

Elder Financial Abuse Litigation Guide

California Advocates for Nursing Home Reform
650 Harrison Street, 2nd Floor San Francisco, CA 94107
(415) 974-5171 or (800) 474-1116 (Consumers Only)
www.canhr.org



Elder Financial Abuse Litigation Guide
California Advocates for Nursing Home Reform

This elder financial abuse litigation guide is designed to familiarize legal services staff with useful California elder financial abuse statutes and to provide them with the tools to litigate elder and dependent adult financial abuse cases. An understanding of how financial abuse occurs will help the plaintiff's attorney develop a cogent recitation of the facts that led up to the abuse. This guide provides the legislative intent behind the establishment of the Elder and Dependent Adult Civil Protection Act (EADACA), which will help direct the trier of fact to the importance of these cases, the impact on seniors, and society's intention to do what it can to combat this insidious activity. The guide also highlights the prominent statutes being used to pursue civil litigation, including a number of several prototype complaints that can be used as a guide when developing a private cause of action.

Special thanks to the following lawyers who have generously shared their work products: Kelly Morgantini, Esq., Daniel Murphy, Esq., Steve Riess, Esq. and Kathryn Stebner, Esq.

All information included in this Guide is up to date as of January 1, 2013. Since laws are subject to change, attorneys using CANHR's publications or information in dealing with a specific legal matter should also research original sources of authority.

The sample documents included in this Guide may not be regarded as legal advice. Statements of fact or opinion are solely the responsibility of the authors and do not imply an opinion or endorsement on the part of CANHR officers, staff or directors unless otherwise specifically stated.

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CANHR

650 Harrison Street, 2nd Floor

San Francisco, CA 94107

(415) 974-5171

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Preface

It is important for lawyers working with senior victims of financial abuse to be familiar with elder financial abuse statutes. Elder financial abuse is becoming the “growth industry” of the 21st century, affecting hundreds of thousands of elderly persons each year. As the holders of the largest percentage of wealth and with access to vast equity reserves in family homes, the elderly are prime targets of greedy family members, friends and caregivers, telemarketing and internet scam artists, and a growing number of unethical professionals. Changes in cognitive abilities, coupled with the fear of outliving resources, make seniors prime targets for financial abuse. Seniors with mild cognitive impairment but who are capable of performing the necessary activities of daily living to remain “independent” in the community are particularly vulnerable to being victimized. Those having trouble with their critical thinking skills can become confused and easily manipulated when it comes to managing their property, personal finances, and estates. Professional predators are expert in selling products that are often inappropriate, such as trusts, annuities, long term care insurance, and reverse mortgages.

II. How to Recognize Financial Abuse

a. Transaction Abuse Indicators

- Inappropriate banking activity, such as unusually large withdrawals or withdrawals from automated banking machines when the elder cannot get to the bank
- Signatures on checks that do not resemble the elder’s signature
- Legal documents signed when the elder is physically incapable of writing
- Checks written out to “cash” being negotiated by the elder’s caregiver
- Checks signed by the senior but filled out by someone else
- A surge of activity in accounts which have been static for years
- Expensive gifts made by the elder to a caretaker
- Checks or credit card transactions made out to direct mail or telemarketing promotions
- Contributions going to newly formed religious or non-profit causes
- Investments in time shares, real property, annuities or financial products
- Large loans against equity in real property to finance investments

b. Possible Legal Document Abuse Indicators

- Power of attorney given by the elder when he or she lacks mental capacity
- A will being made when the elder is not mentally competent
- Elder taking his or her name off of property titles
- The elder adding the name of a caretaker to real property or money accounts in exchange for commitments of continued care and/or affection

c. Life-Style Change Indicators

- Lack of amenities, such as personal grooming items or appropriate clothing, when the elder can well afford it
- Under-deployment of the elder’s existing resources that should be spent on personal care, housing, and maintenance
- Missing cash, jewelry and personal belongings

d. Personal Relationship Abuse Indicators

- Unusual interest by a family member in “conserving” the money being spent for the care of the elder
- Reluctance or refusal by “responsible party” to spend money on the elder’s care
- Recent acquaintances or long-lost relatives expressing affection for a wealthy elder
- A caretaker taking an inappropriate level of interest in the elder’s financial matters

III. FINANCIAL ELDER ABUSE LAWS

Crimes of financial abuse against elder or dependent adults are cowardly and despicable acts that are psychologically devastating and destroy independence. The good news is California has many elder and dependent adult statutes that can be used by criminal prosecutors, civil litigators and those engaged in protective services. Those advocating for the rights and safety of our elder and dependent citizens need to be conversant in the legal resources available. This Guide provides essential information to help advocate for elders or dependent adults who have been financially abused.

a. California's Elder and Dependent Adult Civil Protection Act (EADACPA)

The California Legislature recognized that special laws are needed to protect elder and disabled individuals. The California Legislature declared that elder adults are deserving of special consideration and protection. To that end, statutes were created in both criminal and civil law that encourage prosecution of cases and enhances punishment for those who have been found guilty of the abuse of an elder or dependent adult [Welfare and Institutions Code Section 15600(a)]. The Legislature desired to direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of abuse, neglect, and abandonment [Welfare and Institutions Code Section 15600(b)].

In enacting EADACPA [WIC § 15600 (h)(i)] the Legislature found and declared that infirm elderly persons 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 incentives to prosecute these suits. The intent of the Legislature in enacting this chapter was to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to Section 15630, or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety.

Defining Civil Elder and Dependent Adult Financial Abuse (Welfare and Institutions Code Section 15610.30)

- (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
- (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
 - (2) 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.
 - (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.
- (b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

Private Cause of Action - Civil Suits for Elder And Dependent Adult Abuse (Welfare and Institutions Code § 15657.5)

Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs.

Statute of Limitation for Financial Abuse (Welfare and Institutions Code § 15657.7)

There is a four-year statute of limitations in elder and dependent adult financial abuse cases.

Surviving Cause of Action (Code of Civil Procedure § 377.30)

After the death of the elder or dependent adult, the right to commence or maintain an action shall pass to the personal representative of the decedent. If there is no personal representative, the right to commence or maintain an action shall pass to an heir or an intestate heir whose interest is affected by the action, and the decedent's successor in interest. A creditor or a person who has a claim against the estate who is not an heir or beneficiary of the decedent's estate does not have standing.

Civil Attorneys Freezing Assets (Welfare and Institutions Code § 15657.01)

An attachment may be issued in any action for damages pursuant to Section 15657.5 for financial abuse of an elder or dependent adult, as defined in Section 15610.30. The other provisions of the Code of Civil Procedure not inconsistent with this article shall govern the issuance of an attachment pursuant to this section. In an application for a writ of attachment, the claimant shall refer to this section. An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.

Wrongful Taking from a Decedent (Probate Code § 859)

If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor, or trust, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part. The remedy provided in this section shall be in addition to any other remedies available in law to a trustee, guardian or conservator, or personal representative or other successor in interest of a decedent.

Undue Influence (Civil Code Section 1575)

Undue influence is where a person who has the confidence or authority over another uses their relationship to take advantage of that person's necessities in a grossly oppressive manner. According to California Civil Code Section 1575, undue influence consists of:

1. The use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. Taking an unfair advantage of another's weakness of mind; or,
3. Taking a grossly oppressive and unfair advantage of another's necessities or distress.

b. The Consumer Legal Remedies Act (CLRA)

The CLRA can be used in cases where goods or services have been sold through unfair or deceptive sales practices. An injured party would want to use the CLRA because they can be awarded restitution of their property, punitive damages, court costs and attorneys fees, in addition to any other relief that a court may deem proper. Civil Code Section 1761 defines what is meant by goods and services and who and what is covered by the act. Section 1770 enumerates the various acts considered to be deceptive practices. Section 1780 lays out the remedies and procedures necessary in order to obtain the remedies. Of extreme importance is to note that the person or party who allegedly committed the acts must notify and demand correction of the alleged violation thirty days prior to the commencement of any action under CLRA.

Preliminary Notices and Demands Owed to the Defendant (Civil Code § 1782)

The plaintiff is required to notify the defendant, and make a demand on the defendant thirty days prior to the commencement of an action for damages. If the defendant complies then no action for damages may be maintained under the provision of § 1781.

Additional Remedies for Elder or Disabled Adults under CLRA [Civil Code § 1780 (b)]

Any consumer who is a senior citizen or a disabled person may seek and be awarded, in addition the remedies specified, up to five thousand dollars (\$5,000) where the trier of fact (1) finds that the consumer has suffered substantial physical, emotional or economic damage resulting from the defendant's conduct, (2) makes an affirmative finding in regard to one or more of the factors set for in subdivision (b) of Section 3345 (the defendant knew or should have known that his or her conduct was directed at senior citizens or disabled persons, when the defendant's conduct caused senior citizens or disabled persons to suffer a loss of property that was essential to their well being, and the seniors or disable persons actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct), and (3) finds that an additional award is appropriate.

Factors for Tripling an Award (Civil Code § 3345)

With Civil Code § 3345 the trier of fact may triple an award for a senior or dependent adult. Section 3345 only applies in actions for senior citizens or disabled persons to redress unfair or deceptive acts, practices, or unfair methods of competition. Section 3345 can only be brought when the defendant knew or should have known that his or her conduct was directed at senior citizens or disabled persons, when the defendant's conduct caused senior citizens or disabled persons to suffer a loss of property that was essential to their well being, and when the seniors or disable persons actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

c. False and Misleading Business Practices - Business and Professions Code

The Business and Professions Code has many sections a practitioner can use to pursue suits for unlawful and deceptive tactics against the elderly or dependent adults. In some instances the business practices of predators may have victimized hundreds of persons.

Business and Professions Code § 6126

Practicing law without a license

Business and Professions Code § 6152

Running and capping for an attorney (illegal solicitation of clients)

Business and Professions Code § 6126

Attorneys selling financial products to their clients:

A lawyer, while acting as a fiduciary, may sell financial products to an elder client with whom the lawyer has or has had, within the preceding three years, an attorney-client relationship, if the transaction or acquisition and its terms are fair and reasonable to the client, and if the lawyer provides that client with a disclosure that satisfies all of the following conditions ... "Financial products" means long-term care insurance, life insurance, and annuities governed by the Insurance Code [B&P § 6175(d)].

Business and Professions Code § 6450

Illegal paralegals:

"It is a misdemeanor for any paralegal to offer legal advice to the public or induce a person to make an investment, purchase a financial product or service, or enter into a transaction from which income or profit may be derived."

Business and Professions Code § 1720

Unfair competition means any unlawful, unfair or fraudulent business act or practice or any unfair, deceptive, untrue or misleading advertising.

Business and Professions Code § 17206.1

Penalties and action for recovery:

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars for each violation.

Business and Professions Code § 17206.3

Additional penalties for violations against senior citizens:

- (a) In addition to any liability for a civil penalty pursuant to Section 17206, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens may be liable for a civil penalty not to exceed two thousand five hundred dollars for each violation.

Business and Professions Code § 17500

False or misleading statements:

“It is a misdemeanor for any person to induce a sale through an advertisement that is untrue or misleading information...or which by the exercise of reasonable care should be known, to be untrue or misleading...”

Business and Professions Code § 17500.3

Home solicitations:

“It is unlawful for any person to solicit a sale at the residence of a prospective buyer without clearly revealing, before making any statements other than a greeting, that the purpose he or she has of being there is to effect a sale.”

d. Regulating the Conduct of California Insurance Agents and Brokers - Insurance Code

Insurance Code § 785

Conduct:

“All insurers, brokers, and agents owe a prospective insured who is over 65 a duty of honesty, good faith and fair dealing.

Insurance Code § 785.1

Insurance agents or brokers cannot have a financial relationship with those selling reverse mortgages or veterans' benefits if that relationship leads to the sale of an annuity to a senior.

Insurance Code § 785.4

Insurance agents cannot deliver living trusts or legal documents to the home of a senior if the insurance agent intends to use the delivery as a means of gaining entrance into the seniors' home to attempt to sell an insurance product.

Insurance Code § 789.8

Notice explaining Medi-Cal eligibility requirements

Insurance Code § 789.8

Restriction of annuity sales for Medi-Cal planning. Prohibition where the senior's assets are less than Community Spouse Resource Allowance (CSRA), if the senior would have been eligible for Medi-Cal without having purchased the annuity. There is also a prohibition against selling an annuity to a senior if after the purchase the senior still would be ineligible.

Insurance Code § 789.10

Written notification:

An insurance agent shall notify a senior, 24 hours in advance of a home visit, that the insurance agent intends to go to the senior's home to solicit the sale of an annuity.

Insurance Code § 790.03

Prohibition against unfair or deceptive sales practices.

Conclusion

Elder abuse appears in many forms. There are numerous special statutes to protect the elderly population. A practitioner has an obligation to his or her client to take full advantage of the Legislature's desire to protect this vulnerable population.

IV. Documents

Included you will find examples of how causes of actions have been pled in a variety of civil elder and dependent adult financial abuse cases. These examples are meant to serve as a template for future financial abuse complaints. Scroll down and you will see under each cause of action the name of the case or cases that used that particular cause of action in the pleading.

Cases & Sample Complaints

"Bert & Ernie" Financial Abuse Complaint Template, Plaintiff's Attorney Kathryn Stebner, Esq.

Bert-Ernie Template (Doe V AAA) in Word format

Husband and Wife v. Broker Services, Plaintiff's Attorney Kellie Morgantini, Esq.

Husband and Wife v. Philanthropic Charities, Plaintiff's Attorney Kellie Morgantini, Esq.

McLaughlin v. Holody, Sheer, AEPC, Plaintiff's Attorney Steven Riess, Esq.

Pitts v. The Money Shack, Plaintiff's Attorney Daniel Murphy, Esq.

Plaintiff v. Sanchez, Plaintiff's Attorney Kellie Morgantini, Esq.

Shaufler v. Day, Plaintiff's Attorney Daniel Murphy, Esq.

Smith v. Veteran's Benefits Group, Plaintiff's Attorney Kathryn Stebner, Esq.

Tener v. OM Financial Life, Plaintiff's Attorney Steven Riess, Esq.

V. Guide to Cases and Causes of Action

Breach of Contract

Plaintiff v. Sanchez

Breach of Oral Contract

Husband and Wife v. Broker Services

Breach of Fiduciary Duty and Abuse of an Elder (WIC § 15600, *et seq.*)

a. B&E Template

b. Elder McLaughlin v. Holody

c. Husband and Wife v. Broker Services

d. Plaintiff v. Sanchez

e. Smith v. Veteran's Benefits Group

f. Tener v. OM Financial Life

Breach of Written Contract

Husband and Wife v. Broker Services

Business and Professions Code § 17200, *et seq.*

B&E Template

Cancellation of Instrument based on Fraud in Factum

Pitts v. The Money Shack

Competition Act

Pitts v. The Money Shack

Constructive Fraud

B&E Template

Shaufler v. Day

Consumer Legal Remedies Act (Civil Code § 1770, *et seq.*)

McLaughlin v. Holody

Smith v. Veteran's Benefits Group

Conversion

Tener v. OM Financial Life

Default Judgment

Husband and Wife v. Philanthropic Charities

Elder Abuse

B&E Template

Elder Financial Abuse

McLaughlin v. Holody

Pitts v. The Money Shack

Smith v. Veteran's Benefits Group

Tener v. OM Financial Life

Fraud

B&E Template

McLaughlin v. Holody

Pitts v. The Money Shack

Plaintiff v. Sanchez

Shaufler v. Day

Tener v. OM Financial Life

Injunctive Relief

Pitts v. The Money Shack

Insurance Code § 785 *et seq.*

Shaufler v. Day

Insurance Code § 789.8

B&E Template

Shaufler v. Day

Mortgage Foreclosure Consultant Law (CC § 2945, *et seq.*)

Plaintiff v. Sanchez

Negligence

B&E Template

Smith v. Veteran's Benefits Group

Shaufler v. Day

Tener v. OM Financial Life

Negligent Infliction of Emotional Distress

Smith v. Veteran's Benefits Group

Negligent Misrepresentation

Husband and Wife v. Broker Services

Probate Code Relief § 850

Shaufler v. Day

Recession

Tener v. OM Financial Life

Shaufler v. Day

Unfair Competition Law (B&P ¶ 17200, *et seq.*)

B&E Template

Shaufler v. Day

Smith v. Veteran's Benefits Group

Unfair Business Practices (B&P § 17200, *et seq.*)

Husband and Wife v. Broker Services

Plaintiff v. Sanchez

Tener v. OM Financial Life