature added enhanced remedies to the Elder Abuse Act, it specifically sought to encourage attorneys to take on elder abuse cases.<sup>156</sup> *Covenant Care* advances this legislative goal in two ways. First, the decision wipes out section 425.13's protective barrier that healthcare providers guilty of elder abuse previously hid behind.<sup>157</sup> Second, the holding removes section 425.13's procedural hurdle that attorneys working on elder abuse cases frequently had to jump in order to allege punitive damages.<sup>158</sup>

1. *Covenant Care Eliminates a Defensive Barrier Protecting Healthcare Providers that Engage in Elder Abuse*

The *Covenant Care* decision ensures that healthcare providers guilty of egregious abuse cannot hide behind section 425.13's protections.<sup>159</sup> The decision sweeps away a timing defense commonly used by healthcare providers.<sup>160</sup> After *Covenant Care*, healthcare providers who commit egregious acts against the elderly no longer enjoy the special protections against exemplary damages afforded by section 425.13.<sup>161</sup>

Prior to *Covenant Care*, attorneys seeking punitive damages against

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<sup>154</sup> See discussion *infra* Part III.B (delineating differences between MICRA and Elder Abuse Act).

<sup>155</sup> See discussion *infra* Part III.C (offering reason why *Covenant Care* deters healthcare providers).

<sup>156</sup> See CAL. WELF. & INST. CODE § 15600(j) (Deering 2004) (stating legislature's intentions in adding enhanced remedies).

<sup>157</sup> See *infra* text accompanying notes 159-167 (demonstrating how section 425.13 operated to protect healthcare providers who engaged in elder abuse).

<sup>158</sup> See *infra* text accompanying notes 168-188 (giving reasons why section 425.13 is superfluous).

<sup>159</sup> BUREAU OF NAT'L AFFAIRS, INC., HEALTH CARE FRAUD REPORT, PUNITIVE DAMAGES FOR ELDER ABUSE APPROVED BY STATE SUPREME COURT 268 (Mar. 31, 2004) (on file with author).

<sup>160</sup> *Id.*

<sup>161</sup> *Covenant Care, Inc. v. Superior Court*, 86 P.3d 290, 292 (Cal. 2004).

healthcare providers for elder abuse needed to act quickly to preserve their clients' rights because of section 425.13's time-barring constraints.<sup>162</sup> Defense counsel learned that they could defeat a 425.13 motion by stonewalling discovery aimed at establishing malice, fraud, oppression, or recklessness.<sup>163</sup> Thus, the time constraints required by section 425.13 often destroyed valid cases.<sup>164</sup> Furthermore, when a court fast-tracked a trial date in an Elder Abuse Act case to expeditiously resolve the matter, the time allotted for discovery shortened, thus imposing an additional difficulty on an elder abuse attorney.<sup>165</sup> *Covenant Care*, however, foreclosed this strategy by eliminating section 425.13's mandates in Elder Abuse Act cases.<sup>166</sup> In doing so, the court rallied to the side of the elderly and those who pursue their cause.<sup>167</sup>

## 2. *Covenant Care* Eliminates a Superfluous Procedural Hurdle for Elder Abuse Attorneys

In *Covenant Care*, the court remarked that section 425.13's limitations were not meant to burden those who pursue the cause of abused elderly persons.<sup>168</sup> Instead, the legislature enacted section 425.13 to protect

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<sup>162</sup> Mehta, *supra* note 4, at 40; *see supra* note 72 and accompanying text (addressing section 425.13's time limitations).

<sup>163</sup> BUREAU OF NAT'L AFFAIRS, INC., *supra* note 159 (stating that nursing homes hide behind timing elements of requirement that motion be filed no later than nine months prior to set trial date); E-mail from Russell S. Balisok, Plaintiffs' Counsel for *Covenant Care*, to author (Jan. 28, 2005, 13:24:34 PST) (on file with author). *See generally* Mehta, *supra* note 4, at 40 (noting that problem with section 425.13 has to do with high burden of proof and short time span).

<sup>164</sup> BUREAU OF NAT'L AFFAIRS, INC., *supra* note 159; E-mail from Russell S. Balisok, *supra* note 163; *see also* BUREAU OF NAT'L AFFAIRS, INC., *supra* note 159 (stating nine month time limit passes quickly); Chorney, *supra* note 79, at 1 (describing timing requirements as onerous for plaintiff attorneys); Mehta, *supra* note 4, at 40 (noting that time expires quickly for attorney to preserve client's right to allege punitive damages).

<sup>165</sup> CAL. GOV'T. CODE §§ 68600-68620 (Deering 2004) (detailing California Trial Court Delay Reduction Act); BUREAU OF NAT'L AFFAIRS, INC., *supra* note 159 (stating that fast-tracked trial date and stonewalled discovery cause section 425.13's deadline to pass quickly).

<sup>166</sup> BUREAU OF NAT'L AFFAIRS, INC., *supra* note 159; *see Covenant Care*, 86 P.3d at 293 (allowing plaintiffs to amend their complaints to add punitive damages for elder abuse even after two years).

<sup>167</sup> Balisok & Jimenez, *supra* note 111, at 27.

<sup>168</sup> *Covenant Care*, 86 P.3d at 296. An attorney who filed an amicus brief on behalf of the Consumer Attorneys of California in the *Covenant Care* case described section 425.13's timing requirements as onerous for plaintiff attorneys. Chorney, *supra* note 79, at 1; *see* CAL. CIV. PROC. CODE § 425.13(a) (Deering 2004) (establishing time limitations for filing for punitive damages).

healthcare providers from unsubstantiated punitive damage claims.<sup>169</sup> The court noted that imposing section 425.13's procedural hurdle on elder abuse plaintiffs would likely diminish an attorney's willingness to undertake such cases on a contingency basis.<sup>170</sup> Moreover, extending section 425.13 to elder abuse would be superfluous because section 425.13 seeks to address three concerns already resolved by the Elder Abuse Act.<sup>171</sup>

First, in enacting section 425.13, the legislature sought to require greater certainty when imposing punitive damages in medical malpractice actions.<sup>172</sup> The legislature hoped to ensure this certainty with a pretrial mechanism and the clear and convincing evidence standard.<sup>173</sup> Yet, under the Elder Abuse Act, a plaintiff seeking enhanced remedies must already prove the commission of egregious acts by clear and convincing evidence.<sup>174</sup> Therefore, the higher standard of proof for punitive damages in Elder Abuse Act cases and section 425.13 cases is

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<sup>169</sup> See *Coll. Hosp., Inc. v. Superior Court*, 882 P.2d 894, 896 (Cal. 1994) (stating that prophylactic purpose of section 425.13 is to prevent healthcare providers from onerous burden of defending against meritless punitive damages claims); *Goodstein v. Superior Court*, 42 Cal. App. 4th 1635, 1641 (Ct. App. 1996) (stating legislature enacted section 425.13 amid concern over routine inclusion of sham punitive damage claims in medical malpractice actions); *Looney v. Superior Court*, 16 Cal. App. 4th 521, 532 (Ct. App. 1993) (stating legislative purpose behind section 425.13 was to shelter healthcare providers from need to defend against punitive damages claims).

<sup>170</sup> *Covenant Care*, 86 P.3d 290 at 299. Compare *Eads v. Heritage Enters., Inc.*, 787 N.E.2d 771 (Ill. 2003) (holding that nursing home resident did not have to attach affidavit of merit to her complaint as usually required in malpractice cases), with *Dickerson v. Deaconess Long Term Care of Mo., Inc.*, 279 F. Supp. 2d 1068 (E.D. Mo. 2003) (dismissing case brought by family of deceased nursing home resident for failure to first file complaint with Missouri Attorney General). In *Eads*, the Illinois Supreme Court held that a plaintiff asserting a private cause of action under the Nursing Home Care Act did not have to meet heightened pleading standards normally required in malpractice actions. *Eads*, 787 N.E.2d at 772. To require otherwise would thwart the purpose of the Nursing Home Care Act. *Id.* at 777-79. However, in *Dickerson*, the U.S. District Court for the Eastern District of Missouri held that failure to file a preliminary written complaint with the attorney general as required by the Missouri Omnibus Nursing Home Act was fatal to plaintiffs' action. *Dickerson*, 279 F. Supp. 2d at 1070. The court dismissed the case. *Id.* at 1071.

<sup>171</sup> *Covenant Care*, 86 P.3d at 300-01.

<sup>172</sup> *Id.* at 300; see *supra* notes 68-78 and accompanying text (describing section 425.13's background and goals). Applying section 425.13 to the Elder Abuse Act would not significantly guarantee the propriety of imposing punitive damages. *Covenant Care*, 86 P.3d at 300.

<sup>173</sup> See *supra* notes 68-78 and accompanying text (describing section 425.13's background and goals).

<sup>174</sup> *Covenant Care*, 86 P.3d at 300.

the same.<sup>175</sup> Thus, with or without section 425.13, healthcare providers sued for violating the Elder Abuse Act must defend against egregious allegations.<sup>176</sup> Consequently, the uncertainty of alleging punitive damages that section 425.13 seeks to resolve is moot in Elder Abuse Act cases.

Second, applying section 425.13 to Elder Abuse Act claims would not protect healthcare providers against the unsubstantiated claims that concerned the legislature when it enacted section 425.13.<sup>177</sup> Prior to section 425.13's enactment, the legislature worried that plaintiffs would artfully plead an intentional tort to pray for punitive damages in a simple professional negligence action.<sup>178</sup> This strategy would, in turn, annul protections the legislature intended to afford healthcare providers in the MICRA context because plaintiffs could then pursue frivolous claims.<sup>179</sup> A claim under the Elder Abuse Act, however, already subjects the defendant to enhanced remedies by implying egregious conduct and a potential punitive damages award.<sup>180</sup> Section 425.13, then, addresses a concern that is not at issue in Elder Abuse Act cases.<sup>181</sup>

Finally, the timing requirement in section 425.13 serves to assist a healthcare provider by providing it with adequate notice of a punitive damages claim.<sup>182</sup> In any Elder Abuse Act claim, issues of egregious

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<sup>175</sup> *Id.*; see also *Benun v. Superior Court*, 123 Cal. App. 4th 113, 125 (Ct. App. 2004) (stating that section 425.13's objective is not to weed out frivolous elder abuse claims because level of culpability for punitive damages is same).

<sup>176</sup> *Covenant Care*, 86 P.3d at 300. The clear and convincing evidence standard already serves as a threshold for punitive damages. See *Ramey*, *supra* note 3, at 617 (maintaining that clear and convincing evidence standard virtually eliminates any incentive to bring actions except in cases of truly egregious behavior).

<sup>177</sup> *Covenant Care*, 86 P.3d at 300.

<sup>178</sup> *Id.*; see also *Cent. Pathology Serv. Med. Clinic, Inc. v. Superior Court*, 832 P.2d 924, 930 (Cal. 1992) (noting that interpreting section 425.13 to apply only to nonintentional tort conduct that gives rise to punitive damages undermines legislature's intent to protect healthcare providers). *Contra Bommareddy v. Superior Court*, 222 Cal. App. 3d 1017, 1021 (Ct. App. 1990) (concluding that limiting section 425.13 to causes of action for professional negligence would not render section 425.13 meaningless).

<sup>179</sup> The Elder Abuse Act, however, does not contain this same threat. *Covenant Care*, 86 P.3d at 300; see also *Cent. Pathology*, 832 P.2d at 930-31 (holding that intentional tort allegations against healthcare provider require abiding by section 425.13's procedural mandates).

<sup>180</sup> CAL. WELF. & INST. CODE §§ 15657, 15610.30, 15610.57, 15610.63 (Deering 2004); *Covenant Care*, 86 P.3d at 300.

<sup>181</sup> *Covenant Care*, 86 P.3d at 300.

<sup>182</sup> The timing requirement also prevents last minute insertions of punitive damages claims. *Covenant Care*, 86 P.3d at 301; see CAL. CIV. PROC. CODE § 425.13(a) (Deering 2004) (stating that court will not allow amended pleading that includes claim for punitive

behavior are always present by definition.<sup>183</sup> Thus, because an elder abuse defendant has notice from the outset of facts giving rise to a possible punitive damages claim, section 425.13's timing requirement is unnecessary.<sup>184</sup>

The California legislature designed section 425.13 to address frivolous punitive damages claims against healthcare providers.<sup>185</sup> It designed the Elder Abuse Act to encourage claims against healthcare providers.<sup>186</sup> The legislature struck a balance between the two statutes by including in Elder Abuse Act provisions safeguards addressing section 425.13's concerns.<sup>187</sup> Thus, section 425.13's application in elder abuse situations would be superfluous.<sup>188</sup>

*B. Covenant Care Provides a Potential for Further Demarcation Between MICRA and the Elder Abuse Act*

The choice between pursuing a claim as one of professional negligence under MICRA or one of elder abuse under the Elder Abuse Act dramatically impacts the course of subsequent litigation.<sup>189</sup> One main difference between MICRA and the Elder Abuse Act lies in the remedies

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damages if motion for such order is not filed within two years after complaint or not less than nine months before set trial date).

<sup>183</sup> *Covenant Care*, 86 P.3d at 301.

<sup>184</sup> *Id.*

<sup>185</sup> See *supra* notes 68-78 and accompanying text (describing section 425.13's background and goals).

<sup>186</sup> *Covenant Care*, 86 P.3d at 297.

<sup>187</sup> See *supra* text accompanying notes 172-184 (giving reasons why section 425.13 is unnecessary in Elder Abuse Act cases).

<sup>188</sup> See *supra* text accompanying notes 172-184.

<sup>189</sup> Buhai & Gilliam, *supra* note 49, at 574. The standard of care differs between the two statutes. *Id.* A MICRA defendant must exercise the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing. *Id.* In contrast, an elder abuse plaintiff must demonstrate reckless, oppressive, fraudulent, or malicious conduct in the provision or lack of provision of services. *Id.* The standard is that of a reasonable person. *Id.* The burden of proof for each claim also varies. *Id.* at 576. MICRA cases require proof by a preponderance of the evidence unless a party alleges punitive damages under section 425.13. *Id.* at 575. On the other hand, an elder abuse plaintiff must meet the clear and convincing evidence standard, even to recover economic and noneconomic damages. See CAL. WELF. & INST. CODE § 15657 (Deering 2004); see also *Lawsuits, Lies & Lobbyists*, ADVOC. (Cal. Advocates for Nursing Home Reform, San Francisco, Cal.), Winter 2002, at 2 (stating that elder abuse is not medical malpractice and that legislature formulated Elder Abuse Act to protect elders, while it formulated MICRA to protect doctors).



to which a defendant healthcare provider may be subject.<sup>190</sup> MICRA limits remedies in an attempt to thwart litigation, while the Elder Abuse Act enhances remedies in an attempt to encourage litigation.<sup>191</sup> Thus, a healthcare defendant prefers MICRA, while an elder abuse plaintiff prefers the Elder Abuse Act.<sup>192</sup>

A healthcare defendant favors MICRA because it imposes limitations on a plaintiff's recovery and provides leniency such as allowing collateral evidence.<sup>193</sup> First, a party alleging punitive damages under MICRA must abide by section 425.13's procedural mandates.<sup>194</sup> Second, MICRA disallows an award of noneconomic damages once a patient dies.<sup>195</sup> Third, a MICRA defendant may introduce evidence of a collateral benefit such as disability paid to a plaintiff as a result of the personal injury.<sup>196</sup> Such evidence has the potential to reduce a jury award.<sup>197</sup> Consequently, it behooves a healthcare facility to cloak itself in

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<sup>190</sup> Buhai & Gilliam, *supra* note 49, at 576; Mehta, *supra* note 4, at 37.

<sup>191</sup> Buhai & Gilliam, *supra* note 49, at 576 (stating that Elder Abuse Act cause of action provides for additional damages and attorney's fees, while MICRA cause of action provides for fewer remedies); Mehta, *supra* note 4, at 37 (stating that MICRA imposes numerous limitations on plaintiff's recovery so as to offer protection to healthcare providers); see CAL. ADVOCATES FOR NURSING HOME REFORM, CANHR'S 2004 LEGISLATION UPDATE (2004), <http://www.canhr.org/advocacy/Leg2004.htm> (describing recent legislation favoring elders). The legislature continues to enact legislation to encourage elder abuse claims. *Id.* On September 29, 2004, Governor Arnold Schwarzenegger signed Assembly Bill 2611, which states that a court can impose criminal penalties regardless of whether or not the perpetrator knew the victim was an elder. *Id.* Also, in the civil arena, the bill seeks to lower the level of proof required for financial elder abuse from clear and convincing evidence to a preponderance of the evidence. *Id.*

<sup>192</sup> See discussion *infra* notes 193-203 and accompanying text (detailing differences between MICRA and Elder Abuse Act).

<sup>193</sup> Mehta, *supra* note 4, at 36. It is interesting to note that the vast majority of verdicts in elder abuse lawsuits favor the defense. Buhai & Gilliam, *supra* note 49, at 569; see also notes 60-67 and accompanying text (describing MICRA limitations).

<sup>194</sup> See *Palmer v. Superior Court*, 103 Cal. App. 4th 953, 957-58 (2002) (holding that petitioner's claims fell within scope of MICRA and thus triggered section 425.13's punitive damages restrictions). In civil cases, a plaintiff must prove liability by a preponderance of the evidence. *Stoner v. Williams*, 46 Cal. App. 4th 986, 1001 (Ct. App. 1996).

<sup>195</sup> See CAL. CIV. PROC. CODE § 377.34 (Deering 2004) (limiting damage awards upon death of injured plaintiff).

<sup>196</sup> See CAL. CIV. CODE § 3333.1(a) (Deering 2004) (laying out guidelines for admitting evidence of collateral benefits).

<sup>197</sup> See *Fein v. Permanente Med. Group*, 695 P.2d 665, 686 (Cal. 1985) (stating that California Civil Code section 3333.1(a) is likely to lead to lower malpractice awards because it directly relates to MICRA's objective of reducing costs incurred by malpractice defendants and their insurers).

the protections of MICRA.<sup>198</sup>

An elder abuse plaintiff, on the other hand, favors the Elder Abuse Act because of the potential for enhanced remedies.<sup>199</sup> First, though the burden of proof is higher for any enhanced remedy, plaintiffs do not have to abide by section 425.13's procedural hurdles.<sup>200</sup> Second, the Elder Abuse Act allows the recovery of noneconomic damages to succeed the death of the elder.<sup>201</sup> Third, as distinct from MICRA cases, for Elder Abuse Act cases a court can award reasonable attorney's fees and costs.<sup>202</sup> Thus, the Elder Abuse Act offers incentives to both plaintiffs and their attorneys to participate in Elder Abuse Act cases.<sup>203</sup>

Opponents argue that the *Covenant Care* decision opens the door for more attacks on MICRA.<sup>204</sup> Specifically, opponents worry that this decision will encourage elder abuse plaintiffs to contend that the MICRA noneconomic cap of \$250,000 no longer applies to elder abuse cases.<sup>205</sup> Though this is a legitimate concern for healthcare providers, the damages cap may contravene the legislature's intent of protecting a vulnerable class of persons.<sup>206</sup>

The California legislature designed the cap on noneconomic damages to alleviate concerns of rising medical malpractice insurance costs.<sup>207</sup> In 1975, the legislature set the cap at \$250,000.<sup>208</sup> Today, the adjusted value of that cap has eroded to only \$83,000.<sup>209</sup> Were the legislature to adjust MICRA for inflation, the amount would instead be approximately \$879,000.<sup>210</sup> The losers, regardless of the MICRA cap valuation, are those

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<sup>198</sup> Ramey, *supra* note 3, at 621.

<sup>199</sup> Buhai & Gilliam, *supra* note 49, at 570.

<sup>200</sup> See *supra* notes 114-148 and accompanying text (detailing *Covenant Care* case).

<sup>201</sup> CAL. WELF. & INST. CODE § 15657(b) (Deering 2004).

<sup>202</sup> *Id.* § 15657(a).

<sup>203</sup> *Id.* § 15600(j).

<sup>204</sup> See Tanya Albert, *California Tort Reform Shaken by Abuse Laws as Court Creates Inpatient Loophole*, AMEDNEWS.COM, May 17, 2004 (on file with author); SCPIE CO., MEDIGRAM, CALIFORNIA COURT DECISIONS MAY REDUCE EFFECTIVENESS OF MICRA (2004), [http://www.scpie.com/publications/medigram/2004\\_2q.pdf](http://www.scpie.com/publications/medigram/2004_2q.pdf) (expressing concern that *Covenant Care* will result in more and more cases alleging elder abuse).

<sup>205</sup> Katz & Nakamura, *supra* note 65, at 7.

<sup>206</sup> See discussion *infra* notes 207-215 and accompanying text (discussing how MICRA counteracts Elder Abuse Act).

<sup>207</sup> Ramey, *supra* note 3, at 611; see also CONSUMER ATTORNEYS OF CAL., *supra* note 53, at 2 (stating reasons for MICRA cap on noneconomic damages).

<sup>208</sup> CONSUMER ATTORNEYS OF CAL., *supra* note 53, at 3.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

who suffer the greatest injuries, since their awards may far exceed the MICRA limitation.<sup>211</sup> The winners are those in the insurance industry who increase premiums based upon healthcare facilities' liability.<sup>212</sup> Therefore, the extension of MICRA policies to Elder Abuse Act claims seems counterintuitive.<sup>213</sup> A scheme that appears to make monetary recovery difficult for those who suffer does not blend well with a scheme intended to reduce the abuse of elders.<sup>214</sup> Elder abuse is not medical malpractice and should not be treated as such.<sup>215</sup> Therefore, MICRA caps, though applicable to malpractice claims, should not apply in Elder Abuse Act cases.

*Covenant Care* does not specifically address the applicability of MICRA to Elder Abuse Act claims.<sup>216</sup> The opinion, however, leads to the conclusion that MICRA does not apply to claims for elder abuse simply because the abusers happen to be healthcare providers.<sup>217</sup> Put more plainly, *Covenant Care* indicates that the old days of erring on the side of healthcare providers may be over.<sup>218</sup>

C. *Covenant Care Deters Healthcare Providers from Engaging in Elder Abuse and Second-Rate Care*

The court's ruling in *Covenant Care* will deter healthcare providers from engaging in elder abuse and providing poor quality care.<sup>219</sup> *Covenant Care* strips away a procedural protection for healthcare

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Ramey, *supra* note 3, at 644; see also *Lawsuits, Lies, & Lobbyists*, *supra* note 189, at 2 (stating that nursing home industry would like to extend MICRA limits to elder abuse cases but that elder abuse is not medical malpractice). Because the legislative goal of the Elder Abuse Act is to encourage attorneys to take on elder abuse cases, it does not make sense to cap noneconomic damages at \$250,000. Telephone interview with Russell Balisok, *supra* note 36.

<sup>214</sup> Ramey, *supra* note 3, at 644 (stating that hybrid mix of policies for MICRA and Elder Abuse Act may serve neither side).

<sup>215</sup> See *Lawsuits, Lies, & Lobbyists*, *supra* note 189, at 2 (describing differences between malpractice and elder abuse).

<sup>216</sup> Balisok & Jimenez, *supra* note 111, at 27.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 25 (citing instances of judicial attitude favoring healthcare providers).

<sup>219</sup> CAL. DEP'T OF HEALTH SERVS. LICENSING & CERTIFICATION PROGRAM, *supra* note 36, at 61; see Moskowitz, *supra* note 3, at 118 (stating that civil law has often been catalyst creating change in professional behavior); Ramey, *supra* note 3, at 612 (stating that imposition of greater liability can achieve deterrence).

providers that engage in abuse.<sup>220</sup> Simultaneously, the decision encourages attorneys to take on more Elder Abuse Act cases.<sup>221</sup> These two factors make a punitive damages award against a healthcare provider more of a probability than previously envisioned.<sup>222</sup>

With punitive damages at stake, the possibility of a defendant's bankruptcy or closure is a significant threat.<sup>223</sup> In California, an insurance company cannot pay a jury award of punitive damages.<sup>224</sup> If a jury awards punitive damages, the healthcare provider must pay these damages out of its own funds.<sup>225</sup> Thus, the greater possibility of punitive damages forces a healthcare provider to strive for quality care in its facility.<sup>226</sup>

Opponents of this new ruling worry that *Covenant Care* will produce a whirlwind of meritless lawsuits alleging punitive damages against healthcare providers.<sup>227</sup> They claim that, consequently, elder abuse will be alleged in every malpractice case so that plaintiffs have leverage to file for punitive damages.<sup>228</sup> This fear, however, may be unfounded since *Covenant Care* already addressed some of these concerns.

First, the *Covenant Care* court tightened several definitions for words used in pleading punitive damages.<sup>229</sup> This limits what a party may argue in an elder abuse case.<sup>230</sup> Furthermore, the clarified definitions

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<sup>220</sup> See discussion *supra* Part III.A.1 (describing how section 425.13 provided strategic defense barrier for healthcare providers).

<sup>221</sup> See discussion *supra* Part III.A.2 (detailing why section 425.13 is superfluous).

<sup>222</sup> Cases are now easier to get to trial without section 425.13's procedural hurdle. E-mail from Russell S. Balisok, *supra* note 163.

<sup>223</sup> Katz & Nakamura, *supra* note 65, at 7.

<sup>224</sup> Ramey, *supra* note 3, at 634-35; Katz & Nakamura, *supra* note 65, at 7.

<sup>225</sup> Sources cited *supra* note 224.

<sup>226</sup> See sources cited *supra* note 219 (stating that civil remedies act to deter).

<sup>227</sup> See Albert, *supra* note 204 (stating concern of medical groups that meritless claims alleging elder abuse will follow *Covenant Care*'s holding).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* The court had previously established that fraud, malice, and oppression required extreme or despicable behavior under the Elder Abuse Act. *Id.*; SCPIE CO., *supra* note 204. The court had not, however, strictly defined recklessness as requiring these elements. Albert, *supra* note 204. Yet, post-*Covenant Care*, recklessness requires despicable behavior. *Id.* The court further tightened the definition of "neglect" as more than negligence; neglect constitutes egregious conduct. *Id.* Finally, the court strengthened the idea that elder abuse speaks specifically to custodial care versus medical care. *Id.*; Gordon Ownby, *Elder Abuse Cases: Health Care Provider or Custodian?* (2004), <http://www.capmpt.com/riskmanagement/caseofmonth0404.html>. Physicians rarely provide custodial care, and, thus, the decision may afford them some protection. *Id.*

<sup>230</sup> Albert, *supra* note 204.

enable healthcare providers to defend themselves against meritless elder abuse claims that do not fit within the appropriate definitions.<sup>231</sup> Thus, the *Covenant Care* court's definitional explanations will likely provide boundaries for those healthcare facilities caught up in an onslaught of elder abuse allegations.<sup>232</sup> These boundaries, in turn, will offer more protection to healthcare facilities defending against elder abuse lawsuits.

Second, the final paragraph of the *Covenant Care* opinion may prove useful to healthcare providers because it establishes a heightened pleading standard for Elder Abuse Act claims.<sup>233</sup> The *Covenant Care* court stated that a party must still abide by heightened pleading standards for allegations under the Elder Abuse Act.<sup>234</sup> Therefore, healthcare facilities may be able to challenge general boilerplate claims for punitive damages early on in a lawsuit.<sup>235</sup> Nevertheless, the clear and convincing evidence standard of egregious conduct required by the Elder Abuse Act may limit meritless pleadings.<sup>236</sup> This high standard acts as a protection implicit in the Elder Abuse Act.<sup>237</sup>

Egregious acts committed by healthcare facilities against elders must cease.<sup>238</sup> The legislature intended this result through the Elder Abuse Act, and *Covenant Care* furthers these intentions.<sup>239</sup> The decision enables the Elder Abuse Act to fulfill its purpose and add significantly to the power of our civil justice system by encouraging elder abuse claims and

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<sup>231</sup> *Id.*

<sup>232</sup> Ownby, *supra* note 229.

<sup>233</sup> A plaintiff must plead a statutory cause of action with particularity. *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 916-17 (Cal. 1985). The *Covenant Care* court made it clear that a party must still meet this requirement when alleging an Elder Abuse Act violation. *Covenant Care, Inc. v. Superior Court*, 86 P.3d 290, 301 (Cal. 2004).

<sup>234</sup> *Covenant Care*, 86 P.3d at 301; Katz & Nakamura, *supra* note 65, at 7.

<sup>235</sup> Sources cited *supra* note 234.

<sup>236</sup> See CAL. WELF. & INST. CODE § 15657 (Deering 2004) (establishing necessity of proof by clear and convincing evidence).

<sup>237</sup> See Ramey, *supra* note 3, at 617 (maintaining that clear and convincing evidence standard virtually eliminates any incentive to bring actions, except in cases of truly egregious behavior).

<sup>238</sup> Balisok & Jimenez, *supra* note 111, at 27.

<sup>239</sup> See CAL. WELF. & INST. CODE § 15600 (stating legislature's intentions in taking on cause of elderly); Balisok & Jimenez, *supra* note 111, at 27 (maintaining that *Covenant Care* could not more fairly and clearly underscore legislature's goals to protect elderly and deter heinous conduct against them).

thus deterring abuse in the first place.<sup>240</sup>

#### CONCLUSION

*Covenant Care* provides a victory for elder advocates. The decision advances the legislature's intent of protecting the elderly by encouraging elder abuse claims and deterring abuse.<sup>241</sup> Healthcare providers guilty of elder abuse and second-rate elder care can no longer hide behind section 425.13's procedural protections.<sup>242</sup> Moreover, section 425.13's superfluous procedural hurdles no longer burden attorneys.<sup>243</sup>

In addition, the *Covenant Care* decision provides potential for further demarcation between MICRA and the Elder Abuse Act.<sup>244</sup> The legislature enacted MICRA statutes to discourage lawsuits against healthcare providers and limit recovery for MICRA plaintiffs.<sup>245</sup> In contrast, the legislature enacted the Elder Abuse Act to encourage lawsuits against healthcare providers guilty of egregious abuse and to provide enhanced remedies for plaintiffs.<sup>246</sup> As a result of these contravening goals, a healthcare provider favors MICRA while an elder abuse victim favors the Elder Abuse Act.<sup>247</sup>

Finally, *Covenant Care* serves to deter facilities from abusing elders.<sup>248</sup> The elimination of section 425.13's applicability to the Elder Abuse Act makes punitive damages more of a threat to a healthcare facility.<sup>249</sup> If society forces facilities to pay out of their pockets, this may encourage them to treat the elderly with care. *Covenant Care* ensures that the civil justice system will play a dominant role in ending decades of neglect and abuse of the elderly.<sup>250</sup>

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<sup>240</sup> Balisok & Jimenez, *supra* note 111, at 28.

<sup>241</sup> CAL. WELF. & INST. CODE § 15600.

<sup>242</sup> See discussion *supra* Part III.A.1 (describing how section 425.13 provided strategic defense barrier to healthcare providers engaged in elder abuse).

<sup>243</sup> See discussion *supra* Part III.A.2 (detailing why section 425.13 was superfluous when applied to Elder Abuse Act cases).

<sup>244</sup> See discussion *supra* Part III.B (elaborating differences between MICRA and Elder Abuse Act).

<sup>245</sup> See discussion *supra* Part III.B.

<sup>246</sup> See discussion *supra* Part III.B.

<sup>247</sup> See discussion *supra* Part III.B.

<sup>248</sup> See discussion *supra* Part III.C (offering reason why *Covenant Care's* decision will deter healthcare facilities from engaging in elder abuse).

<sup>249</sup> See discussion *supra* Part III.C.

<sup>250</sup> Balisok & Jimenez, *supra* note 111, at 27.