2010 WL 3761427 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.
Southern Division

Henry BROCKSCHMIDT and Linda Brockschmidt, individuals, Plaintiffs,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, a
corporation; and Does 1 through 30, inclusive, Defendants.

No. SACV 10-0030 JVS (ANx).
August 24, 2010.

Defendant Liberty Mutual Insurance Company's Memorandum of Points and Authorities in Support of Its Motion to Dismiss Plaintiffs' Third Cause of Action in First Amended Complaint

Stephen J. Erigero (SBN 121616), Wendy L.R. Miele (SBN 165551), Ropers, Majeski, Kohn & Bentley, 515 South Flower Street, Suite 1100, Los Angeles, CA 90071-2213, Telephone: (213) 312-2000, Facsimile: (213)312-2001, Email: serigero@rmkb.com, Attorneys for Defendant, Liberty Mutual Fire Insurance Company.

Date: September 27, 2010

Time: 1:30 p.m.

Dept. 10C

[Trial: February 22, 2011]

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MEMORANDUM OF POINTS AND AUTHORITIES

I. *SUMMARY OF THE ARGUMENT*

On or about **June 21, 2010,** Plaintiffs filed a First Amended Complaint ("FAC") to add a third cause of action against Liberty Mutual for financial **abuse** of an **elder** under California Welfare & Institutions Code, § 15600, *et seq*. This claim against Liberty Mutual is based on a theory of recovery that is not applicable to a dispute involving recovery of insurance contract benefits as a matter of law. Therefore, this court should dismiss the third cause of action.

Plaintiffs allege that the statute makes those responsible for the "care and custody" of **elder** adults liable for their financial damages arising from "**abuse**, abduction, neglect or abandonment." (FAC, ¶33.) Although no California case so holds, plaintiffs assert that they had a "fiduciary relationship" with Liberty Mutual as a result of a homeowners' insurance policy that they purchased. (FAC, ¶34.) Plaintiffs then contend that Liberty Mutual's refusal to pay certain insurance benefits allegedly promised under the homeowners' policy comes within the definition of "financial **abuse**" as defined in Section 15610.30 of the statute. (FAC ¶35.)

Plaintiffs' third cause of action fails for several reasons. First, the intent of that portion of the statute on which plaintiffs rely is designed to protect **elders** against financial **abuse** by those in a position of trust that have the ability to manipulate and control senior citizens' finances. Financial advisers and estate planners, for example, assume fiduciary duties by virtue of their positions and in such instances they have heightened duties in the handling of an **elder's** finances.

Under California law, however, the insurer-insured relationship is not a fiduciary relationship, as a matter of law. An insurer owes no fiduciary duty to an insured as a result of their insurer-insured relationship. Here, Liberty Mutual and plaintiffs had the typical insurer-insured relationship, which is governed by the language in the insurance policy and by California's Insurance Code. Therefore, plaintiffs' third cause of action against Liberty Mutual is improper as a matter of law, and this motion to dismiss must be granted.

II. *FACTUAL BACKGROUND*

On **December 11, 2009,** plaintiffs filed the captioned "bad faith" lawsuit against Liberty Mutual for allegedly failing to receive full policy benefits for alleged damage to their home caused by two separate water incidents on **December 27** and **30, 2008,** respectively. The hose drain for the water softener became disconnected from the drainpipe, which allegedly caused resultant damage. (FAC ¶ 7.)

> This sinking caused two old minor cracks in the ceiling in dining room to become much larger; a crack in dinette doorway to become much larger; various new cracks to forms; and part of the house to sink since the supports were compromised due to the water lowering house by approximately one inch. (FAC at 4:16-21.)

On **January 2, 2009,** a Liberty Mutual Property Loss Specialist inspected the home and estimated repair of the damages (replace vinyl flooring, buckling in floor boards, molding) to be **$4,039.99. On December 30, 2008,** ServPro, a restoration contractor, retained by Liberty Mutual, commenced the job at plaintiffs' home and completed work on **January 13, 2009.**

On January 20, 2009, plaintiffs hired a general contractor to inspect their home. It was his opinion that the foundation of plaintiffs' home was compromised by water leaking down through the floor. Bonham has no expertise as a soils or structural engineer.

In response to plaintiffs' concerns, on **February 6, 2009,** Liberty Mutual retained John Doyle, a registered professional engineer, to investigate. Doyle concluded that the unlevel floor condition and cracking in the walls and ceilings in plaintiffs' home **pre-existed** the water softener leakage. In Doyle's opinion, a relatively small volume of water leakage occurred. It may have soaked the surface of the ground, but was insufficient to soak the soils below the interior piers and cause any swelling and upward heave of the piers.

Based on Doyle's report, Liberty Mutual denied plaintiffs' claim to repair the foundation believing it to be **pre-existing damage,** which the Liberty Mutual policy did not cover.

III. *LEGAL STANDARD FOR 12(B)(6) MOTIONS*

A motion to dismiss tests the legal sufficiency of the pleading. (F.R. Civ. P. 12(b)(6).) Under Rule 12(b)(6), a claim may be dismissed either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support an otherwise cognizable legal claim. (*SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996.))

A motion to dismiss should be granted if it appears that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. (*Conlev v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996.)) A court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. (*Pareto v. F.D.I.C*, 139 F.3d 696, 699 (9th Cir. 1998.) A court need not accept as true unreasonable inferences or conclusory allegations cast in the form of factual allegations. (*Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001.))

IV. *RULES FOR INTERPRETING A STATUTE*

"The fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*O'Kane v. Irvine*, 47 *Cal.App.4th* 207, 211 (1996.)) "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.*, 2 Cal.4th 593, 601 (1992).) "Where the statutory wording is clear a court "should not add to or alter [it] to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*O'Kane, supra*, 47 Cal.App.4th at p. 211.)) Furthermore, statutory language must be viewed in context, "keeping in mind the nature and obvious purpose of the statute where they appear." (*Mover*

v. Workmen's Comp. Appeals Bd., 10 Cal.3d 222, 230 (1973).) If statutory terms are unclear or ambiguous, we may consider various extrinsic aids to help us ascertain the Legislature's intent, including legislative history and "the ostensible objects to be achieved." (*Day v. City of Fontana*, 25 Cal.4th 268, 272 (2001).) In such circumstances.
we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. (Id.)

V. *"FINANCIAL ABUSE" OF ELDER STATUTE: LEGISLATURE DID NOT INTEND TO PROTECT INSURANCE POLITY BENEFITS*

A. *The Language Of The Financial Abuse Statute*

Plaintiffs third cause of action is improper because it does not allege a claim under California's **Elder Abuse** Act for financial **abuse**. The California Legislature enacted the **Elder Abuse** Act "to protect **elders** by providing enhanced remedies which encourage private, civil enforcement of laws against **elder abuse** and neglect." (*Negrete v. Fid. & Guar. Life Ins. Co.*, 444 F. Supp.2d 998, 1001 (CD. Cal. 2006.))

Financial **elder abuse** is defined in **§15610.30(a),** which provides:
"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.

§15610.30(b) provides:

> 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.

§15610.30(c) provides:

> For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent adult is deprived of any property right, including by means of an agreement donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult.

A "representative" is defined in **§15610.30(d),** which provides:
For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an **elder** or dependent adult.

(2) An attorney-in-fact of an **elder** or dependent adult who acts within the authority of the power of attorney.

We note that this amended version of the statute became effective January 1, 2009. It was effective at the time of Liberty Mutual's denial of coverage for plaintiffs' claim for the foundation repair, and therefore, applicable here.

B. ***The Legislative Intent And Purpose Of The Statute***

The issue is whether the California legislature intended to protect **elders** against coverage disputes involving their insurance policy benefits. Here, plaintiffs allege that Liberty Mutual's refusal to pay a claim amounts to financial **abuse** under the statute. The ordinary meaning of the statute suggests generally that a wrongful taking occurs where an entity, by means of an agreement, retains an **elder's** personal property held directly or by a representative. "Representative" is defined, in effect, as one acting in the capacity of a fiduciary. (§15610.30(d).)

Here, plaintiffs had a homeowners policy, much like car insurance, that plaintiffs elected to renew annually with Liberty Mutual. Under the insurance contract, which plaintiffs attached to their complaint, plaintiffs agreed to pay Liberty Mutual a policy premium in exchange for certain coverages, knowing that the policy was subject to detailed policy terms, exclusions and conditions. Based on the language of this statute, plaintiffs do not and cannot allege that plaintiffs were deprived of a personal property right in insurance policy benefits because the California Legislature never *intended* the **Elder Abuse** Act to cover contingent insurance policy benefits, particularly absent a fiduciary relationship.

"The legislative intent underlying the **Elder Abuse** Act was to create an expansive class of individuals obligated to report **elder abuse** to the proper authorities." (*Bernard v. Foley*, 39 Cal. 4th 794, 813 (2006.)) (See also, Welf. & Inst. Code, §15600.)

> The purpose of the **Elder Abuse** and Dependent Adult Civil Protection Act, *Cal. Welf. & Inst Code $ 15600 et seq.*, is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of **abuse** and custodial neglect. To this end, the legislature added to the Act heightened civil remedies for egregious **elder abuse**, seeking thereby to enable interested persons to engage attorneys to take up the cause of **abused elderly** persons and dependent adults. (*Covenant Care, Inc. v. Superior Court*, 32 Cal. 4th 771, 787 (2004.)

"Generally, the Legislature has proceeded carefully and diligently in its effort to curb the worst practices against our **elders**." (Balisok, **Elder Abuse** Litigation (The Rutter Group 2008) 1:22, p. 1-3.)

We point out that the 2008 amendment to §15610.30(b) deleted the words "bad faith" from the definition, and no longer required that a taking of property be in "bad faith." This substantive change impliedly removed the connection with dishonest or unreasonable conduct that the term typically has been used in relation to insurers. [1] The Insurance Code, therefore, is the source for rules governing insurance and the alleged unreasonable withholding of insurance policy benefits and not the **Elder Abuse** Act.

VI. ***LIBERTY MUTUAL DOES NOT HAVE A FIDUCIARY RELATIONSHIP WITH PLAIN TIFFS AS A MATTER OF LAW***

A. ***Insurer-Insured Relationship Is Not A Fiduciary Relationship***

Section 15610.30(c)(1) of the statute also requires that the **elder** be deprived of a property right, which is either "**held directly or by a representative of an elder or dependent adult."** The **elder's** "representative" is defined to mean, in effect, anyone

that acts in a fiduciary capacity. (§15610.30(d).) Here, plaintiffs do not allege that the policy benefits were ever held by them directly. Rather, they allege that they paid Liberty Mutual premiums for homeowners' insurance coverage for 62 years and "were deprived of the insurance benefits promised under the policy ..." (FAC, ¶35.) In fact, they could have elected to cancel their insurance policy at any time. Furthermore, Liberty Mutual was never plaintiffs' "representative" as defined by the statute, despite plaintiffs allegations that Liberty Mutual "had a fiduciary relationship with plaintiffs." (FAC, ¶34.)

Under California law, courts have held that an insurance company does not act in a fiduciary capacity to its insured. "The insurer-insured relationship is not a true 'fiduciary relationship' in the same sense as the relationship between trustee and beneficiary." (*Negrete v. Fidelity & Guar. Life Ins. Co.*, 444 F. Supp.2d 998, 1003 (CD. 2006.)

> It is, rather, a relationship often characterized by unequal bargaining power in which the insured must depend on the good faith and performance of the insurer. This characteristic has led the courts to impose special and heightened duties, but while these special duties are akin to, and often resemble, duties which are also owed by fiduciaries, the fiduciary-like duties arise because of the unique nature of the insurance contract, not because the insurer ***is*** a fiduciary. (*Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal. 4th 1142, 1150-51 (2001) (emphasis in original.)

(See also, *Solomon v. North American Life & as. Ins. Co.*, 151 F.3d 1132, 1138 (9th Cir. 1998) [insurer owed no fiduciary duty to an insured as a result of their insurer-insured relationship]; (*Kanne v. Connecticut General Life Ins. Co.*, 607 F. Supp. 899 (CD. Cal. 1985), *rev. on other grounds*, 859 F.2d 96 (9th Cir. 1988) ["California law does not recognize an action for breach of fiduciary duty between an insured an insurer."]

Liberty Mutual sold plaintiffs a homeowners insurance policy. They had a typical insurer-insured relationship, and therefore, under California law, no fiduciary relationship exists between Liberty Mutual and plaintiffs. Therefore, plaintiffs' allegation that they had a fiduciary relationship with Liberty Mutual is improper. Further, plaintiffs, cannot allege a cause of action for financial **abuse** under the **Elder** **Abuse** Act absent a fiduciary relationship. None existed, and therefore, Liberty Mutual's motion to dismiss plaintiffs' third cause of action must be granted.

B. *Insurer Owes A Fiduciary Duty Only Where Insurer Exceeds Role As A Typical Insurer*

The only time that an insurer has been held to owe a fiduciary duty is when it acts more than an insurer. (*Twomey v. Mitchell, Jones & Templeton, Inc.*, 262 Cal.App2d 690, 708 (1968) [found that a broker providing investment advice owed a fiduciary duty to advisee.] In *Negrete, supra*, 444 F. Supp. 2d at p. 1004, the court denied Fidelity & Guarantee Life Insurance Company's ("F&G") motion to dismiss concluding that the relationship alleged in plaintiff's complaint was not simply that of an insurer-insured, but rather one that entailed a fiduciary duty. The court specifically referenced the following paragraph in plaintiff's complaint:

> By virtue of their purported positions as financial advisors, estate planning specialists, and because of their superior knowledge and ability to manipulate and control senior citizens' finances and legal status, the [managing general agents] and the [national marketing organizations], owned, operated and/or controlled by defendant who marketed and sold F&G annuities to senior citizens assumed fiduciary duties owed to Mr. Ow and the Class. (*Id*.)

In *Negrete*, plaintiff conservator brought a class action suit on behalf of the class representative against defendant F&G alleging multiple claims in connection with the sale of annuities to older persons. The company moved to dismiss the claims of **elder** **abuse** in violation of California's **Elder** **Abuse** Act and breach of fiduciary duty. The conservator alleged that F&G defrauded the class representative into purchasing a deferred annuity that matured after his actuarial life expectancy. The class action sought to halt and remedy the harm caused by the F&G's fraudulent and unlawful sales practices in connection with deferred

annuity products to senior citizens where the date that distribution payments from the annuity was beyond the actuarial life expectancy.

The court stated that the conservator stated a claim for **elder abuse** because it was alleged that the company fraudulently acquired millions of dollars by engaging in a "churning" scheme, specifically, using deceptive practices to deplete the accumulated cash value from an existing life insurance policy or annuity. The conservator's allegations were also found sufficient to state a claim for common law breach of fiduciary duty against F&G in that the relationship alleged was not simply that of an insurer-insured, but rather one which could entail a fiduciary duty.

Similarly, in *Zimmer v. Nawabi*, 566 F. Supp.2d 1025 (E.D. CA 2008), the court granted an **elderly** borrower's motion for summary judgment on her breach of fiduciary duty claim and **Elderly Abuse** Act claim against a mortgage broker that received fees wrongfully obtained as a result of the employees' false statements. The court stated that under California law a mortgage loan broker acts in a fiduciary capacity. This duty obligates brokers to make a full and accurate disclosure of the terms of a loan to borrowers and to act always in the utmost good faith toward their principals. A mortgage broker breaches this duty if he or she provides materially misleading an incomplete information regarding the terms of a loan, even if the correct terms are in the loan documents and the borrower does not read the written documents. (*Id.* at p. 1032.)

As plaintiff's broker, the court determined that Golden State Financing Corporation and its employees owed these fiduciary duties to the 79 year-old plaintiff. Based on plaintiffs' age and Nawabi's misrepresentations that the terms of her home refinance loan would be different than the actual terms of the loan, the held that the broker was liable under the financial **abuse** subsection of the **Elder Abuse** Act.

By contrast, the northern district court granted defendant Conseco Life Insurance Company's motion to dismiss plaintiffs' breach of fiduciary duty cause of action in its first amended complaint finding that plaintiffs failed to allege facts supporting their contention that the defendant insurers assumed duties **exceeding** the typical insurer-insured relationship. The court pointed out that plaintiffs alleged that the life insurance policies at issue were "investment vehicles" and that the policyholders could elect to stop making payments or to take loans out against the value of the policy. "These allegations do not establish that, like the insurers in *Negrete*, defendants acted as financial advisors and estate planning specialists." (*Brady v. Conseco, Inc. and Conseco Life Ins. Co.*, 2009 U.S. Dist. LEXIS 65516 (N.D. Cal., Dec. 29, 2009.)

Liberty Mutual sold homeowners insurance to plaintiffs. Plaintiffs allege that plaintiffs "entrusted Liberty Mutual with their homeowner insurance coverage needs for over 62 years." (FAC, ¶34.) It is not alleged, and plaintiffs cannot allege that Liberty Mutual acted as a financial planner of plaintiffs' estate or provided financial advice to them. Liberty Mutual provided plaintiffs with homeowners' insurance that was subject to the terms, conditions and exclusions of the policy. Liberty Mutual and plaintiffs had a typical insurer-insured relationship, and plaintiffs have not and cannot allege that such a relationship was exceeded. Therefore, plaintiffs' allegation that there was a fiduciary relationship between them is improper as a matter of law. Furthermore, because there was no fiduciary relationship, plaintiffs cannot satisfy the requirements of the financial **abuse** portion of the **Elder Abuse** Act. Therefore, Liberty Mutual's motion to dismiss must be granted.

VII. *CONCLUSION*

Liberty Mutual respectfully requests the court grant its motion to dismiss plaintiffs' third cause of action under the **Elder Abuse** Act because plaintiffs assert a theory of recovery that is improper as a matter of law. Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief under the statute. Additionally, Liberty Mutual requests that the court strike all of the damages as well as attorneys' fees and costs that plaintiffs seek to recover under the third cause of action.

Dated: August 24, 2010

Respectfully Submitted,

ROPERS, MAJESKI, KOHN & BENTLEY

By: */s/ STEPHEN J. ERIGERO*

STEPHEN J. ERIGERO

WENDY MIELE

Attorneys for Defendant

LIBERTY MUTUAL FIRE INSURANCE

COMPANY

Footnotes

1 **2008 Amendment:** Amended (b) by substituting "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" for "appropriates or retains possession of property in bad faith."

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