

The Winn Case: A Game Changer for California's Senior Care & Housing Industry

Over the past several decades, various actions by California's legislature and courts have significantly impacted available recovery for elder abuse claims, alternating between favoring patients and providers. The insurance industry has reacted accordingly by changing the way policies are written and tightening available coverage and policy limits.

The California legislature first sparked an onslaught of elder abuse litigation after enacting the Elder & Dependent Adult Civil Protection Act (EDACPA) in 1982 (Welfare & Institutions Code section 15600, *et. seq.*), which provides enhanced remedies of attorneys' fees and post-mortem recovery for pain and suffering if abuse of an elder is proven, which can be mere negligence in their care. EDACPA also permits recovery of punitive damages in certain circumstances. Prior to EDACPA, there were very few cases brought on behalf of the elderly alleging malpractice or failures in care because recoveries were limited by California's Medical Insurance Compensation Recovery Act (MICRA), California Civil Code section 3333.2, which caps non-economic damages such as pain and suffering at \$250,000. There was no wage loss due to the age and/or infirmity of the claimants and given the fragility of the claimant population, there frequently could be no recovery for pain and suffering, as such claims do not survive death.

After EDACPA's enactment, and as members of the senior care and housing industry are painfully aware, cases alleging elder abuse started being filed with increasing frequency in the mid-1990s. By the late-1990s and into the early-2000s, there was a tsunami of elder abuse litigation with jury awards and settlements growing exponentially. Insurance policies for skilled nursing, rehabilitation and acute care facilities were initially written like standard business liability policies, not like malpractice policies which are "claims made." As a result, policy limits could be "stacked," meaning that recoveries were significant. Insurers quickly reacted to the onslaught of litigation by limiting coverage, including making most policies "claims made," which effectively eliminated the application of multiple years of coverage for a claim of elder abuse. Many other insurers simply stopped offering coverage to the senior care and housing industry altogether.



by Linda E. Klamm & Samantha D. Wolff



The senior care and housing industry was again impacted by the California Supreme Court's 2004 decision in *Covenant Care v. Superior Court* (2004) 32 Cal.4th 771. Prior to this decision, defense counsel asserted that MICRA's \$250,000 limit applied to damages for pain and suffering under EDACPA. But in *Covenant Care*, the California Supreme Court held that MICRA's cap did not apply because even though the skilled nursing facility was a licensed health care provider, the facility was being sued under EDACPA for "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." (*Covenant Care, supra*, 32 Cal.4th at p. 783 [emphasis added].) Plaintiff's counsel reacted by filing even more cases and began naming doctors, nurses, health care providers, and affiliated facilities and their holding companies as defendants in the hope of triggering more insurance policies and garnering larger settlements, jury awards, and attorneys' fees.

The most recent impact came in May of this year, when the pendulum finally swung in favor of elder care providers in the California Supreme Court's decision in the case of *Winn v. Pioneer Medical Group, Inc.*, (May 19, 2016) 63 Cal. 4th 148. In *Winn*, the Court held that a defendant must have care or custody of the claimant and must provide for one or more of the basic needs of an elder or dependent adult in order for a claim of neglect to lie for elder abuse. (*Winn*, at 160.) The Court rejected the notion that an outpatient clinic could be held liable for elder abuse where it did not have "care and custody" of the claimant and did not provide basic services that an ordinary fully competent able-bodied adult could normally provide for themselves. The Court noted that "it is the defendant's relationship with an elder or a dependent adult – not the defendant's professional standing or expertise – that makes the defendant potentially liable for neglect." (*Winn*, at 158.)

The practical outcome of the *Winn* decision is likely to be lowered settlement and jury award potential for alleged "elder abuse" claims. Only facilities that have care and custody of an elder or dependent adult and provide the type of services that an able-bodied adult could normally provide on their own, can be held liable under EDACPA. Additionally, affiliated facilities and holding companies will not have liability under EDACPA, and similarly, doctors, nurses, other healthcare providers and clinics will not be liable under EDACPA absent a custodial relationship. Notably, many non-custodial defendants in recently initiated cases alleging elder abuse are using the *Winn* decision to extricate themselves from litigation.

***Winn's* probable impact on insurance for the senior care and housing industry is twofold. First, insurers will likely take the position that medical care providers without a custodial relationship to a claimant will not be liable under EDACPA and that their liability will be limited by MICRA, thereby limiting the amount insurers will be willing to pay to settle such claims. Second, insurers will similarly take a very narrow view on the liability of affiliated and holding companies of custodial care providers in offering monies for settlement.**

Take care to ensure you have the appropriate coverages in place. If you have concerns or questions regarding the impact of the *Winn* case on your insurance coverage, or need assistance with resolution, contact the authors of this alert, below.

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