

# Common Law Protections for Elderly Californians

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## 1. Fiduciary Duty

- A. The deemed fiduciary relationship  
this fiduciary duty arises from the status of the relationship of the parties.
  - examples: husband and wife; principal and agent; health care provider and patient; partners; attorney and client. See e.g., *Seeger v. Odell* (1941) 18 Cal. 2d 409; Cal.Jur.3d, *Fraud and Deceit* section 11
- B. The confidential relationship in fact.  
This relationship gives rise to the same fiduciary duty as a duty arising from one of the relationships described above. However, the relationship in question is based on
  - the vulnerability of one party to the other, which
  - results in the empowerment of the stronger party by the weaker, which
  - empowerment has been solicited or accepted by the stronger party, and
  - which prevents the weaker party from effectively protecting itself.*Persson v. Smart Inventions, Inc.* (2005) 125 Cal. App. 4<sup>th</sup> 1141, 1161

Because vulnerability is central to a confidential relationship, a fiduciary duty frequently arises when dealing with our frail elderly.

- C. Fiduciary duty is a central concept in litigation under the common law  
The establishment of a fiduciary duty creates a duty of full disclosure of facts, which usually does not otherwise exist.  
Further, any advantage to the stronger party over the weaker is *presumed* fraudulent. Civil Code section 1573.

## 2. Avoiding Contract

- A. If of unsound mind. Civil Code section 38, 39.
- B. If of sound mind, but contract is the product of undue influence (Civil Code sections 1565; 1566)
- C. Consent to contract is not free or valid if obtained by duress, menace, fraud, undue influence or mistake. Civil Code section 1567.

## 3. The Elderly, Frail Victim in Tort Actions

- The vulnerability of the victim is relevant to the duty to disclose in a fraud setting. OCM Principal Opportunities Fund v. CIBC World Markets Corp. (2007) 157 Cal. App. 4<sup>th</sup> 835, 859.

- The vulnerability of the victim is also relevant to the issue of reliance. The element of reliance and knowledge are subjective, requiring evidence of the victim's state of mind. *Slakey Bros. Sacramento, Inc. v. Parker* (1968) 265 Cal. App. 2d 204.
- The vulnerability of the victim is relevant to the element of "outrageousness" in a claim for intentional infliction of emotional distress. *Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 946.
- In punitive damage claims involving proof of "reprehensibility," the age, condition and vulnerability of the victim is relevant. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419.

#### **4. Common Law Claims Not Preempted Under the Medicare Advantage Act (42 U.S.C. section 1395w)**

In *Cotton v. Starcare Medical Group, Inc., et al.*, (2010) 183 Cal. App. 4<sup>th</sup> 437, the court held that claims based on state statutes and regulations which were specifically applicable to HMOs were preempted by 42 U.S.C. section 1395w-26(b)(3), but that common law claims and statutes of general applicability *were not preempted*. Accordingly, in many cases previously thought preempted, state common law claims may now proceed directly against HMOs. In addition, despite the provisions of Health & Safety Code section 1371.25 prohibiting the imposition of liability on HMOs vicariously, HMOs may now be vicariously liable for the misconduct of their delegated and contract health care providers.