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## Financial elder abuse and insurance

### SUCCESSFUL LITIGATION OF FINANCIAL ELDER ABUSE MAY INCLUDE TREBLE DAMAGES AND ATTORNEY'S FEES AWARDS

California's senior population is growing faster than any other age group in the state. The Journal for the American Medical Association reports that from 1990 to 2016, the life expectancy of Californians rose from 75 to 80.9. According to projections by the

California Department of Finance, the number of Californians 65 and older is expected to climb by 2.1 million between now and 2026. In comparison, the number of Californians under the age of 25 will only grow by 2,500. The California Legislature recognizes that elders are a

class of persons who are particularly vulnerable to abuse and that "this state has a responsibility to protect" them. (Welf. & Inst Code, § 15600(a); see *Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1139-1140.)

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Accordingly, those of us entrusted with protecting the legal rights of senior citizens must endeavor to help protect the financial health of our aging population, especially with respect to their homes and contractual rights. It is anticipated that an upward trend of claims for financial elder abuse will occur as the citizens of our state age in record numbers, especially in the loss-of-insurance-benefits context.

### Typical claims

In property-loss bad-faith insurance cases against insurers, it is typically our practice to assert claims for both breach of contract and breach of the covenant of good faith and fair dealing. If the dispute also includes facts supportive of a broker-negligence claim (for example, underinsured values on real property), we will also assert breach-of-fiduciary-duty claims. Finally, if our clients are over the age of 65, we assess whether it is appropriate to assert financial elder abuse claims under California law.

The California Welfare and Institutions Code section 15610.27 (the Elder Abuse Act), defines an “elder” as a person beyond the age of 65 years and is intended “to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) The original focus of the Act was on reporting abuse and neglect. However, later amendments shifted the focus to private, civil enforcement, which permits individuals to pursue claims in litigation for financial elder abuse.

Abuse of an elder or a dependent adult is defined under the Elder Abuse Act as “[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering” (§ 15610.07(a)) or “[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.” (§ 15610.07(b).)

The Elder Abuse Act also prohibits the financial abuse of an elder; “financial

abuse” occurs when a person or entity “takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.” (Welf. & Inst. Code, § 15610.30.) “Personal property” includes money, goods, chattels, things in action and evidence of debt. (Civ. Code, § 14.) A “wrongful use” is deemed to have occurred when, “among other things,” any of the above actions is taken “in bad faith.” (*Ibid.*)

To establish a “wrongful use” of property to which an elder has a contract right (i.e., insurance benefits), the elder must demonstrate a breach of the contract, or other improper conduct. In *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, the trial court sustained a demurrer without leave to amend to the plaintiffs’ complaint, which asserted a claim for wrongful foreclosure and a claim for elder abuse based on the foreclosure.

Importantly, the Elder Abuse Act imposes an additional requirement beyond the existence of improper conduct, namely, that “the person or entity *knew or should have known* that this conduct is likely to be harmful to the elder ... adult.” (Welf. & Inst. Code, § 15610.30 (b) (italics added).) In statutes and other legal contexts, the “knew or should have known” standard ordinarily conveys a requirement for actual or constructive knowledge. (See e.g., *Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1196.) Generally, constructive knowledge “means knowledge ‘that one using reasonable care or diligence should have, and therefore is attributed by law to a given person’ [, and] encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm to one who merely should know of a dangerous condition.” (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1190-1191 quoting Black’s Law Dict. (7th ed. 1999) p. 876.) It stands to reason that a deprivation of insurance benefits due to an elder, when the insurer has actual or constructive knowledge of the age of the insured (through insurance company records procured from the application

process and maintained in the file thereafter), is likely to be harmful to the elder.

Under the Elder Abuse Act, wrongful conduct occurs “when the party who violates the contract actually knows that it is engaging in a harmful breach, or reasonably should be aware of the harmful breach.” (Welf. & Ins. Code, § 15610.30, subd. (b); *Paslay v. State Farm Gen. Ins. Co.* (2016) 248 Cal.App.4th 639, 659.) In *Negrete v. Fidelity and Guar. Life Ins. Co.* (C.D.Cal.2006) 444 F.Supp.2d 998, the plaintiff asserted several class claims against an insurer, including claims for breach of fiduciary duty and financial elder abuse, alleging that the insurer employed deceptive practices in selling annuities to senior citizens. The federal court concluded that the fraud allegations were sufficient to state an elder abuse claim.

### Financial elder abuse

A party engages in financial elder abuse by withholding or misappropriating funds to which an elder is entitled under a contract. (*Paslay v. State Farm Gen. Ins. Co.*, 248 Cal. App. 4th at 658-659 [recognizing that summary adjudication of an elder abuse claim is improper when triable issues regarding bad faith or unreasonable conduct by an insurer exist]; *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1307, 1315-1316 [plaintiff stated elder abuse claim based on defendant’s failure to pay funds owed under contract]; *Wood v. Jamison* (2008) 167 Cal.App.4th 156, 164-165 [elder’s attorney engaged in financial abuse by improperly accepting funds to which elder was entitled through loan]; *Negrete v. Fidelity and Guar. Life Ins. Co.*, *supra* [claims of deceptive sales practices by insurer selling annuities to senior citizens and churning insurance policies were sufficient to state an elder abuse claim].) Similarly, courts have found in a number of settings that commissions paid by a third party to a defendant arising from an abusive transaction are sufficient to constitute elder abuse. (See, e.g., *Wood v. Jamison* (2008) 167 Cal.App.4th 156, 164-165 [finder’s fee paid from the

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lender sufficient]; *Zimmer v. Nawabi* (E.D. Cal. 2008) 566 F.Supp.2d 1025, 1034 [commission paid by mortgage broker sufficient].)

What are the practical considerations of a financial elder abuse claim? A four-year statute of limitation applies to a financial elder abuse cause of action. (Welf. & Inst. Code, § 15657.7.) The statute of limitations on a financial elder abuse cause of action runs from the time “the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse.” (*Ibid.*) Accordingly, the allegations in an elder financial abuse count should include:

- all factual bases describing the insurance policy, the subject property that was insured, the named insured(s), the insured loss that occurred, the failure of the insurance company to cover the insured loss, any facts specifying poor or unlawful treatment of the insured by the claims adjusters and any facts describing the hardship, distress, etc. incurred by the insured(s) resulting from the insurer’s conduct;
- that plaintiff is an “elder” as the term is defined in Welfare and Institutions Code section 15610.27, having been beyond the age of 65 years old at the time the insurer wrongfully denied the claim;
- that the insurer committed unlawful financial abuse against the elder; “Financial abuse” of an elder ...occurs when a person or entity...[t]akes, secretes, appropriates, retains or retains real or personal property of an elder or ...for wrongful use or with intent to defraud, or both...or assists in taking, secreting, appropriating, obtaining or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.” (Welf. & Inst. Code, §§ 15610.30 and 15657.6);
- that “personal property” includes money, chattels, things in action and evidences of debt. (Civ. Code, § 14;
- that the elder had vested personal property rights to money and benefits triggered under the insurance policy once their insured’s loss occurred;

- that the insurer retained the personal property with an intent to deprive the elder of his/her money and benefits, constituting financial abuse;
- that the insurer committed financial elder abuse when it (a) took policy premiums from the insureds with no intent of fully paying benefits promised under the insurance policy; (b) that by and through the insurance application process and internal company records, the insurer has or had knowledge that the insured is an elder; (c) that the insurer intentionally under-scope and under-adjusted the loss (or denied the loss altogether); and (d) that the insurer wrongfully retained policy benefits by delaying and denying payment to the elder and paid less than what was due and owing to the elder;
- that the elder was harmed by the unlawful elder abuse;
- that the insurer knew or should have known that its conduct was directed to an elder and knew or should have known that its conduct was likely to be harmful to the elder;
- that the insurer deliberately disregarded the high degree of probability that its conduct would injure the elder;
- that the insurer’s conduct caused the elder to suffer because its conduct was a substantial factor in causing the elder’s harm, causing a loss of primary residence, an uncovered loss of the elder’s personal property, and a loss of assets essential for the elder’s health and welfare;
- that the elder is substantially more vulnerable than other members of the public to the insurer’s conduct because of his/her age, [poor health and infirmity, impaired understanding, restricted mobility, etc.] and actually suffered substantial physical, emotional and economic damage resulting from the insurer’s conduct; and
- that the insurer is guilty of recklessness, oppression, fraud and/or malice in the commission of its financial elder abuse.

### Treble damages and attorney’s fees

The damages awarded in elder financial abuse cases can be substantial. In addition to the damages recoverable for breach of contract and bad faith in insurance litigation, damages for

financial elder abuse may be trebled. (Civ. Code, § 3345.) An additional layer of protection and benefit for senior citizens is contained within section 15657.5(a) of the Elder Abuse Act, which requires the court to award reasonable attorney fees and costs to a plaintiff where the defendant is found liable for financial abuse of an elder. Notably, in addition to the mandate that a prevailing plaintiff be awarded reasonable attorney fees and costs, the section contains no reciprocal provision for a prevailing defendant. (See *Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, 1190.)

### Claims not extinguished by death

Nor does an elder need to be alive at the time elder abuse claims are asserted on their behalf; after the victim dies, the right to sue for elder abuse transfers to a named personal representative of the deceased or a successor in interest if there is no designated personal representative. (Welf. & Inst. Code, §15657.7.) And, damages may be awarded against an individual defendant for pre-death pain and suffering upon a finding of clear and convincing evidence of recklessness, malice, oppression, or fraud. (Welf. & Inst. Code, §15657.5, subd. (b).) These damages may arise in the context of property-loss litigation from withheld funds (i.e., insurance benefits) the elder should have received to pay for alternative living arrangements if the elder’s home is in an unlivable condition.

Traditional damages are awarded in financial elder abuse cases based upon a preponderance of the evidence (i.e., 51%) against individual defendants. (See Judicial Council of California Civil Jury Instructions 2017 edition, p. 380.) Employer defendants may also be liable for financial elder abuse, attorneys’ fees and costs and pre-death pain and suffering under vicarious liability principles. (Welf. & Inst. Code, §§ 15657.5, subds. (b) and (c), 15657.7.) This adds another serious consideration for plaintiffs’ attorneys to make in determining whether to pursue an employer financial institution or insurance company for the financially abusive acts of an employee.

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