

2013 WL 3810545 (S.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. California.

Patricia JOHNSTON, Plaintiff,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation, Defendant.

No. 13-CV-00574-MMA-BLM.
March 18, 2013.

Points and Authorities in Support of Allstate Insurance Company's Motion to Dismiss

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Date: May 28, 2013

Time: 2:30 p.m.

Ctrm: 3A

I. Introduction

This case arises from unfortunate circumstances, but the issues now before the Court are straightforward legal ones.

In July 2012, plaintiff Patricia Johnston went on vacation. While she was gone, a man who had been doing yard work for her unexpectedly passed away in her house. Because the body was not discovered for several days, it began to decay and caused damage to the house. Plaintiff made a claim to Allstate for the damage. Allstate initially determined that there was no coverage, but plaintiff disputed this decision. Ultimately, although the complaint fails to mention this, Allstate agreed to pay for the damage to the house.

Plaintiff contends that she is entitled to more money. She has alleged claims for breach of contract and breach of the implied covenant (insurance “bad faith”), which Allstate does not challenge at the pleading stage. But plaintiff has alleged other causes of action that fail as a matter of law.

The fourth cause of action is for **financial elder abuse**. To state such a claim, plaintiff must allege that Allstate wrongfully took, obtained, or retained some real or personal property from her. But here plaintiff simply contends that Allstate should have paid her more money for her claim. She does not and cannot allege that Allstate wrongfully took any property from her. Therefore, she cannot state a claim for **elder abuse**.

The fifth cause of action purports to be brought under the [California Civil Code Section 3345](#) for unfair or deceptive acts against a senior citizen. That statute, however, does not create a separate cause of action. It merely permits a trier of fact to triple fines and civil penalties available for violation of other statutes, including [Civil Code Section 1750 et. seq.](#), the Consumer Legal Remedies Act (the “CLRA”). The CLRA itself, however, does not apply to insurance disputes. *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 61 (2009). Therefore, to the extent the fifth cause of action is one for violation of the CLRA, it is legally defective.

Alternatively, to the extent plaintiff is attempting to use [Section 3345](#) to treble the damages she seeks under her common law claims, the Court should also dismiss that claim. The text of the statute and controlling Ninth Circuit authority make clear that [Section 3345](#) provides for the trebling of statutory penalties, but does not permit the trebling of compensatory damages for common law claims.

II. Plaintiff cannot state a claim for **elder abuse**

The fourth cause of action purports to allege a claim for **financial elder abuse**. “**Financial abuse**” of an **elder** occurs when a person or entity:

(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.

...

(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...

[Cal. Welf. & Inst. Code § 15610.30](#) (italics added).

Thus, for a plaintiff to state a claim for **financial elder abuse**, she must show that Allstate wrongfully took, obtained, or retained real or property from her. For example, in *Das v. Bank of America, N.A.*, 186 Cal. App. 4th 727 (2010), the plaintiff attempted to allege an **financial elder abuse** claim based on alleged predatory loans that the defendant made to her father. The trial court sustained the defendant's demurrer to the **elder abuse** claim without leave to amend. The Court of Appeal affirmed, ruling: “Nothing in appellant's complaints suggests that respondent [bank], in issuing a loan to [the **elder**] and transferring his funds at his request, obtained his property for an improper use...” *Id.* at 744. See also *Hardin v. Wal-Mart Stores, Inc.* 813 F. Supp. 2d 1167, 1181 (E.D. Cal. 2011) (Wal-Mart's alleged breach of a promise to provide an employee with enough hours to maintain full-time status and insurance benefits did not constitute **financial elder abuse**). *C.f.*, *Woody. Jamison*, 167 Cal. App. 4th 156, 164-65 (2008) (holding that attorney committed **financial elder abuse** by *taking* an undisclosed finder's fee from client's funds).

Welfare & Institutions Code Section 5657.6 also demonstrates that the **financial elder abuse** statute applies only when property is taken away from an **elder**. It states:

A person or entity that takes, secretes, appropriates, obtains, or retains ... the real or personal property of an **elder** . . . shall, upon demand by the **elder** . . . return the property and if that person or entity fails to return the property, the **elder** or dependent adult shall be entitled to the remedies provided by Section 15657.5, including attorney's fees and costs.

[Cal. Welf & Inst. Code § 15657.6](#) (italics added). One can only “return” something that is actually taken from someone else.

Finally, a claim for insurance benefits does not constitute real or personal property. Property must be capable of being transferred. “[I]t is a fundamental principle of law that one of the chief incidents of ownership in property is the right to transfer it.” *In re Marriage of McTiernan and Dubrow*, 133 Cal. App. 4th 1090, 1100 (2005), citing *Bias v. Ohio Farmers Indemnity Co.*, 28 Cal. App. 2d 14, 16 (1938). But a claim for insurance benefits is not property; it is a personal injury claim, and personal injury claims cannot be transferred. *Block v. California Physicians Service*, 244 Cal. App. 2d 266, 270 (1966). Thus, a claim for insurance benefits is not property for the purposes of the **financial elder abuse** statute.

In *Mercer v. State Farm Mut. Auto Ins. Co.*, 2011 WL 8106473 (L.A. Superior Court 2011), the court applied these principles to a lawsuit arising from an insurance claim and dismissed the **elder abuse** cause of action. There, the plaintiff brought a breach of contract and bad faith suit arising from the insurer's alleged delay in paying a claim. Like here, the plaintiff also added a claim for **elder abuse**. The court, however, dismissed that claim, ruling that the plaintiff did not allege that the insurer took or retained any property from her:

Plaintiff has presented no authority which would indicate or imply that the benefits of the policy are “real or personal property.” Personal property must be capable of being transferred. . .

The claim for the benefits of an insurance policy is not property, but rather a personal injury claim; and personal injury claims cannot be transferred. As such, a claim for benefits cannot be considered property for the purposes of the **financial elder abuse** statute.

Absent any authority stating that a claim for benefits of an insurance policy are property, Plaintiff has failed to identify any real or personal property that was taken or retained by Defendant.

Id. at p. 2 (citations omitted).

Here, plaintiff contends that Allstate should have paid her more money for her insurance claim. But she does not and cannot allege that Allstate wrongfully took and/or retained any property from her. So while plaintiff might be able to state claims for breach of contract and breach of the implied covenant, she cannot state a claim for **elder abuse**. Therefore, the Court should dismiss the fourth cause of action.

III. Plaintiff cannot state a claim for violation of the CLRA

The fifth cause of action purports to be brought under the Civil Code for unfair or deceptive acts against senior citizens. Although the complaint does not say so explicitly, this cause of action appears to be one for violation of the Consumer Legal Remedies Act, [Civil Code Section 1750 et. seq.](#) (the “CLRA”), which prohibits unfair advertising and other misleading sales practices. The CLRA, however, does not apply to insurance. Therefore, the fifth cause of action is legally defective.

The only statute actually mentioned in the fifth cause of action is [Civil Code Section 3345](#). But [Section 3345](#) does not create a separate cause of action. It merely permits a trier of fact to triple certain statutory fines and civil penalties in cases involving senior citizens and disabled persons, as defined under the CLRA. [Section 3345\(a\)](#) provides:

- (a) This section shall apply only in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons, as those terms are defined in subdivisions (f) and (g) of Section 1761 [part of the CLRA], to redress unfair or deceptive acts or practices or unfair methods of competition.

[Section 3345](#) then goes on to discuss the factors that the trier of fact may consider in deciding whether to triple the statutory fines and penalties.

Similarly, the CLRA cross-references [Section 3345](#). In Section 1780, it states:

Any consumer who is a senior citizen or a disabled person, as defined in subdivisions (f) and (g) of Section 1761, as part of an action under subdivision (a), may seek and be awarded, in addition to the remedies specified therein, up to five thousand dollars (\$5,000) where the trier of fact does all of the following:

- (A) Finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

(B) Makes an affirmative finding in regard to one or more of the factors set forth in [subdivision \(b\) of Section 3345](#).

(C) Finds that an additional award is appropriate.

[Civil Code § 1780\(b\)\(1\)](#) (emphasis added).

Thus, [Section 3345](#) does not itself provide a cause of action; it simply addresses the remedies available to senior citizens. So to the extent the fifth cause of action purports to be an independent claim, it is really one for violation of the CLRA.

The CLRA, however, does not apply to insurance. *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 61 (2009). In *Fairbanks*, the California Supreme Court explained that, by its terms, the CLRA applies only to transactions involving “goods or services,” and that insurance is neither a “good” nor “service” within the meaning of the CLRA. *Id.* The Court also reviewed the Legislative history of the statute and concluded that the history confirmed that the CLRA was not meant to apply to claims pertaining to insurance.

Fairbanks confirmed what the Supreme Court stated 30 years earlier, not long after the CLRA was enacted. *Civil Service Employees Ins. Co. v. Superior Court*, 22 Cal. 3d 362 (1978) (noting that an annuity, which is a type of insurance, is neither a “good” nor “service” within the meaning of the CLRA). Federal courts that have considered the issue have also rejected attempts to sue insurance companies under the CLRA. See e.g. *Estate of Migliaccio v. Midland Nat'l. Life Ins.*, 436 F. Supp. 2d 1095, 1108 (C.D. Cal. 2006); *Moroney v. American Intern. Group (In re Bacon)*, 415 F. Supp. 2d 1027, 1035-36 (N.D. Cal. 2006).

It's no wonder, then, why the fifth cause of action does not expressly refer to the CLRA. But plaintiff cannot disguise that cause of action and avoid *Fairbanks* by referring only to [Section 3345](#) and not to the CLRA. Because this claim is for violation of the CLRA, and because the CLRA does not apply to insurance, the Court should dismiss the fifth cause of action.

IV. [Section 3345](#) does not permit plaintiff to seek treble compensatory damages

Because plaintiff cannot state a claim for violation of the CLRA, she may contend - as a fallback position - that the fifth cause of action really isn't a separate claim, and that she is just using [Section 3345](#) to triple the damages available under other claims. Such a claim fails as well.

[Section 3345](#) provides for the trebling of fines and penalties. It is not a catchall provision that allows for the wholesale trebling of ordinary compensatory damages for any tort claim. [Section 3345](#) states:

(b) Whenever a trier of fact is **authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter**, and the amount of the fine, penalty, or other remedy is subject to the trier of fact's discretion, the trier of fact shall consider all of the following factors, in addition to other appropriate factors, in determining the amount of fine, civil penalty or other penalty, or other remedy to impose. Whenever the trier of fact makes an affirmative finding in regard to one or more of the following factors, **it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute**, or, where the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding. ..

Thus, the Ninth Circuit has expressly held that [Section 3345](#) applies only to fines and penalties authorized by statute to punish or deter; it does not apply to general claims for compensatory damages. *Sanchez v. Monumental Life Ins. Co.*, 102 F. 3d 398, 405

(9th Cir. 1996) (“On its face, therefore, this statute allows for the trebling, in certain cases involving senior citizens and disabled individuals, of fines or penalties which are otherwise ‘authorized by a statute.’ Monumental’s argument that this provision would allow Sanchez to treble the otherwise available contract damages is erroneous.”). See also *Clark v. Superior Court*, 50 Cal. 4th 605, 609 (2010) (“Civil Code section 3345 authorizes the trebling of a remedy only when it is in the nature of a penalty”; therefore, claims for restitution are not subject to Section 3345’s trebling provision.).

Here, then, plaintiff cannot use Section 3345 to triple her claims for compensatory damages under other causes of action such as breach of contract or bad faith. Therefore, the request for treble damages should be dismissed.

V. Conclusion

The Court should dismiss the fourth and fifth causes of action and the claim for treble damages.

DATED: March 18, 2013

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