

## ELDER ABUSE AND MICRA

We have recently encountered attempts by plaintiffs' attorneys to further expand the already broad scope of the Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act"). Specifically, they argue that there are two kinds of elder neglect -- (1) "simple" elder neglect, and (2) reckless, oppressive, fraudulent or malicious elder neglect -- and that proving *either* type of neglect takes the action outside of MICRA.

As the statutory definition of elder neglect closely parallels the definition of ordinary negligence, such an argument would obviously have serious ramifications if accepted by a trial court. In an effort to counter this new attempt to circumvent the protections given to health care providers, following is an analysis of the relationship between the Elder Abuse Act and MICRA in this context.

The Elder Abuse Act defines "neglect" as:

The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

Where such neglect is proven by clear and convincing evidence, *and* the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of the neglect, the plaintiff may recover attorney's fees and costs, and other heightened remedies. In other words, the Act describes (1) elder abuse, and (2) reckless, oppressive, fraudulent and/or malicious elder abuse. Only for the second category is a plaintiff entitled to the heightened remedies under the Act.

A common question in elder abuse lawsuits is: Does MICRA apply? According to the California Supreme Court, the answer is *no*, at least where the neglect is proven by clear and convincing evidence, and is reckless, oppressive, fraudulent or malicious. (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771; *Delaney v. Baker* (1999) 20 Cal.4th 23.)

However, the plaintiff's bar has attempted to bootstrap the principles above into an argument that MICRA does not apply in *any* action brought pursuant to the Elder Abuse Act, regardless of whether "recklessness, oppression, fraud or malice" is proven by clear and convincing evidence at trial. In other words, plaintiffs contend that proving simple neglect by a preponderance of the evidence places the action outside the scope of MICRA.

Although this remains an open question in California jurisprudence, it is our conclusion that the plaintiff's bar is misguided. While it may be the case that there are two degrees of elder abuse, only the more egregious of the two should place an action outside the scope of MICRA. This distinction is necessary to avoid the confusion that would arise

from determining whether a defendant's actions were "neglect" or "professional negligence." As stated by the California Supreme Court:

The difficulty in distinguishing between "neglect" and "professional negligence" lies in the fact that some health care institutions, such as nursing homes, perform custodial functions *and* provide professional medical care. When, for example, a nursing home allows a patient to suffer malnutrition, defendants appear to argue that this was "professional negligence," the inability of nursing staff to prescribe or execute a plan of furnishing sufficient nutrition to someone too infirm to attend to that need herself. But such omission is also unquestionably "neglect," as that term is defined in former section 15610.57.

Section 15657 provides the way out of this ambiguity: *if the neglect is "reckless[]," or done with "oppression, fraud or malice," then the action falls within the scope of section 15657 and as such cannot be considered simply "based on . . . professional negligence" within the meaning of section 15657.2.* The use of such language in section 15657, and the explicit exclusion of "professional negligence" in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, "acts of egregious abuse" against elder and dependent adults (Sen. 3d reading analysis, Sen. Bill No. 679 (1991-1992 Reg. Sess.) as amended Sept. 10, 1991, p. 2), while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened "clear and convincing evidence" standard.

(*Delaney, supra*, 20 Cal.4th at pp. 34-35 [emphasis added].)

The holding in *Delaney* was later described by the Supreme Court as "concluding that a cause of action for 'reckless neglect' under the Elder Abuse and Dependent Adults Civil Protection Act, section 15600 et seq., is distinct from a cause of action 'based on professional negligence' within the meaning of section 15657.2." (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 116 [emphasis added].) The necessary implication is that simple neglect -- without more -- is indistinct from professional negligence, and MICRA would apply.

The analysis was reiterated by the Supreme Court in *Covenant Care*:

As we have noted, the Legislature apparently concluded that the high standard imposed by section 15657 -- clear and convincing evidence of (i) liability and (ii) recklessness, malice, oppression or fraud -- adequately protects health care providers from liability under the statute for acts of simple or even gross negligence.

(*Covenant Care, supra.*, 34 Cal.4th at p. 785.) Thus, elder abuse should not be removed from the protections of MICRA unless it is reckless, oppressive, fraudulent or malicious.

In short, California courts have yet to directly and comprehensively address the full interplay between the Elder Abuse Act and MICRA. However, based upon the Supreme Court rulings in *Delaney* and *Covenant Care*, we have concluded that the protections of MICRA should remain in effect unless a plaintiff is able to prove elder abuse by clear and convincing evidence, and that the elder abuse was committed with recklessness, malice, oppression or fraud.