

# PROTECTING OUR ELDERS: PROBLEMS AND SOLUTIONS

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# Health & Safety Code §15610.57

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Neglect broadly defined to include negligent conduct, including the failure to provide healthcare, food, clothing, water or shelter, or to assist in personal hygiene or the failure to protect from health and safety hazards, or the failure to prevent malnutrition or dehydration.

## Welfare & Institutions Code §15610.63

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Physical abuse defined to include a variety of criminal acts, including *battery*, as well as “unreasonable physical constraint” and the prolonged or continual deprivation of food or water. In addition, physical abuse includes the use of a physical or chemical restraint or psychotropic medication for punishment or for a period beyond that for which the medication was ordered by physician, or for any purpose not authorize the physician.

# Who commits neglect and physical abuse?

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Custodial care givers:

Family

Institutional Care Providers

# Institutional Care Providers: Hospitals

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Typically those seeking to prevent readmission of elderly patients with chronic cardiac or pulmonary conditions in order to avoid substantial Medicare readmission penalties.

# Institutional Care Providers: Nursing Facilities

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Typically because adequate staffing and training of nursing personnel is an expense not compatible with planned profit goals.

# Institutional Care Providers:

Managed care entities such as HMOs and the medical groups and hospitals

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HMOs contract and delegate duties to provide care to hospitals and medical groups, who receive a fixed fee per patient per month to provide care. The less care provided, the more the delegated provider stands to realize as a profit.

# Showing required under Welfare & Institutions Code §15657

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- That the misconduct causing injury is shown by **clear and convincing** evidence to have amounted to malice, fraud, oppression or recklessness.
- Generally, this requires showing defendant knew or should have known that a course of conduct (act or omission) would probably result in severe injury.

# Red Flags

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- Malnutrition
- Severe Pressure Sores
- Broken bones

# Red Flags (con't)

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- Hospital persuasion to put patient on hospice status
  - (per Medicare, hospice requires condition expected to lead to death within 6 months)
  - (hospice is a service exclusively paid for by federal govt)

# Red Flags (con't)

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- Patient enrolled in Medicare Advantage plan
- Combined with an unusual outcome or
- A marked departure from the standard of care  
= elder abuse

# HMOs: Why sue them?

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- That's where the trouble starts
- HMO has power to correct bad behavior by its delegees

# Medicare Preemption

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When suing Medicare HMO or entity contracting with Medicare HMO, must consider and anticipate preemption defense.

- Expressly Preempted:
  - All state statutes and regulations aimed at HMOs
  - All other state laws including common laws if inconsistent with federal objectives.
- COMMON LAW not inconsistent with federal objectives not preempted.

(Uhm v. Humana)

# Bibliography

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*Winn v. Pioneer Med. Gp.* (2016) 63 Cal. 4<sup>th</sup> 148

*McCall v. PacifiCare of California* (2001) 25 Cal. 4<sup>th</sup> 412

*Uhm v. Humana* (9<sup>th</sup> Cir. 2010) 620 F.3d 1134

California Welfare & Institutions Code §15610.57 (neglect)

California Welfare & Institutions Code §15610.63 (physical abuse)

California Welfare & Institutions Code §15657 (remedies)

Title 42 U.S.C. §1395w-26(b)(3) (Medicare preemption)