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George S. Ingalls

Linda T. Layton

Nomiki B. Weitzel

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# ELDER ABUSE ORIGINATING IN THE INSTITUTIONAL SETTING

GEORGE S. INGALLS,\* LINDA T. LAYTON,\*\* AND NOMIKI B. WEITZEL\*\*\*

## I. INTRODUCTION

As the largest segment of our Nation's population ages, their problems increase proportionally. One of the most serious of these concerns is abuse of the elderly. Elder abuse occurs in both domestic and institutional environments. This article will address abuse originating in institutional settings designed specifically to protect and nurture our elderly population.

## II. STATISTICS

The Older Americans Act (OAA) was passed by Congress in 1965 to provide for state area agencies on aging to assess the need for elder abuse prevention services.<sup>1</sup> In 1987, the Omnibus Budget Reconciliation Act<sup>2</sup> amended the OAA to reform the standards for nursing home facilities and to provide for the Long Term Care Ombudsman Program to investigate and resolve complaints at the facilities.<sup>3</sup>

The Long Term Care Ombudsman Annual Report for Fiscal Year 1995<sup>4</sup> has recently been published. This report gives specific statistics of complaints leveled at long term care facilities and the resolution of these complaints.<sup>5</sup> According to the report, about 72% of the facility com-

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\* George S. Ingalls, Esquire, received his B.A. from Tulane University in 1970, and his J.D. from Tulane University School of Law in 1974. He also attended Johns Hopkins University where he received his Masters of Administrative Science-Information Technologies in 1990. Mr. Ingalls practices in the fields of elder law, estates and trusts law, and real estate law in Baltimore, Maryland. He is a founding member and past chair of the Section of Elder Law of the Maryland State Bar Association, and a member of the National Academy of Elder Law Attorneys.

\*\* Linda T. Layton, Esquire, practices in the fields of elder law, and estates and trusts law in Baltimore, Maryland. She is a member of the Section of Elder Law and the Section of Estates and Trusts of the Maryland State Bar Association, and a member of the National Academy of Elder Law Attorneys.

\*\*\* Nomiki B. Weitzel, Esquire, practices in the fields of elder law, and estates and trusts law in Baltimore, Maryland. She is an adjunct professor at the University of Baltimore School of Law. She is a member of the Section of Elder Law of the Maryland State Bar Association, and a member of the National Academy of Elder Law Attorneys.

1. Pub. L. No. 89-73, 79 Stat. 218 (codified as amended at 42 U.S.C. §§ 3011-3058ee (1994 & West Supp. 1998)).

2. Pub. L. No. 100-203, 101 Stat. 1330 (codified as amended in scattered sections of the U.S.C.).

3. Id. § 4201(a)(3), 101 Stat. 1330-160 to -174 (codified as amended at 42 U.S.C. § 1395i-3(a)(3) (1994 & West Supp. 1998)).

4. 1995 *Long Term Care Ombudsman Annual Rep. Pt III* <<http://www.aoa.dhhs.gov/napis/95nors/part3.html>>.

5. *Id.* at 1.

plaints were either resolved or partially resolved.<sup>6</sup> Over 85% of the complaints related to nursing home residents.<sup>7</sup> The total number of complaints by the fifty-two national Ombudsmans' Offices reporting was 218,455 complaints filed by 162,338 complainants. Nursing home complaints amounted to 86.7% of the complaints.<sup>8</sup>

Twenty-eight state Ombudsmans' Offices provided a detailed breakdown of complaints. Out of 54,305 total complaints,<sup>9</sup> 47,343 pertained to nursing facilities,<sup>10</sup> and 30% of these complaints were from the residents themselves. Twenty-nine states provided the most frequently cited complaints. Of the 82,442 complaints pertaining to nursing homes,<sup>11</sup> 24,587 pertained to residents' rights.<sup>12</sup> Of these residents' rights complaints, 6,128 were for abuse, gross neglect, and exploitation.<sup>13</sup> There were also 17,780 complaints dealing with the quality of life, and 25,945 addressing residential care.<sup>14</sup>

From the twenty-nine reporting offices, which total 50% of all complaints received, the most frequently received complaints were for:

Accidents and improper handling	3.9%
Dignity, self-respect, attitude	3.8%
Menu quality	3.7%
Personal hygiene	3.7%
Requests for assistance, call lights	3.4%
Care plan and resident assessment	3.4%
Shortage of staff	3.0%
Discharge/eviction, planning, and notice	2.7%
Personal property lost, stolen . . . destroyed	2.7%
Symptoms unattended, no notice of change of condition	2.4%
Other care	2.3%
Physical abuse	2.2%
Medications-administration, organization	2.1%
Cleanliness, pests	1.7%
Family conflict	1.7%
Billing/charges notice, accounting	1.6%
Odors	1.5%

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6. *Id.*

7. *Id.* at 2.

8. *Id.*

9. *Id.* at 3.

10. *Id.*

11. *Id.* at 5.

12. *Id.*

13. *Id.*

14. *Id.*

Roommate conflict	1.4%
Legal guardianship, conservatorship, power of attorney, wills	1.4%
Staff unresponsive, unavailable	1.4%
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TOTAL	49.9% <sup>15</sup>

The total number of complaints from the twenty-nine states providing full data was 93,125.<sup>16</sup> Of these, 72.38% were verified<sup>17</sup> and 60.06% were resolved to the satisfaction of the resident.<sup>18</sup> The twenty-three states not providing complete data reported a total of 123,341 complaints from 102,782 complainants.<sup>19</sup> Seventy-seven percent were resolved or partially resolved.<sup>20</sup> Those complaints pertaining to nursing homes totaled 82%.<sup>21</sup>

Although these statistics are two years old, they still reflect the seriousness of abuse issues prevalent in institutional settings. The knowledge that 50% of the total complaints are violations of the residents' rights should put the federal government on alert that the laws in place and the surveying procedures that exist are not sufficient to combat the problem of abuse, neglect, and exploitation.

### III. RESIDENTS' BILL OF RIGHTS

The Office of the Inspector General of the Department of Health and Human Services has identified seven different types of elder abuse:

1. Physical Abuse—Infliction of physical pain or injury which includes sexual abuse;
2. Misuse of restraints—Chemical or physical control of a resident beyond a physician's orders or not in accordance with an accepted medical practice;
3. Verbal or Emotional Abuse—Infliction of mental or emotional suffering;
4. Physical Neglect—Disregard for the necessities of daily living;
5. Medical Neglect—Lack of care for existing medical problems;
6. Verbal or Emotional Neglect—Creating situations in which esteem is not fostered;

15. *Id.* at 6, 7.

16. *Id.* at 8.

17. *Id.*

18. *Id.*

19. *Id.* at 9.

20. *Id.*

21. *Id.*

7. Personal Property Abuse (Material Goods)—Illegal or improper use of a resident's property by another for personal gain.<sup>22</sup>

The federal government has not provided a concrete definition of elder abuse. However, in order to combat the increase in nursing home abuse that came to light in the 1980s, Congress passed the Nursing Home Reform Act<sup>23</sup> (included in the Omnibus Budget Reconciliation Act of 1987 [OBRA]).

This Act mandates that, for a facility to qualify for federal funding, "A skilled nursing facility must provide services to attain or maintain the highest practicable physical, mental, and psychological well-being of each resident in accordance with a written plan of care which"<sup>24</sup> describes the resident's needs and how those needs will be met. This plan of care is to be prepared initially with the participation of the residents' families and is to be periodically reviewed and revised.<sup>25</sup> "The resident has a right to a dignified existence, self determination, and communication with and access to persons and services inside and outside the facility."<sup>26</sup> "The resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights."<sup>27</sup> To achieve these goals, the law provides that a resident has certain rights that must be met by the nursing facility. The "facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life."<sup>28</sup> "The facility must promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality."<sup>29</sup>

OBRA 1987 includes a "Residents' Bill of Rights" which provides the basic requirements for the care of residents in skilled nursing facilities. This Bill of Rights is found in 42 U.S.C. § 1395i-3(c)-(h) and 42 C.F.R. § 483.10-483.15.<sup>30</sup> The Bill of Rights<sup>31</sup> provides that residents

22. Christine L. McDaniel, *Elder Abuse in the Institutional Setting* (visited May, 1997) <<http://www.ink.org/public/keln/bibs/mcdaniel2.html>>.

23. Pub. L. No. 100-203, §§ 4201-03, 101 Stat. 1330-160 to 182 (codified as amended at 42 U.S.C. § 1395i-3 (1994 & West Supp. 1998)).

24. 42 U.S.C. § 1395i-3(b)(2)(A).

25. *Id.* § 1395i-3(b)(2)(B), (C).

26. 42 C.F.R. § 483.10 (1997).

27. *Id.* § 483.10(a)(2).

28. 42 C.F.R. § 483.15 (1997).

29. *Id.* § 483.15(a).

30. 42 USC § 1395i-3(c)-(h); 42 CFR §§ 483.10, -.15. These sections provide that each resident has the following rights:

1. Freedom of Choice—to choose a personal physician, to be informed in advance of care and treatment, to be informed in advance of changes in care and treatment, and to participate in these changes;
2. Privacy—with respect to accommodations, medical treatment, written and telephonic communications, visits and meetings with family and resident groups;

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3. Confidentiality—of personal and clinical records and access to those records;
    4. Accommodations of needs—to reside and to receive services with reasonable accommodation of individual needs and preferences, and to receive advance notice of room or roommate changes;
    5. Grievances—to voice complaints about care and treatment that is (or fails to be) furnished without fear of discrimination of reprisal, and to receive prompt action by the facility to resolve grievances;
    6. Participate in resident and family groups—to be free to organize and to participate in resident groups, and to have family meet with other family members of the residents in the facility;
    7. Participate in other activities—to participate in social, religious, and community activities;
    8. Examination of survey results—to examine results of facility surveys furnished to the Secretary with respect to the facility and any plan of correction;
    9. Refusal to certain transfers—to refuse transfer to another room for the purpose of relocating from a skilled portion of the facility to less skilled portion of the facility;
    10. Notice of rights and services—the facility must make available upon admissions, both orally and in writing, the resident's legal rights and the services available in the facility, all entitlement and eligibility requirements of Medicare and Medicaid, the protection procedures of personal funds, available client advocacy groups, complaint procedures, advance directives, notification procedures of accident or change in the resident's physical, mental or psychological state, and change in room or roommate;
    11. Transfer and discharge rights—to be permitted to remain in the facility and not to be transferred or discharged unless the transfer is necessary for the resident's welfare, the residents's health has improved sufficiently so that they no longer need the facility's services, the safety of other individuals is endangered, the resident fails to pay for care, or the facility ceases to operate;
    12. Access and visitation—to have immediate access by a representative of the Secretary, the State, ombudsman, resident's physician, family visitor having consent of resident, providers of health services, legal or other residential services;
    13. Quality of care—facility must establish and maintain identical policies and practices regarding transfer, discharge, covered services;
    14. Admission Policies—facility must not require resident to waive any rights under Medicare or Medicaid or third party guarantee of payment as condition of admissions;
    15. Protection of the resident's funds—facility must not require the resident to deposit personal funds with the facility. If the resident does give written authority for the facility to hold funds, any amount over \$100.00 must be deposited in an interest-bearing account separate from facility accounts. 42 U.S.C. § 1395i-3.
    16. Environment—facility must provide:
      - a. A safe, clean, comfortable and homelike environment which allows the resident to use his or her personal belongings to the extent possible;
      - b. Housekeeping and maintenance services necessary to maintain a sanitary, orderly, and comfortable interior;
      - c. Clean bed and bath linens that are in good condition;
      - d. Private closet space in each resident's room;
      - e. Adequate and comfortable lighting levels in all areas;
      - f. Comfortable and safe temperature levels;
      - g. Maintenance of comfortable sound levels. 42 C.F.R. § 483.15(h)(1)-(7).

Specific rights against restraint and abuse are found in 42 CFR § 483.13(a)-(c) (1997).

- (a) Restraints—The resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms. § 483.13(a);
- (b) Abuse—The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion. § 483.13(b);
- (c) Staff treatment of residents—The facility must develop and implement written policies and procedures that prohibit the mistreatment, neglect, and abuse of residents, and the misappropriation of the resident's property. § 483.13(c);
  - (1) The facility must:
    - (i) not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion;

have a freedom of choice<sup>32</sup> to choose a personal physician, and to participate in and be informed about any changes in their own care and treatment. Residents also have a right of privacy in their own accommodations, treatment, communications, both written and telephonic, and with family members during visits.<sup>33</sup> Residents can refuse certain transfers to another room, and they must be able to remain in the facility unless their condition improves or such a transfer is necessary for the resident's welfare.<sup>34</sup> Strict confidentiality is to be observed with regard to all personal and clinical records.<sup>35</sup> All residents will be able to voice any grievances about their care and treatment without fear of discrimination or reprisal.<sup>36</sup> Residents are free to participate in resident and family groups<sup>37</sup> and to participate in social, religious, and community activities,<sup>38</sup> and to receive visits from the state,<sup>39</sup> Ombudsmen's Office, legal services health services or other residential services.<sup>40</sup> Residents also have the right to examine the results of any surveys pertaining to the facility and any corrections directed by the Secretary.<sup>41</sup> The facility must make available upon admission, both orally and in writing, the resident's legal rights and the services available in the facility, all entitlement requirements for benefits to which the resident may be eligible, complaint procedures, and notification procedures.<sup>42</sup> Furthermore, facilities are required to provide identical policies and practices regarding transfer, discharge, and covered services.<sup>43</sup> The facility must not require the resident to waive any rights under Medicare or Medicaid or a third party guarantee of payment as a condition of admission.<sup>44</sup>

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(ii) not employ individuals who have been:

- (A) found guilty of abusing, neglecting, or mistreating residents by a court of law; or
- (B) have had a finding entered into the State Nurse Aide Registry concerning abuse, neglect, mistreatment of residents, or misappropriation of their property; and

(iii) report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff to the State Nurse Aide Registry, or licensing authorities.

*Id.*

- 31. 42 U.S.C. § 1395i-3(c).
- 32. *Id.* § 1395i-3(c)(1)(A)(i).
- 33. *Id.* § 1395i-3(c)(1)(A)(iii).
- 34. *Id.* § 1395i-3(c)(2)(A)(i), (ii).
- 35. *Id.* § 1395i-3(c)(1)(A)(iv).
- 36. *Id.* § 1395i-3(c)(1)(A)(vi).
- 37. *Id.* § 1395i-3(c)(1)(A)(vii).
- 38. *Id.* § 1395i-3(c)(1)(A)(viii).
- 39. *Id.* § 1395i-3(c)(1)(A)(ix).
- 40. *Id.* § 1395i-3(c)(3)(D).
- 41. *Id.* § 1395i-3(c)(1)(A)(ix).
- 42. *Id.* § 1395i-3(c)(1)(B).
- 43. *Id.* § 1395i-3(c)(4).
- 44. *Id.* § 1395i-3(c)(5)(A)(i), (ii).

The resident is not required to deposit any personal funds with the facility.<sup>45</sup> The facility must provide a clean, safe, comfortable, and home-like environment allowing the residents to use their own personal belongings.<sup>46</sup> Clean bed and bath linens must be provided<sup>47</sup> in addition to comfortable and safe sound levels, temperature, and lighting.<sup>48</sup> This Bill of Rights is intended to put nursing homes on notice that every resident has the same rights to a dignified existence in the home and that every home is responsible for making sure that each resident is accorded these rights.

#### IV. DEFINITIONS AND STATE STATUTES

In addition to the federal mandate, individual states have passed legislation addressing the abuse of the elderly to provide increased protection and legal remedies. These laws recognize that the elderly and frail are more susceptible to abuse, neglect, and exploitation than the general population. The elderly may also have developmental disabilities and mental and verbal limitations which often make it impossible for them to ask for help and protection, to represent themselves in court, or to retain legal counsel to obtain relief on their behalf.

State statutes generally list definitions of abuse, neglect and exploitation. For example, the definition of abuse in Washington State is “. . . a non accidental act of physical or mental mistreatment or injury, or sexual mistreatment, which harms a person through action or inaction by another individual.”<sup>49</sup> California law defines elder abuse as “. . . physical abuse, neglect, fiduciary abuse, abandonment, isolation or other treatment with resulting physical harm or pain or mental suffering, or the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.”<sup>50</sup> Arizona defines abuse as the: “(a) Intentional infliction of physical harm; (b) Injury caused by negligent acts or omissions; (c) Unreasonable confinement; or (d) Sexual abuse or sexual assault.”<sup>51</sup> Neglect in Washington means “a pattern of conduct or inaction by a person or entity with a duty of care for a frail elder or vulnerable adult that results in the deprivation of care necessary to maintain the vulnerable person’s physical or mental health.”<sup>52</sup> Arizona defines neglect as a “pattern of conduct without the

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45. *Id.* § 1395i-3(c)(6)(A)(i).

46. 42 C.F.R. § 483.15(h)(1) (1997).

47. *Id.* § 483.15(h)(3).

48. *Id.* § 483.15(h)(5)-(7).

49. WASH. REV. CODE ANN. § 74.34.020(2) (West Supp. 1998).

50. CAL. WELF. & INST. CODE § 15610.07 (West Supp. 1998).

51. ARIZ. REV. STAT. ANN. § 46-451(A)(1)(a)-(d) (West 1997).

52. WASH. REV. CODE ANN. § 74.34.020(6).



person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.<sup>53</sup> Florida follows the basic Arizona statute giving a standard of care "that a prudent person would consider essential for the well-being of a disabled adult or elderly person." This statute adds that neglect also means "the failure of a care giver to make a reasonable effort to protect a disabled adult or elderly person from abuse, neglect, or exploitation by others."<sup>54</sup> Washington defines exploitation as "the illegal or improper use of a frail elder or vulnerable adult or that person's environment or resources, including trust funds, for another person's profit or advantage."<sup>55</sup> The Arizona statute is similar. However, the Florida statute is much broader in its definition. In Florida, "[E]xploitation" applies to a person who:

1. Stands in a position of trust and confidence with a disabled adult or an elderly person and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a disabled adult's or an elderly person's funds, assets, or property with the intent to temporarily or permanently deprive a disabled adult or an elderly person of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the disabled adult or elderly person; or
2. Knows or should know that the disabled adult or elderly person lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the disabled adult's or elderly person's funds, assets, or property with the intent to temporarily or permanently deprive the disabled adult or elderly person of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the disabled adult or elderly person.

(b) "Exploitation" may include, but is not limited to:

1. Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
2. Unauthorized taking of personal assets;
3. Misappropriation, misuse, or transfer of moneys belonging to a disabled adult or elderly person from a personal or joint account; or

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53. ARIZ. REV. STAT. ANN. § 46-451(A)(7).

54. FLA. STAT. ANN. § 415.102(20) (West 1998).

55. WASH. REV. CODE ANN § 74.34.020(5).

4. Intentional or negligent failure to effectively use a disabled adult's or elderly person's income and assets for the necessities required for that person's support and maintenance.<sup>56</sup>

In recognizing the need to remedy the problems of elder abuse, neglect, or exploitation, each state has taken its own approach to defining the scope of the problem and offering remedial legislation.

## V. FEDERAL CAUSES OF ACTION AND REMEDIES

The federal government makes each state responsible for reviewing and investigating allegations of abuse. Each state must also survey nursing facilities on a regular basis to determine the quality of care provided.<sup>57</sup> These surveys are to be conducted without prior notice to the nursing facility.<sup>58</sup> The average interval between surveys cannot exceed twelve months.<sup>59</sup> If the Secretary finds that a facility fails to meet the necessary requirements of care, there are several remedies available:

1. Denial of payment of federal funds;
2. Civil penalties not to exceed \$10,000.00 for each day of noncompliance;
3. Appointment of temporary management at the facility to ensure the health and safety of its residents.<sup>60</sup>

While these remedies are specific, they are based on survey results that are too sporadic to individually benefit an abused resident. Recently, more creative remedies have been pursued on behalf of residents who are in need of a more expeditious resolution to their problem. Suits based on false claims, false advertising, breach of contract, class actions, and breach of residents' rights have all been instituted to provide remedies where no state laws provide for specific elder abuse damages.<sup>61</sup> These remedies include:

A. FALSE CLAIMS—The federal False Claims Act<sup>62</sup> provides for monetary damages and court costs, "if a person

- (1) knowingly presents, or causes to be presented to an officer or employee of the Government or a member of the armed force a false or fraudulent claim for payment or approval;

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56. FLA. STAT. ANN. § 415.102(12)(a), (b).

57. 42 U.S.C. § 1395i-3(g)(1)-3(h)(2)(B)(iii) (1994 & West Supp. 1998).

58. *Id.* § 1395i-3(g)(2)(A)(i).

59. *Id.* § 1395i-3(g)(2)(A)(iii).

60. *Id.* § 1395i-3(h)(2)(B)(i)-(iii).

61. See David R. Hoffman & Carol Rolf, *New Trends in Nursing Home Liability*, Long Term Care and the Law Symposium, National Health Care Lawyers Association (Jan. 1997).

62. 31 U.S.C. § 3729(1)-(3) (1994 & West Supp. 1998).

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . .

If a facility fails to provide the care to its residents required by the Residents Rights, i.e., “. . . in such a manner and in such an environment as will promote maintenance and enhancement of the quality of life of each resident . . .,” the facility may have submitted a false claim for payment.<sup>63</sup>

B. FALSE ADVERTISING—Another potential cause of action involves suits for false advertising. A nursing facility which advertises that it will provide a good quality of care to its residents, may subject itself to a claim for false advertising if it is later found to have violated the federal standard of care requirements.<sup>64</sup> If the facility has been cited for failures to meet the care required, after being periodically surveyed, and during that same period the facility has advertised that it provides good quality care, a false advertising claim could be pursued.<sup>65</sup>

C. BREACH OF CONTRACT AND BREACH OF RESIDENT'S RIGHTS—All residents must sign the admission contract or agreement when they enter a facility.<sup>66</sup> These contracts list the care and services that will be provided to the resident.<sup>67</sup> If the facility fails to provide the quality of care cited in the contract, the facility may have breached that contract, and a basis for suit is created.<sup>68</sup> In addition, the residents may be certified as a class for a class action breach of contract suit.<sup>69</sup> When the admission contract is signed, the resident also receives a detailed list of his or her resident's rights. As previously described, these rights include privacy, confidentiality, grievance procedures, and are all listed in the federal law.<sup>70</sup> Any resident who is denied any of these rights, or whose care does not meet the requirement of the highest practicable physical, mental and psychological well being of the resident may have a basis for a suit for breach of resident's rights.<sup>71</sup>

These innovative causes of action are necessary since many states do not have specific state laws against elder abuse. While causes of action

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63. 42 C.F.R. § 483.15(a) (1997).

64. Hoffman & Rolf, *supra* note 64.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. 42 U.S.C § 1395i-3(c)(1)(A)(i)-(xi) (1994 & West Supp. 1998).

71. *See generally* 42 U.S.C. § 3001-3058ee (1994 & West Supp. 1998).

for assault and battery have been tried, such suits do not recognize that the elderly are often incapable of recognizing their own abuse or the abuser because of physical or mental conditions such as Alzheimer's and senile dementia. This effectively prevents senile individuals from having the same benefits of causes of action that the general population enjoys. Thus, in attempting to protect these vulnerable residents, other causes of action have been used. The promulgation of specific state laws against elder abuse do not create new causes of action; they give the elderly as a specific population the benefit of existing causes of action.

## VI. CRIMINAL LIABILITY UNDER STATUTES PUNISHING ELDER ABUSE OR NEGLECT

The laws of the states under review<sup>72</sup> contain at least one criminal statute<sup>73</sup> holding a person who abuses or neglects<sup>74</sup> a vulnerable adult guilty of a crime punishable by a fine or imprisonment or both.<sup>75</sup> In

72. California, Louisiana, Maryland, Massachusetts, North Dakota, and Oregon.

73. CAL. PEN. CODE § 368 (West 1988 & Supp. 1998) (inflicting of physical pain or mental suffering on dependent adult and theft or embezzlement by caretaker); CAL. WELF. & INST. CODE § 15656 (West 1991) (subjecting elder or dependent adults to unjustifiable physical pain or mental suffering, great bodily harm, theft or embezzlement); LA. REV. STAT. ANN. § 14:93.3 (West 1986 & Supp. 1998) (inducing cruelty upon the infirm); *id.* § 14:93.4 (exploiting the infirm); *id.* § 14:93.5 (inflicting sexual battery upon the infirm); MD. ANN. CODE § 35D (1996) (abusing or neglecting vulnerable persons); MASS. GEN. LAWS ANN. ch. 265, § 38 (West 1990) (abusing patients in long-term care facilities); *id.* § 13K (assaulting or battering an elderly or disabled person); N.D. CENT. CODE § 12.1-31-07 (1997) (endangering a vulnerable adult); *id.* § 12.1-31-07.1 (exploiting a vulnerable adult); OR. REV. STAT. § 163.205 (criminalizing mistreatment in the first degree); OR. REV. STAT. § 163.200 (1997) (criminalizing mistreatment in the second degree).

74. CAL. PEN. CODE § 368(a)(1) (. . . wilfully causes or permits . . . to suffer, or inflicts whereon unjustifiable physical pain or mental suffering . . . or causes or permits the elder . . . to be placed in a situation such that his or her person or health is endangered . . . ); CAL. WELF. & INST. CODE § 15656(a) (. . . great bodily harm or death . . . to suffer, or inflicts unjustifiable physical pain or mental suffering . . . or causes or permits the elder . . . to be placed in a situation such that his or her health is endangered . . . ); LA. REV. STAT. ANN. § 14:93.3(A) (. . . intentionally or criminally negligent mistreatment or neglect . . . whereby unjustifiable pain, malnourishment, or suffering is caused ); MD. CODE ANN. tit. 27, § 35D(a)(2)(i) (abuse means the sustaining of any physical pain or injury by a vulnerable adult as a result of cruel or inhumane treatment or as a result of a malicious act ); *id.* § 35D(a)(2)(ii) (abuse includes sexual abuse); *id.* § 35D(a)(8)(i) (neglect means the intentional failure to provide necessary assistance and resources for the physical needs of the vulnerable adult); MASS. GEN. LAWS. ch. 265, § 38 (abuse of patients in long-term care facilities); *id.* § 13K(b) (assault and battery upon an elderly or disabled person, . . . commits an assault, battery . . . [that] causes bodily injury . . . ); N.D. CENT. CODE § 12.1-31-07(2) (endangering a vulnerable adult, . . . act that causes . . . life to be endangered, health to be injured, or preexisting physical or mental condition to deteriorate, or . . . [failure] to perform acts . . . necessary to maintain or preserve the life or health of the . . . vulnerable elderly adult . . . ); *id.* § 12.1-31-07.1 (exploitation of a vulnerable adult); OR. REV. STAT. § 163.205(1)(a), 1(b)(A) (intentionally or knowingly withholds necessary and adequate food, physical care, or medical attention . . . causes physical injury).

75. CAL. PEN. CODE § 368(a)(1) (infliction of physical pain or mental suffering, theft or embezzlement, . . . punishable by imprisonment in the county jail not exceeding one year, or in the state prison for two, three, or four years); CAL. WELF. & INST. CODE § 15656(a) (great bodily harm, theft or embezzlement, . . . punishable by imprisonment in the county jail not exceeding one year, or in the state prison for two, three, or four years); LA. REV. STAT. ANN. § 14:93.3(E) (cruelty or exploitation . . . shall be fined not more than ten thousand dollars or imprisoned with or without hard labor for not more than

face, the state of California has also incorporated criminal penalties into its civil elder abuse statute.<sup>76</sup>

A few states have criminal statutes that specifically prohibit mistreatment of residents of nursing homes.<sup>77</sup> However, most states' criminal statutes specifically target the abuser who may be a "caregiver,"<sup>78</sup> under a contractual duty to provide care,<sup>79</sup> or under a "legal" duty.<sup>80</sup> Even when a statute does not specifically mention long-term care facilities, a conviction against medical practitioners has been upheld under such a nonspecific statute.<sup>81</sup> In addition to punishing intentional acts such as assault and battery, all the six states' criminal elder abuse statutes punish either "wanton" or "reckless" action, criminal negligence, or criminal neglect.<sup>82</sup> Many of these statutes have survived constitutional challeng-

ten years, or both); M.D. CODE ANN. tit. 27, § 35D(b)(1) (abuse or neglect . . . misdemeanor . . . and on conviction is subject to a fine not exceeding \$5,000 or imprisonment for not more than 5 years, or both); MASS. GEN. LAWS ANN. ch. 265, § 38 (abuse of patients in long-term care facilities, . . . imprisonment in jail or house of correction for not more than two years or by a fine of not more than five thousand dollars, or by both); *id.* § 13K(b) (assault and battery, . . . by imprisonment in the state prison for not more than five years or in the house of correction for not more than two and one half years or by a fine of not more than one thousand dollars or by both); N.D. CENT. CODE § 12.1-31-07(2) (endangering a vulnerable adult, Class B felony with a maximum of ten years imprisonment, a fine of ten thousand dollars, or both); *id.* § 12.1-31-07.1(2)(a) (exploitation of a vulnerable adult, Class A felony with a maximum of twenty years imprisonment, a fine of ten thousand dollars, or both); OR. REV. STAT. § 163.205(3) (class C felony punishable by up to 5 years imprisonment).

76. CAL. WELF. & INST. CODE §§ 15600-15675 (West 1991) (Elder Abuse and Dependent Adult Civil Protection Act includes § 15656 which is virtually identical to the criminal elder abuse statute and penalties at CAL. PEN. CODE § 368).

77. LA. REV. STAT. ANN. § 14:93.3(A) (. . . resident of a nursing home, mental retardation facility, mental health facility, hospital or other residential facility); MASS. GEN. LAWS ANN. ch. 265, § 38 (any person who knowingly and willfully abuses, mistreats, or neglects a patient or resident of a long-term care facility . . .).

78. CAL. PEN. CODE § 368(f) (caretaker means any person who has the care, custody, or control of or who stands in a position of trust with an elder or dependent adult); CAL. WELF. & INST. CODE § 15656(d) (any person . . . having the care or custody of any elder or dependent adult . . .); LA. REV. STAT. ANN. § 14:93.3(B) (caregiver is defined as any person . . . who temporarily or permanently is responsible for the care of the infirm, physically or mentally disabled adult . . .); MD. CODE ANN. tit. 27, § 35D(b)(1) (a caregiver, a parent or other person who has permanent or temporary care or responsibility for the supervision of a vulnerable adult, or any household member); MASS. GEN. LAWS ANN. ch. 265, § 13K(a) (caretaker is . . . a person with responsibility for the physical care of an elder . . .); N.D. CENT. CODE § 12.1-31-07(1)(a) (caregiver means a person who is responsible for the care of a disabled adult or vulnerable elderly adult . . . or a person who has assumed responsibility for the care of a disabled adult or vulnerable elderly adult); OR. REV. STAT. § 163.205(1)(b) (. . . person . . . having assumed the permanent or temporary care, custody or responsibility for the supervision of a dependent or elderly person . . .).

79. MASS. GEN. LAWS ANN. ch. 265, § 13K(a)(iii) (responsibility arising from a contractual duty, it may be inferred that a person who receives monetary or personal benefit or gain as a result of a bargained-for agreement to be responsible for providing primary and substantial assistance for the physical care of an elder or person with a disability is a caretaker); OR. REV. STAT. § 163.205(2)(c) (legal duty includes but is not limited to a duty created by familial relationship, court order, contractual agreement, statutory law, or case law).

80. OR. REV. STAT. § 163.205(2)(c) (legal duty includes but is not limited to a duty created by familial relationship, court order, contractual agreement, statutory law, or case law).

81. The court in *People v. Superior Court*, 252 Cal Rptr 335, 341 (Cal. Ct. App. 1988), found that there is nothing in CAL. PEN. CODE § 368 (causing or permitting injury to dependent adult) to indicate that medical practitioners are exempt from the law's proscriptions.

82. CAL. PEN. CODE § 368(a)(1) (. . . willfully causes or permits the elder or dependent adult to

es.<sup>83</sup> Criminal penalties are frequently included in elder abuse reporting statutes.<sup>84</sup> These statutes mandate the reporting of any incident of elder abuse and usually provide criminal immunity to the reporter.

## VII. CIVIL REMEDIES

Pursuing a civil remedy for abused elderly individuals creates two threshold problems. First, the elderly plaintiff may not be mentally aware of the injuries incurred, and may be unable to testify about the injury. Second, traditional measures of damages, lost wages, pain and suffering and economic loss may be unavailable to someone whose actuarial life expectancy is limited. Several states have approached this problem by enacting specific statutory relief for abused elders including the awarding of attorneys fees in certain circumstances, including California, Louisiana, Maryland, Massachusetts, North Dakota, and Oregon.

### A. CALIFORNIA

California has enacted the Elder Abuse and Dependent Adult Civil Protection Act.<sup>85</sup> The California Legislature recognizes that elders and

be placed in a situation such that his or her person or health is endangered . . . ); LA. REV. STAT. ANN. § 14:93.3(A) (criminally negligent mistreatment or neglect); MD. CODE ANN. tit. 27, § 35D(8)(i) (neglect means intentional failure to provide necessary assistance and resources for the physical need of the vulnerable adult, including food, clothing, toileting, essential medical treatment, shelter, or supervision); MASS. GEN. LAWS. ch. 265, § 38 (knowingly and willfully abuses, mistreats, or neglects); *id.* §13K(d), (e) (wantonly or recklessly permits another to commit . . . bodily injury); N.D. CENT. CODE § 12.1-31-07(2) (failing to perform acts that the caregiver knows are necessary to maintain or preserve the life or health of the disabled adult or vulnerable elderly adult and the failure causes . . . injury, or pre-existing physical or mental condition to deteriorate); OR. REV. STAT. § 163.145 (criminal negligence); *id.* § 163.205 (criminal mistreatment in the first degree); *id.* § 163.200 (criminal mistreatment in the second degree).

83. The court in *People v Superior Court* found that CAL. PEN. CODE § 368(a), making it a crime for any person who "having the care or custody of any dependent adult, willfully causes . . . the adult to be injured," was not unconstitutionally vague, was not deficient in its notice requirements, and was not overbroad. 252 Cal Rptr. at 341-42. In *State v Brenner*, the court held that LA. REV. STAT. ANN. § 14:93.3(A), which defined cruelty to the infirm as ". . . the intentional or criminally negligent mistreatment or neglect whereby unjustifiable pain or suffering is caused . . ." was not unconstitutionally vague. 486 So. 2d 101, 104 (La. 1986). Moreover, in *State v Damefle*, the court held that the term "adequate physical care" in OR. REV. STAT. § 163.200 was not unconstitutionally vague. 750 P.2d 518, 520-21 (Or. Ct. App. 1988). See *State v. Warner*, 819 P2d 1390, 1391-92 (Or. Ct. App. 1991).

84. CAL. PEN. CODE § 11160 (West 1992 & Supp. 1998) (defining reporting duties of health facilities, clinics); *id.* § 11162 (West 1992 & Supp. 1998) (misdemeanor punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding \$1,000 or by both); CAL. WELF. & INST. CODE § 15630 (West 1992 & Supp. 1998) (mandating that reporters' . . . failure to report is a . . . misdemeanor punishable by not more than six months imprisonment in a county jail not exceeding six months, or by a fine not exceeding one thousand dollars \$1,000 or by both . . .); LA. REV. STAT. ANN. § 14:403.2 (West 1986 & Supp. 1998) (abuse and neglect of adults and failure to report . . . penalties); *id.* § 14:403.2(J)(1) (any person who . . . fails to report . . . shall be fined not more than five hundred dollars or imprisoned not more than six months, or both); *id.* § 40:2009.13 (West 1992 & Supp. 1998) (providing for nursing home complaints); *id.* § 40:2009.20(B)(2) (West 1992 & Supp. 1998) (making it a duty to make complaints, penalizing any person who . . . violates the provisions of this section shall be fined not more than five hundred dollars or imprisoned for not more than two months, or both); OR. REV. STAT. § 124.060 (1997) (mandating the duty of officials to report); *id.* § 410.990 (1997) (providing a criminal penalty for violation of § 124.060 is a fine of \$500)

85. CAL. WELF. & INST. CODE §§ 15600-15675 (West 1991 & Supp. 1998).

dependent adults may be subject to abuse,<sup>86</sup> that a significant number of these individuals have developmental disabilities which often leave them vulnerable to abuse and incapable of asking for help.<sup>87</sup> In addition, elderly and dependent adults who are at the greatest risk of abuse, neglect, or abandonment by their families or caretakers suffer from health problems that place them in a dependent and vulnerable position.<sup>88</sup>

The Legislature further found that elderly persons, with infirmities and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentive to prosecute these suits.<sup>89</sup> The Legislature also added Article 8.5, beginning with § 15657, to this chapter to enable interested persons to target attorneys who may be interested in taking up the cause of abused elderly persons and dependent adults.<sup>90</sup>

Under the Elder Abuse and Dependent Adult Civil Protection Act, California requires clear and convincing proof that a defendant is liable for physical abuse,<sup>91</sup> neglect,<sup>92</sup> or fiduciary abuse.<sup>93</sup> The defendant must

86. *Id.* § 15600(a).

87. *Id.* § 15600(c).

88. *Id.* § 15600(d).

89. *Id.* § 15600(h).

90. *Id.* § 15657(a), (b), (c).

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in § 15610.63, neglect as defined in § 15610.57, or fiduciary abuse as defined in § 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law:

- (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
- (b) The limitations imposed by § 337.34 of the CODE OF CIVIL PROCEDURE on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of § 3333.2 of the CIVIL CODE.
- (c) The standards set forth in subdivision (b) of Section 3294 of the CIVIL CODE regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

*See id.*

91. *Id.* § 15610.63(a)-(f) (West Supp. 1998). "Physical abuse" means any of the following:

- (a) Assault, as defined in § 240;
- (b) Battery, as defined in § 242;
- (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in § 245;
- (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
- (e) Sexual assault, that means any of the following:
  - (1) Sexual battery, as defined in § 243.4;
  - (2) Rape, as defined in § 261;

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- (3) Rape in concert, as defined in Section 264.1;
  - (4) Spousal rape, as defined in § 262;
  - (5) Incest, as defined in § 2851;
  - (6) Sodomy, as defined in § 286;
  - (7) Oral copulation, as defined in § 288a;
  - (8) Penetration of a genital or anal opening by a foreign object, as defined in § 289.
- (f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:
- (1) For punishment;
  - (2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given;
  - (3) For any purpose not authorized by the physician or surgeon.

*Id.*

92. *Id.* § 15610.57(a)-(d). "Neglect" means the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care which a reasonable person in a like position would exercise. *Id.* Neglect includes, but is not limited to, all of the following:

- (a) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter;
- (b) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means though prayer alone in lieu of medical treatment;
- (c) Failure to protect from health and safety hazards;
- (d) Failure to prevent malnutrition.

*Id.*

93. *Id.* § 15610.30(a)-(c). "Fiduciary abuse" means a situation in which one or both of the following apply:

- (1) A person, including but not limited to, one who has the care or custody of, or who stands in a position of trust to, an elder or a dependent adult, takes, secretes, or appropriates their money or property, to any wrongful use, or for any purpose not in the due and lawful execution of his or her trust.
- (2) A situation in which all of the following conditions are satisfied:
  - (A) An elder (who would be a dependent adult if he or she were between the ages of 18 and 64) or dependent adult or his or her representative requests that a third party transfer to the elder or dependent adult or to his or her representative, or to a court-appointed receiver, property that meets all of the following criteria:
    - (i) the third party holds or has control of the property;
    - (ii) The property belongs to, or is held in express trust, constructive trust or resulting trust for, the elder or dependent adult;
    - (iii) The ownership or control of the property was acquired in whole or in part by the third party or someone acting in concert with the third party from the elder or dependent adult at a time when the elder or dependent adult was a dependent adult or was a person who would have been a dependent adult if he or she had then been between the ages of 18 and 64;
  - (B) Despite the request for the transfer of property, the third party without good cause either continues to hold the property or fails to take reasonable steps to make the property readily available to the elder or dependent adult, to his or her representative or to a court-appointed receiver;
  - (C) The third party committed acts described in this paragraph in bad faith. A third party shall be deemed to have acted in bad faith if the third party either knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available. For purposes of this subdivision, a third party should have known of this right if, on the basis of the information received by the elder or dependent adult, or the elder or dependent adult's representative, it is obvious to a reasonable person that the elder or dependent adult had this right.
    - (b) For the purpose of this section, the term "third party" means a person who



also be guilty of oppression, fraud, or malice in the commission of the abuse. In addition, California provides for an award of reasonable attorney fees and costs in these types of actions. The award of attorneys fees is also governed by the California Rules of Professional Conduct and is assessed in terms of the value of the litigation to the plaintiff's quality of life, the results of the litigation, the response of the defendant to the potential liability, and the reasonableness of any offer to compromise.<sup>94</sup> Damages are exempted from the limitations imposed by California law,<sup>95</sup> but an award of punitive damages against an employer for acts of an employee are governed by the general California rule.<sup>96</sup>

The California statute provides additional remedies in cases where the abduction of an elderly person has been proven by clear and convincing evidence. The court must award to the plaintiff reasonable attorney's fees and costs including the cost of representation in any state which deals with travel expenses, fees for a conservator, and returning the

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holds or has control of property that belongs to or is held in express trust, constructive trust or resulting trust for an elder or dependent adult.

- (c) For the purposes of this section, the term "representative" means an elder or dependent adult's conservator of the estate, or attorney-in-fact acting within the authority of the power of attorney.

*Id.*

94. *Id.* § 15657.1(a)-(c). The award of attorney's fees pursuant to subdivision (a) of § 15657 shall be based on all factors relevant to the value of the services rendered, including, but not limited to, the factors set forth in Rule 4-200 of the RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, and all of the following:

- (a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained;
- (b) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability;
- (c) The reasonableness and timeliness of any written offer in compromise made by a party to the action.

*Id.*

95. *Id.* § 15657(b).

96. *Id.* § 15657(c).

abductee to California.<sup>97</sup>

#### B. LOUISIANA

Louisiana has taken a somewhat different approach in providing for civil recovery by abused elders. Louisiana enacted a civil cause of action for a violation of the statutory Residents' Bill of Rights.<sup>98</sup> Some of the

97. *Id.* § 15657.05(a)-(c) (West Supp. 1998). Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in § 15610.06, in addition to all other remedies otherwise provided by law:

- (a)(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
- (2) The award of attorney's fees shall be governed by the principles set forth in § 15657.1.
- (b) The limitations imposed by § 377.34 of the CODE OF CIVIL PROCEDURE on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of § 3333.2 of the CIVIL CODE.
- (c) The standards set forth in subdivision (b) of § 3294 of the CIVIL CODE regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

98. LA. REV. STAT. ANN. § 40:2010.8(A)-(E) (West 1992 & Supp. 1998) (Residents' Bill of Rights).

- (A) All nursing homes shall adopt and make public a statement of the rights and responsibilities of the residents residing therein and shall treat such residents in accordance with the provisions of the statement. The statement shall assure each resident the following:
  - (1) The right to civil and religious liberties, including but not limited to knowledge of available choices, the right to independent personal decision, and the right to encouragement and assistance from the staff of the facility in the fullest possible exercise of these civil and religious rights.
  - (2)(a) The right to private and uncensored communications, including but not limited to receiving and sending unopened correspondence; access to a telephone; visitation with any person of the resident's choice, and overnight visitation outside the facility with family and friends in accordance with nursing home policies, physicians orders, and Title XVIII (Medicare) and Title XIX (Medicaid) of the Social Security Act regulations, without the loss of his bed.
  - (b) Nursing home visiting hours shall be flexible, taking into consideration special circumstances such as out-of-town visitors and working relatives or friends. With the consent of the resident and in accordance with the policies approved by the Department of Health and Hospitals, the home shall permit recognized volunteer groups, representatives of community based legal, social, mental health, and leisure and planning programs, and members of the clergy access to the home during visiting hours for the purpose of visiting with and providing services to any resident.
  - (3) The right to present grievances on behalf of himself or others to the nursing home's staff or administrator, to governmental officials, or to any other person; to recommend changes in policies and services to nursing home personnel; and to join with other residents or individuals within or outside the home to work for improvements in resident care, free from restraint, interference, coercion, discrimination, or reprisal. This right includes access to the resident's sponsor and the Department of Health and Human Resources

and the right to be a member of, to be active in, and to associate with advocacy or special interest groups.

- (4) The right to manage his own financial affairs or to delegate such responsibility to the nursing home, but this delegation may be only to the extent of the funds held in trust by the home for the resident. A quarterly accounting of any transactions made on behalf of the resident shall be furnished to the resident and his sponsor if requested. A copy shall be retained in the resident's records on file in the home.
- (5) The right to be fully informed, in writing and orally, prior to or at time of admission and during his stay, of services not covered under Title XVIII or Title XIX of the Social Security Act or not covered by the basic per diem rates and of bed reservation and refund policies of the home.
- (6) The right to be adequately informed of his medical condition and proposed treatment, unless otherwise indicated by the resident's physician; to participate in the planning of all medical treatment, including the right to refuse medication and treatment, unless otherwise indicated by the resident's physician; and to be informed of the consequences of such actions.
- (7) The right to receive adequate and appropriate health care and protective and support services, including services consistent with the resident care plan, with established and recognized practice standards within the community, and with rules promulgated by the Department of Health and Human Resources.
- (8) The right to have privacy in treatment and in caring for personal needs; to have closed room doors, and to have facility personnel knock before entering the room, except in case of an emergency or unless medically contraindicated; to have confidentiality in the treatment of personal and medical records; and to be secure in storing and using personal possessions, subject to applicable state and federal health and safety regulations and the rights of other residents. Privacy of the resident's body shall be maintained during but not limited to toileting, bathing, and other activities of personal hygiene, except as need for resident safety or assistance.
- (9) The right to be treated courteously, fairly, and with the fullest measure of dignity and to receive a written statement and oral explanations of the services provided by the home, including statements and explanations required to be offered on an as needed basis.
- (10) The right to be free from mental and physical abuse and from physical and chemical restraints, except those restraints authorized by a physician for a specified and limited period of time and those necessitated by an emergency. In case of an emergency, restraint may only be applied by a qualified licensed nurse, who shall set forth in writing the circumstances requiring the use of the restraint, and, in case of a chemical restraint, a physician shall be consulted immediately thereafter. Restraints shall not be used in lieu of staff supervision or merely for staff convenience or resident punishment, or for any reason other than resident protection or safety.
- (11)(a) The right to be transferred or discharged only if necessary for his welfare and if his needs cannot be met in the facility; . . .
- (12) The right to select a personal physician; to obtain pharmaceutical supplies and services . . . .
- (13) The right to retain and use personal clothing and possessions as space permits . . . .
- (14) The right to have copies of the nursing home's rules and regulations and an explanation of the resident's responsibility to obey all reasonable rules and regulations of the nursing home and of his responsibility to respect the personal rights and private property of other residents.
- (15) The right to be informed of the bed reservation policy for a hospitalization . . . .
- (16) The right to receive a prompt response to all reasonable requests and inquiries.
- (17) The right of the resident to withhold payment for physician visitation if the physician did not examine the resident.

rights addressed included the right to civil liberty, religious liberty,<sup>99</sup> uncensored communications, and flexible visiting hours.<sup>100</sup> The Residents' Bill of Rights also ensures that the elderly are able to present grievances to the nursing home's staff and administrator, and government officials,<sup>101</sup> to manage their own financial affairs<sup>102</sup>, and to receive information about those services covered and those services not covered.<sup>103</sup> In addition, the elderly are to be provided with adequate and appropriate health care, protection, and support services,<sup>104</sup> to maintain privacy in treatment and in caring for personal needs,<sup>105</sup> to be treated courteously, fairly, and with fullest measure of dignity,<sup>106</sup> and to be free from mental and physical abuse.<sup>107</sup>

The Louisiana Legislature has determined that persons residing within nursing homes are isolated from the community, often lack the means to assert their rights as individual citizens, and need to live within the least restrictive environment possible in order to retain their individuality and some personal freedom.<sup>108</sup> In response to elder abuse problems, the

(18) The right to refuse to serve as a medical research subject without jeopardizing access to appropriate medical care.

(19) The right to use tobacco at his own expense under the home's safety rules . . . .

(20) The right to consume a reasonable amount of alcoholic beverages at his own expense . . . .

(21) The right to retire and rise in accordance with his reasonable requests . . . .

(22) The right to have any significant change in his health status immediately reported to him . . . .

(B) A sponsor may act on a resident's behalf to assure that the nursing home does not deny the resident's rights under the provisions of R.S. 40:2010.6 et seq., and no right enumerated therein may be waived for any reason whatsoever.

(C) Each nursing home shall provide a copy of the statement required by R.S. 40:2010.8(A) to each resident and sponsor upon or before the resident's admission to the home . . . .

(D) (1) Any violation of the residents' rights set forth in R.S. 40:2010.6 et seq. shall constitute grounds for appropriate action by the Department of Health and Hospitals. Residents shall have a private right of action to enforce these rights, as set forth in R.S. 40:2010.9. The state courts shall have jurisdiction to enjoin a violation of the residents' rights and to assess fines for violations not to exceed one hundred dollars per individual violation. . . .

(E) Any person who submits or reports a complaint concerning a suspected violation of residents' rights or concerning services or conditions in a home or health care facility or who testifies in any administrative or judicial proceedings arising from such complaint shall have immunity from any criminal or civil liability therefor unless that person has acted in bad faith with malicious purpose, or if the court finds that there was an absence of a justiciable issue of either law or fact raised by the complaining party.

99. *Id.* § 40:2010.8(A)(1).

100. *Id.* § 40:2010.8(A)(2)(a), (b).

101. *Id.* § 40:2010.8(A)(3).

102. *Id.* § 40:2010.8(A)(4).

103. *Id.* § 40:2010.8(A)(5).

104. *Id.* § 40:2010.8(A)(7).

105. *Id.* § 40:2010.8(A)(8).

106. *Id.* § 40:2010.8(A)(9).

107. *Id.* § 40:2010.8(A)(10).

108. L.A. REV. STAT. § 40:2010.6 (West 1992). The legislature found that persons residing within

Legislature acted to preserve the dignity and personal integrity of residents of nursing homes through the recognition and declaration of rights safeguarding nursing home residents' rights to self-determination. These rights complement rather than substitute for other survey and inspection programs regarding nursing homes.<sup>109</sup>

Civil recovery ensures that any resident whose rights are deprived or infringed upon shall have a cause of action against any nursing home or health care facility responsible for the violation.<sup>110</sup> The action may be brought by the resident or his curator in any court of competent jurisdiction in order to enforce rights and to recover actual damages for any deprivation or infringement on the rights of a resident.<sup>111</sup> A prevailing plaintiff is entitled to recover reasonable attorney's fees, costs of the action, and damages.<sup>112</sup> However, if the court finds that a losing plaintiff has acted in bad faith with malicious purpose, and that there was no justiciable issue, the court shall award the prevailing party his reasonable attorney's fees.<sup>113</sup> The remedies provided for in civil actions are in addition to and cumulative with other legal and administrative remedies available to a resident and governmental agencies.<sup>114</sup>

### C. MARYLAND

Maryland has not yet enacted an Elder Abuse statute to provide additional rights to elders other than those available to the population in

nursing homes are isolated from the community and often lack the means to assert their rights as individual citizens. The legislature further recognizes the need for these persons to live within the least restrictive environment possible in order to retain their individuality and some personal freedom. It is therefore the intent of the legislature to preserve the dignity and personal integrity of residents of nursing homes through the recognition and declaration of rights safeguarding against encroachments upon nursing home residents' right to self-determination. It is further the intent that the provisions of §§ 40:2010.6-.9 complement and not duplicate or substitute for other survey and inspection programs regarding nursing homes.

109. *Id.* § 40:2010.9(A), (B) (West 1992).

110. *Id.* § 40:2010.9.

- A. Any resident whose rights, as specified in § 40:2010.8, are deprived or infringed upon shall have a cause of action against any nursing home or health care facility responsible for the violation. The action may be brought by the resident or his curator, including a curator ad hoc. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual damages for any deprivation or infringement on the rights of a resident. Any plaintiff who prevails in such action shall be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds that the losing plaintiff has acted in bad faith with malicious purpose, and that there was an absence of a justiciable issue of either law or fact, in which case the court shall award the prevailing party his reasonable attorney fees. *Id.*
- B. The remedies provided in this action are in addition to and cumulative with other legal and administrative remedies available to a resident and to the Department of Health and Hospitals or other governmental agencies. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

general. During the 1997 Legislative session, a bill<sup>115</sup> based on a Wash-

115. S. 187 (Md. 1997).

Preamble

WHEREAS, the General Assembly recognizes that the needs and problems of vulnerable elderly adults of this State deserve special attention because vulnerable elderly adults are especially susceptible to abuse, neglect, and exploitation; and

WHEREAS, Vulnerable elderly adults may have developmental disabilities and mental and verbal limitations that often make it impossible for them to ask for help, represent themselves in court, or retain legal counsel; and

WHEREAS, Criminal cases of abuse of vulnerable elderly adults are seldom prosecuted and few civil cases are brought because of a lack of incentive to prosecute, problems of proof, or court delay; and

WHEREAS, The General Assembly acknowledges that it has a responsibility to protect vulnerable elderly adults, who are a disadvantaged class; and

WHEREAS, Vulnerable elderly adults who are victims of abuse, neglect, or exploitation and their families should be afforded easy access to the civil courts to protect their rights; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article—Family Law

14-101.

(A) In SUBTITLES 1 THROUGH 4 of this title the following words have the meanings indicated.

SUBTITLE 5. CIVIL REMEDIES

14-501.

(1) In this section, the following words have the meanings indicated.

(2) "Abuse" means:

Intentional infliction of physical harm;

(II) Injury caused by a negligent act or omission;

(III) Unreasonable confinement; or

(IV) Rape or a sexual offense.

"Neglect" means a pattern of conduct or inaction that:

(I) Is taken without the informed consent of a vulnerable elderly adult by a person who has a duty of care for the vulnerable elderly adult; and

(II) Results in the deprivation of food, water, medication, medical services, shelter, cooling services, heating services essential for physical or mental health.

"Exploitation" means the unlawful or improper use of a vulnerable elderly adult or the resources of a vulnerable elderly adult for the profit or advantage of another.

(5) "Vulnerable Elderly Adult" means an individual 60 years of age or older who has the functional, mental, or physical inability to provide for personal care or to protect against abuse, neglect, or exploitation.

(B)(1) In addition to other remedies available under the law, an action for damages may be brought on behalf of a vulnerable elderly adult who has been subjected to abuse, neglect, or exploitation while under the care of a health care facility as defined under title 19, subtitle 1 of the Health-General Article.

(2) Persons who may be found civilly liable in an action brought under this section include an owner, agent, officer, director, or partner of a health care facility.

(C)(1) An action may be brought under this section by a guardian, spouse, adult child, parent, adult sibling or other relative, close friend, financial institution, attorney, accountant, or other person who has the responsibility of the care of the vulnerable elderly adult's funds or property.

(2) If the vulnerable elderly adult who is the plaintiff in the action dies, the right to initiate or maintain the action on petition shall accrue to the personal representative of the estate of the vulnerable elderly adult for the benefit of the surviving spouse, child, or other heir.

(D) The standard of proof in actions brought under this section is the preponderance of the evidence.

ington State model, was introduced, but the bill was not enacted.

#### D. MASSACHUSETTS

Massachusetts has enacted a set of patients' and residents' rights which apply to individuals in hospitals, nursing homes, rest homes, and other institutions.<sup>116</sup> These rights include, inter alia, the right to know

A finding of abuse, neglect, or exploitation under this section creates a presumption of actual malice.

(1) A prevailing plaintiff may be awarded actual, consequential, and punitive damages, the costs of the suit, reasonable attorney's fees as awarded by the court and not necessarily reflective of the damages awarded, reasonable fees for any guardian, guardian ad litem, or expert that is needed to bring an action under this section.

If the vulnerable elderly adult who is awarded damages is a recipient of the Maryland Medical Assistance Program, the state is entitled to be reimbursed for all nursing home costs paid for the recipient, so long as the reimbursement paid to the state does not exceed 40% of the damages awarded.

(G) If a dispute exists about the care given to a vulnerable elderly adult by a health care facility, the parties are encouraged but not required first to use informal means, such as mediation, to try to resolve the dispute.

(H) This section does not affect the Maryland Tort Claims Act.

Section 2. AND BE IT FURTHER ENACTED, That this Act shall be construed only prospectively and may not be applied or interpreted to have any effect on or application to any case filed before the effective date of this Act.

Section 3. AND BE IT FURTHER ENACTED, That this Act shall take effect October 21, 1997.

116. MASS. GEN. LAWS ANN. CH. 111, § 70E (West 1996 & Supp. 1998). Every patient or resident of a facility shall have the right:

- (a) upon request, to obtain from the facility in charge of his care the name and specialty, if any, of the physician or other person responsible for his care or the coordination of his care;
- (b) to confidentiality of all records and communication to the extent provided by law;
- (c) to have all reasonable requests responded to promptly and adequately within the capacity of the facility;
- (d) upon request, to obtain an explanation as to the relationship, if any, of the facility to any other health care facility or educational institution insofar as said relationship relates to his care or treatment;
- (e) to obtain from a person designated by the facility a copy of any rules or regulations of the facility which apply to his conduct as a patient or resident;
- (f) upon request, to receive from a person designated by the facility any information which the facility has available relative to financial assistance and free health care;
- (g) upon request, to inspect his medical records and to receive a copy thereof in accordance with section seventy, and the fee for said copy shall be determined by the rate of copying expenses, except that no fee shall be charged to any applicant, beneficiary or individual representing said applicant or beneficiary . . . if the record is requested for the purpose of supporting a claim or appeal under any provision of the Social Security Act or federal or state financial needs based benefit program, . . .
- (h) to refuse to be examined, observed, or treated by students or any other facility staff without jeopardizing access to psychiatric, psychological, or other medical care and attention;
- (i) to refuse to serve as a research subject and to refuse any care or examination when the primary purpose is educational or informational rather than therapeutic;
- (j) to privacy during medical treatment or other rendering of care within the capacity of the facility;
- (k) to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purpose of prior discussion of the source of payment unless such delay can be imposed without material risk to his health, and this right shall also extend to those persons not already patients or residents of a facility if said facility has a certified emergency

the person responsible for one's care, to confidentiality of records, to inspect one's own medical records, to refuse care under certain circumstances, to privacy in terms of medical treatment, to prompt life saving treatment in an emergency, to informed consent, and to receive copies of itemized bills.<sup>117</sup>

For violations of patients' or residents' rights, the aggrieved person may bring, in addition to any other action allowed by law or regulation, a civil action under the Massachusetts statute (§§ 60 B-E inclusive, of Chapter 231).<sup>118</sup> Sections 60 B-E provide procedures for bringing abuse claims as malpractice actions against a health care provider.<sup>119</sup>

care unit:

- (l) to informed consent to the extent provided by law;
- (m) upon request to receive a copy of an itemized bill or other statement of charges submitted to any third party by the facility for care of the patient or resident and to have a copy of said itemized bill or statement sent to the attending physician of the patient or resident; and
- (n) if refused treatment because of economic status or lack of a source of payment, to prompt and safe transfer to a facility which agrees to receive and treat such a patient. Said facility refusing to treat such patient shall be responsible for: ascertaining that the patient may be safely transferred; contacting a facility willing to treat such patient; arranging the transportation; accompanying the patient with necessary and appropriate professional staff to assist in the safety and comfort of the transfer, assure that the receiving facility assumes the necessary care promptly, and provide pertinent medical information about the patient's condition; and maintaining records of the foregoing.

Every patient or resident of a facility shall be provided by the physician in the facility the right:

- (a) to informed consent to the extent provided by law;
- (b) to privacy during medical treatment or other rendering of care within the capacity of the facility;
- (c) to refuse to be examined, observed, or treated by students or any other facility staff without jeopardizing access to psychiatric, psychological or other medical care and attention;
- (d) to refuse to serve as a research subject, and to refuse any care or examination when the primary purpose is educational or informational rather than therapeutic;
- (e) to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purpose of prior discussion of source of payment unless such delay can be imposed without material risk to his health;
- (f) upon request, to obtain an explanation as to the relationship, if any, of the physician to any other health care facility or educational institutions insofar as said relationship relates to his care or treatment, and such explanation shall include said physician's ownership or financial interest, if any, in the facility or other health care insofar as said ownership relates to the care or treatment of said patient or resident;
- (g) upon request to receive an itemized bill including third party reimbursement paid toward said bill, regardless of the sources of payment;
- (h) in the case of patient suffering from any forms of breast cancer to complete information on all alternative treatments which are medically viable. . . .

Any person whose rights under this section [70E] are violated may bring, in addition to any other action allowed by law or regulation, a civil action under sections sixty B to sixty E, inclusive, of chapter two hundred and thirty-one. . . .

No provision herein shall be construed as limiting any other right or remedies preexisting at law.

117. *Id.*

118. *Id.*

119. *Id.* ch. 231, § 60B (1985 & Supp. 1998). Section 60B provides that every action for



The aggrieved person is not limited from exercising other rights or remedies.<sup>120</sup>

Malpractice actions against providers of health care are heard initially before a tribunal including a justice of the superior court, a Massachusetts licensed physician, or a representative of the institution in non physician cases, and a Massachusetts licensed attorney.<sup>121</sup> The tribunal determines if the evidence presented is sufficient to raise a legitimate question of liability for judicial inquiry.<sup>122</sup> If the tribunal finds in favor of a defendant, then the plaintiff must post a bond prior to proceeding to litigation.<sup>123</sup>

#### E. NORTH DAKOTA

North Dakota has not yet enacted an elder abuse civil statute.

#### F. OREGON

Oregon has enacted the Elder Abuse Prevention Act,<sup>124</sup> which

malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court a physician licensed to practice medicine in the commonwealth under the provisions of ch. 112, § 2 and an attorney authorized to practice law in the commonwealth, at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result. Said physician shall be selected by the single justice from a list submitted by the Massachusetts Medical Society representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth. . . . The attorney and physician shall, subject to appropriation, each be compensated in the amount of fifty dollars.

Where the action of malpractice is brought against a provider of health care not a physician, the physician's position on the tribunal shall be replaced by a representative of that field of medicine in which the alleged tort or breach of contract occurred, as selected by the superior court justice in a manner he determined fair and equitable. If a finding is made for the defendant or defendants in the case the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of six thousand dollars in the aggregate secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant or defendants in the case for cost assessed, including witness and experts fees and attorneys fees if the plaintiff does not prevail in the final judgment. Said single justice may, within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. Upon motion filed by the plaintiff, and a determination by the court that the plaintiff is indigent said justice may reduce the amount of the bond but may not eliminate the requirement thereof. For the purpose of this section, a provider of health care shall mean a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic, or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See generally* OR. REV. STAT. §§ 124.005-.040 (1997) (ELDER ABUSE PREVENTION ACT).

- (1) "Abuse" means one or more of the following:
  - (a) Any physical injury caused by other than accidental means, or that appears to be at variance with the explanation given of the injury;
  - (b) Neglect that leads to physical harm through withholding of services necessary to maintain health and well-being;
  - (c) Abandonment, including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caregiver or other person;

provides a statutory civil remedy against a person committing elder abuse. However, the Act exempts specified institutions from liability unless the institution is first convicted of criminal abuse under state law.<sup>125</sup> After the criminal conviction, a civil suit will remain for recovery

- (d) Willful infliction of physical pain or injury;
- (e) Use of derogatory or inappropriate names, phrases or profanity, ridicule, harassment, coercion, threats, cursing, intimidation or inappropriate sexual comments or such a nature as to threaten significant physical or emotional harm to the elderly person.
- (2) "Elderly person" mean any person 65 years of age or older who is not subject to the provisions of §§ 441.640 to 441.665.
- (3) "Interfere" means to interpose in a way that hinders or impedes.
- (4) "Intimidate" means to compel or deter conduct by a threat.
- (5) "Menace" means to act in a threatening manner.
- (6) "Molest" means to annoy, disturb or persecute with hostile intent or injurious effect.

*Id.*

Section 124.100 authorizes the elderly or incapacitated person to bring a civil action against abusers.

- (1) An elderly or incapacitated person who suffers injury, damage or death by reason of physical abuse or fiduciary abuse may bring an action against any person who has caused the physical or fiduciary abuse or who has permitted another person to engage in physical or fiduciary abuse. The court shall award the following to a plaintiff who prevails in an action under this section:
  - (a) All economic damages, as defined in ORS 18.560, resulting from the physical or fiduciary abuse, or \$500, whichever amount is greater.
  - (b) All non economic damages, as defined in ORS 18.560, resulting from the physical or fiduciary abuse.
  - (c) Reasonable attorney fees incurred by the plaintiff.
  - (d) Reasonable fees for the services of a conservator or guardian ad litem incurred by reason of the litigation of a claim brought under this section.
- (2) An action may be brought under the provisions of this section only by a person who is 65 or more years of age, by an incapacitated person defined by § 126.003 or by a guardian, conservator or attorney-in-fact for a person who is incapacitated or 65 or more years of age.
- (3) An action may only be brought under the provision of the section for physical abuse described in § 124.105, or for fiduciary abuse described in § 124.110.
- (4) An action may be brought under this section against a person for permitting another person to engage in physical or fiduciary abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or fiduciary abuse.
- (5) A person commencing an action under this section must serve a copy of the complaint on the Attorney General within 30 days after the action is commenced.

*Id.*

125. OR. REV. STAT. § 124.115(1), (2) (1997).

- (1) Except as provided by subsection (2) of this section, an action under § 124.100 may not be brought against:
  - (a) Financial institutions, as defined by § 706.008;
  - (b) A health care facility, as defined in § 442.015;
  - (c) Any facility licensed or registered under § 443; or
  - (d) Broker-dealers licensed under §§ 59.005-.370.
- (2) An action may be brought under § 124.100 against a person listed in subsection (1) of this section if:
  - (a) The person is convicted of one of the crimes specified in ORS 124.105(1);  
or
  - (b) The person engages in conduct constituting fiduciary abuse as described in § 124.110, and the person is convicted of a crime by reason of the conduct. § 124.120. The court may restrain and remedy the conduct described in §§ 124.105, -124.110 by issuing appropriate orders including but not limited to;

of damages. In essence, this arrangement requires a criminal standard of proof for a civil recovery of abuse against an institution. The remedies provided under the statute supplement other remedies available at law. Oregon's definition of abuse includes physical injury caused by other than accidental means, neglect, abandonment, willful infliction of physi-

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- (1) A judgement for the remedies provided by § 124.100,
- (2) Restraining orders, temporary injunctions or other actions as the courts deems proper, including the acceptance of satisfactory performance bonds, the creation of receiverships, the appointment of qualified receivers and the enforcement of constructive trust,
- (3) Ordering any person to divest direct or indirect interest or contact with any person or enterprise,
- (4) Imposing reasonable restrictions, including permanent injunctions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor or conduct to the extent permitted by the Constitution of the United States and this state.

*Id.*

§ 124.125(1), (2)

- (1) The Attorney General, the Department of Human Resources or any district attorney may bring an action against any person who engages in conduct described in § 124.105 and §124.110. In addition to remedies otherwise provided in §§ 124.100-.140, upon prevailing in the action, the court shall award to the Attorney General, Department of Human Resources or district attorney costs of investigation and penalties. Penalties awarded under this section may not exceed \$25,000 per occurrence.
- (2) The Attorney General may intervene in any civil action brought under § 124.100 if the Attorney General certifies that, in the opinion of the Attorney General, the action is of general public importance. In the action, the state shall be entitled to the same relief as if the Attorney General instituted the action under the provisions of this section.

Section 124.130 Statute of limitation.

An action under §§ 124.100-.140 must be commenced within seven years after discovery of the conduct described in § 124.105 and § 124.110 that gives rise to a cause of action under §§ 124.100-.140.

Section 124.135 Remedies not exclusive.

The remedies provided by §§ 124.100 -.140 are in addition to any other remedy civil or criminal that may be available under any other provision of law.

Section 124.140 Estoppel based on criminal conviction.

A defendant convicted in any criminal proceeding of conduct that gives rise to a cause of action under § 124.100, whether the conviction results from a plea or verdict, is estopped from denying the conduct for purposes of an action under §§ 124.100-.140.

cal pain or injury, and threats of significant harm.<sup>126</sup> The definition also includes fiduciary abuse.<sup>127</sup>

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126. OR. REV. STAT. § 124.105 (1992). An action may be brought under § 124.100 for physical abuse if the defendant engaged in conduct against an elderly or incapacitated person that would constitute any of the following:

- (a) Assault, under the provisions or §§ 163.160, -.165, -.175, -.185;
  - (b) Menacing, under the provision of § 163.190;
  - (c) Recklessly endangering another person, under the provisions of § 163.195;
  - (d) Criminal mistreatment under the provisions of §§ 163.200, -.205;
  - (e) Rape, under the provisions of §§ 163.355, -.365, -.375;
  - (f) Sodomy, under the provisions of §§ 163.385, -.395, -.405;
  - (g) Unlawful sexual penetration, under the provisions of §§ 163.408, -.411;
  - (h) Sexual abuse under the provisions of §§ 163.415, -.425, -.427.
- (2) An action may be brought under § 124.100 for physical abuse if the defendant used any unreasonable physical or chemical constraint on the plaintiff or subjected the plaintiff to prolonged or continued deprivation of food or water. *Id.*
- (3) An action may be brought under § 124.11 for physical abuse if the defendant used a physical or chemical restraint, or psychotropic medication on the plaintiff without an order from a physician licensed in the State of Oregon or under any of the following conditions:
- (a) For the purpose of punishing the elderly or incapacitated person;
  - (b) For the purpose no consistent with the purpose authorized by a physician;
  - (c) For a period significantly beyond that for which the restraint or medications was authorized by a physician. *Id.*

127. *Id.* § 124.110(1)-(3). An action may be brought under § 124.100 for fiduciary abuse in the following circumstances.

- (a) When a person, including but not limited to a person who has the care or custody of an elderly or incapacitated person or who stands in a position of trust to an elderly or incapacitated person, takes or appropriates money or property of the elderly or incapacitated person for any wrongful use or for any purpose not in the due and lawful execution of the trust or duty of the person.
  - (b) When an elderly or incapacitated person requests that another person transfer to the elderly or incapacitated person any money or property that the other person holds or controls and that belongs to or is held in express trust, constructive trust or resulting trust for the elderly or incapacitated person, and the other person, without good cause, either continues to hold the money or property or fails to take reasonable steps to make the money or property readily available to the elderly or incapacitated person when:
    - (A) The ownership or control of the money or property was acquired in whole or in part by the other person or someone acting in concert with the other person for the elderly or incapacitated person; and
    - (B) The other person acts in bad faith, or knew or should have known of the right of the elderly or incapacitated person to have the money or property transferred as requested or otherwise made available to the elderly or incapacitated person.
- (2) For the purposes of this section, a person has the care and custody of an elderly or incapacitated person if the person voluntarily, by contract or by order of the court undertakes the responsibility for providing subsistence, medical or other care to an elderly or incapacitated person, provides financial advice to an elderly or incapacitated person or manages the finances or resources of an elderly or incapacitated person. Persons with the care and custody of an elderly or incapacitated person include those persons providing care including but not limited to medical care, custodial care, personal care, mental health services, rehabilitative services or any other kind of care provided that is required because of age or disability.
- (3) A transfer of money or property that is made for the purpose of qualifying an elderly or incapacitated person for Medicaid benefits or for any other state or federal assistance program, or the holding and exercise of control

The civil action provides that an elderly or incapacitated person who suffers damage through physical or fiduciary abuse may bring an action against the perpetrator. The prevailing plaintiff is awarded all economic damages or \$500, whichever is greater, non economic damages, and reasonable attorneys' fees and conservator fees.<sup>128</sup> The action may be brought on by a person who is sixty-five or older, by an incapacitated person, or by a representative of either.<sup>129</sup>

Health care facilities and other specified institutions are exempt unless first convicted of certain specified crimes,<sup>130</sup> including: assault, reckless endangerment, criminal mistreatment, rape, sodomy, or conduct constituting fiduciary abuse.<sup>131</sup> If convicted of a specified crime, the defendant is estopped from denying the conduct for purposes of an action under the Act.<sup>132</sup> In addition to awarding damages, a court may issue restraining orders, injunctions, and other equitable remedies to curtail the conduct.<sup>133</sup> The period of limitations is seven years.<sup>134</sup> The Attorney General may intervene in any civil action brought under the Act.<sup>135</sup>

Each of the jurisdictions examined has chosen a different method of responding to the statistics illustrating the disturbing issue of elder abuse. Each jurisdiction has enacted some form of criminal sanction, but not every jurisdiction has enacted a civil remedy specifically addressing elder abuse. California has provided a civil statute, but requires clear and convincing proof before allowing recovery. Louisiana has provided a civil remedy as part of its Residents' Bill of Rights. Massachusetts has chosen to bring cases in the medical malpractice forum. Oregon has provided a civil remedy, but with regard to institutions, only after a criminal conviction has been rendered. Maryland and North Dakota have not yet enacted specific elder abuse civil statutes. As the incidents of elder abuse in the institutional setting continue to increase with a growing population, the resulting societal pressures will likely result in increased legislative initiatives to provide additional legal remedies for the elderly individuals who are subjected to abuse.

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over money or property after such a transfer, does not constitute a wrongful use under subsection (1)(a) of this section or the holding of money or property without good cause for the purpose of subsection (1)(b) of this section.

128. *Id.* § 124.100(1)(a)-(d) (1997).

129. *Id.* § 124.100(2).

130. *Id.* § 124.115 2(a).

131. *Id.* § 124.115(2)(b).

132. *Id.* § 124.140 (1997).

133. *Id.* § 124.120(1)-(4) (1997).

134. *Id.* § 124.130 (1997).

135. *Id.* § 124.125(2) (1997).