



EXPERT ADVICE

COMBATING FINANCIAL ABUSE OF ELDERS

By Steven Riess

Notwithstanding the record-breaking budget impasse, state lawmakers did something remarkable last year when they enacted **Senate Bill 1140**, a groundbreaking expansion of the rights of financially exploited elders. The new statute, written by Senate President Pro Tem Darrell Steinberg (D-Sacramento), took effect this January and amends the Welfare and Institutions Code.

Since 1991 the legal definition of *financial abuse* had required an elder to prove his or her property was taken for a wrongful use or with the intent to defraud. In many instances, however, a perpetrator does not exploit an elder through overt fraud, but rather by unduly influencing the elder's decisions. In such cases, proving the defendant had the requisite intent can be difficult. But SB 1140 revised the definition by adding undue influence as a basis for proving financial abuse. (See Cal. Welf. & Inst. Code § 15610.30(a)(3).)

Undue influence, as defined by Civil Code section 1575, involves taking unfair advantage of a person's weakness of mind or the confidence that person reposed in the perpetrator. Traditionally, undue influence simply negates contractual consent and entitles the victim to rescission. But rescission is a particularly inappropriate remedy for victims of elder financial abuse because it does not allow the plaintiff to recover damages or the full costs of litigation. A predator who is forced to rescind an agreement merely disgorges his ill-gotten gains and is otherwise undeterred from future predatory acts. Such defendants can often exhaust the resources of elderly litigants in order to obtain deeply discounted settlements. By including undue influence as a basis for financial abuse, California now authorizes the recovery of damages, attorneys fees, and costs and thereby provides victims with a potent tool for a faster recovery (Cal. Welf. & Inst. Code § 15657.5(a)).

A similar impediment had existed with regard to abusive sales to elders of diminished capacity. As with undue influence, lack of capacity negates contractual consent. Accordingly, the remedy for an unsuitable sale to an elder who lacks capacity was rescission. But SB 1140 changed this by requiring a perpetrator to return, upon demand, property taken from an elder who lacks capacity. Failing to do so subjects the perpetrator to remedies that reach beyond rescission: damages, attorneys fees, and costs (Cal. Welf. & Inst. Code § 15657.6).

Perhaps most significantly, SB 1140 changed the statutory definition of *wrongful use*. The term was always problematic, as the law defined it ambiguously as the bad faith failure to return an elder's property. This definition was particularly troublesome in a commercial context in which the elder voluntarily delivered possession of money or property. SB 1140 redefined *wrongful use* in remarkably expansive terms: It now means the taking of an elder's property whereby the perpetrator knew or should have known that doing so would likely be harmful to the elder (Cal. Welf. & Inst. Code § 15610.30 (b)). This new definition fundamentally changes the obligations of those who engage in property transactions with elders. No longer will the only limitation on aggressive sales be a prohibition against material misrepresentations—the concept of "let the elder beware" goes out the window. Rather, a seller may be liable for damages if the seller knows or should know that the sale is likely to harm the elder. This new duty owed to elders is consistent with the Legislature's previous characterization of elders as a disadvantaged class entitled to special protection. Because all transactions involve some degree of risk, in the years ahead the courts will undoubtedly provide guidance as to when and under what circumstances a seller has gone too far and should reasonably have known that the net effect of a transaction on an elder would be harmful.

SB 1140 made other significant changes to the law on financial abuse. The bill expressly recognizes that a victim may recover compensatory as well as punitive damages; holds an employer vicariously liable for financial-abuse damages resulting from the wrongful conduct of an employee committed in the course and scope of employment; and provides a four-year statute of limitations that commences when the plaintiff discovers, or should discover, the facts constituting the financial abuse (Cal. Welf. & Inst. Code §§ 15657.5 and 15657.7).

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SB 1140 is an important milestone in the development of the rights of elders and should significantly help victims recover from the effects of economic exploitation. Hopefully, the new law will prove to be an effective deterrent to those who prey upon elders. However, its full impact remains to be seen.

Steven Riess is a San Francisco attorney who participated in the drafting of SB 1140. He specializes in elder financial-abuse litigation.



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