

2012 WL 7151684 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)  
United States District Court, C.D. California.

Frederick MEISEL, Plaintiff,

v.

BANKERS LIFE & CASUALTY COMPANY; and Does 1 through 40, Inclusive, Defendants.

No. 2:12-cv-03719 MWF(MANx).  
November 19, 2012.

**Defendant Bankers Life and Casualty Company's Reply in Support of Motion for Partial Summary Judgment**

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Hon. [Michael W. Fitzgerald](#).

**Hearing Date: December 3, 2012**

**Time: 10:00 a.m.**

**Courtroom: 1600**

**Action Filed: March 27, 2012**

**Trial Date: January 8, 2013**

Comes now Defendant Bankers Life & Casualty Company (“Bankers Life”) and for its Reply in further Support of its Motion for Partial Summary Judgment, hereby submits the following additional Memorandum of Points and Authorities for the court's consideration:

***SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES***

Bankers Life seeks summary judgment in its favor on Plaintiff's claim under the [California Welfare and Institutions Code § 15610.30](#) *et seq.*, otherwise known as **Financial Elder Abuse**.

Plaintiff in his responsive brief urges reliance on the plain language of the statute. However, he ignores the definition of “mental suffering” required to sustain his claim. While it is not surprising that Plaintiff would be irritated or distressed that his claim for benefits had been denied -- as would anyone who believes he is entitled to benefits that have been denied -- Plaintiff has failed to show evidence of the harm required to assert a claim under the **Financial Elder Abuse** statute. Section 15610.53 of the statute defines the requisite “mental suffering” as follows:

“Mental suffering” means fear, agitation, confusion, **severe depression**, or other forms of **serious** emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe **depression** or serious emotional distress of the **elder** or dependent adult.

(Emphasis added.) In this case, there is absolutely no evidence that the disappointment or irritation that the Plaintiff experienced when his claim was denied rose to the level of “severe” emotional distress. He does not claim, nor can he be heard to complain, that he suffered from fear, agitation, confusion, severe **depression** or other forms of **serious** emotional distress at the hands of Bankers Life. In his Amended Complaint, Plaintiff contends he has suffered emotional distress [Am. Complaint ¶¶ 51, 56], and that he is entitled to damages for mental and emotional distress [Am. Complaint Prayer for Relief, ¶ 1]. However, he does not assert he was severely depressed, or severely depressed, or fearful, agitated or confused.

Moreover, Plaintiff does not contend that any emotional distress he may have experienced when his claim for benefits was denied was the result of intimidating behavior, threats, harassment, or by deceptive acts, false or misleading statements **made with malicious intent** to agitate, confuse, frighten or cause severe **depression**. This court has recently dismissed a claim for **Financial Elder Abuse** where Plaintiff failed to plead the necessary element of mental suffering required by the statute. *Siemonsma v. Mutual Diversified Employees Fed. Credit Union*, 2011 U.S. Dist. LEXIS 44032 (C.D. Cal. 2011). Because the Plaintiff has failed to plead that he was suffered the level of mental distress contemplated by the **Financial Elder Abuse** statute, his claim must fail.

There is no evidence Plaintiff was intimidated, threatened, harassed, or deceived. He has not contended, nor is there a shred of evidence, that the Bankers Life employees with whom Mr. Meisel and his representatives communicated were anything other than professional, respectful and polite. There is no evidence that, at any time during the course of the claim investigation, the denial of the claim, the appeal process or the appeal denial, Bankers Life employees deliberately deceived the Plaintiff, made any statements or otherwise communicated with Plaintiff in any format whatsoever with the intent to upset, agitate, confuse, frighten or cause him severe **depression** or serious emotional distress. “If the moving party discharges its burden by showing an absence of evidence to support an essential element of a claim ..., is it not required to produce evidence showing the absence of a material fact on such issues, or to support its motion with evidence negating the non-moving party's claim.” *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000), as cited in *Kennedy v. Jackson National Life Ins. Co.*, 2010 U.S. Dist. LEXIS 111653 (N.D. Cal. 2010) (further citations omitted).

With no such evidence to support this element of **Financial Elder Abuse**, Plaintiff's claim under this statute must fail.

Plaintiff asserts in his responsive brief that Bankers Life should not be allowed to look for the elements of the statute in order to defend the claim of **Financial Elder Abuse**. And yet, Plaintiff attempts to expand the parameters of **Financial Elder Abuse**, despite the absence of evidence to support the requisite elements of the statute. Looking at the first type of **financial abuse**, there is no evidence that Bankers Life took, secreted, appropriated, obtained or retained Plaintiff's property for a wrongful use or with intent to defraud him. [§ 15610.30(a)(1)] Rather, the Plaintiff's claim was denied because Bankers Life determined that he had not provided proof that he was chronically ill, which is required to trigger policy benefits. [§ 15610.30(a)(2)] The parties to this litigation obviously dispute whether the denial of Plaintiff's claim was proper. However, the disputed decision to deny the Plaintiff's insurance claim in this case falls far short of the elements, or the intent, of the **Financial Elder Abuse** statute.

Plaintiff does not contend that Bankers Life assisted another entity in **financial abuse**, such that the second type of **abuse** contemplated by the statute is not relevant to this matter. Turning to the third type of “**financial abuse**” of an **elder**, there is no contention that Bankers Life took, secreted, appropriated, obtained or retained Plaintiff's property by undue influence. Mr. Meisel purchased his long-term care policy in 2002, and Plaintiff does not contend that this is a case of fraud or improper influence at the time he purchased the subject policy, or indeed during the handling of his claim in 2011.

For all these reasons, and as more fully set forth in Defendant's Motion for Partial Summary Judgment and the evidentiary materials that accompany its Motion, Defendant hereby respectfully asserts it is entitled to judgment in its favor as a matter of law on Plaintiff's claim for **Financial Elder Abuse**, and for all other just and proper relief.

DATED: November 19, 2012

S.K. HUFFER & ASSOCIATES, P.C.

By: /s/Andrea R. Simmons

Andrea R. Simmons

Attorneys for Defendant

BANKERS LIFE AND CASUALTY

COMPANY

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