

Timing Is Everything: What Is The Period Of Limitations For Elder Financial Abuse Actions?

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Question Presented: What is the statute of limitations for elder financial abuse actions?

Brief Answer: EADACPA does not specify a period of limitations for elder financial abuse actions. However, since an action for elder financial abuse is an action upon a statute, either the one year period of CCP § 340(a) or the three year period of CCP § 338(a) applies. The one year statute applies to actions which seek civil penalties while the three year statute applies to actions which seek remedies other than civil penalties. Punitive damages may sometimes be recovered in elder financial abuse actions. While punitive damages and civil penalties share similar characteristics, they are distinct legal concepts. Furthermore, even where it is clear that an action seeks civil penalties, the one year statute of limitations does not apply where the award of such penalties is discretionary rather than mandatory. Because punitive damages are distinct from civil penalties and because they are always discretionary, the three year statute of limitations should apply. However, no appellate decision has yet resolved which period of limitations applies.

1. An action for elder financial abuse is an action upon a statute, and therefore either the one year period of CCP § 340(a) or the three year period of CCP § 338(a) applies.

It is not uncommon for victims of elder financial abuse to conceal their victimization from family and friends. Often they are intimidated by their vulnerability, embarrassed by their loss, and fear that the victimization will be viewed as evidence of their inability to properly care for themselves. Accordingly, there is often substantial delay before others learn of the loss and before an attorney may be retained. Thus, it is not uncommon for the period of limitations to be of concern in elder financial abuse cases.

Periods of limitation reflect legislative policies regarding an individual's privilege to litigate.² Their primary purpose is to prevent the assertion of stale claims by plaintiffs who have failed to file their actions until evidence is no longer fresh and witnesses are no longer available so that it becomes difficult or impossible to defend against.³ Thus, at some point, the defendant's right to be free of a stale claim outweighs the plaintiff's right to a remedy. That point, of course, is a matter of public policy and is established by the Legislature through the specific periods of limitations.

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² *O'Neill v. Tichy* (1993) 19 Cal. App. 4th 114, 120.

³ *Addison v. State of California* (1978) 21 Cal.3d 313, 317.

Some statutory schemes which confer the right to seek civil damages specify applicable periods of limitations within the statutes creating the right.⁴ For other causes of action, the applicable period of limitations must be found among the more categorical listing of limitations found in the Code of Civil Procedure.⁵ Within these more general statutes, the periods of limitation are defined principally by the nature of the claimed right. For example, an action for assault, battery, or injury to an individual caused by the wrongful act or neglect of another must be commenced within two years;⁶ an action upon an oral contract must be commenced within two years.⁷ The Code of Civil Procedure also provides a four year period of limitations for causes of action not otherwise addressed.⁸ Two additional sections provide periods of limitation which are not based upon the nature of the right claimed, but rather upon the nature of the remedy sought. Section 338 provides:

“Within three years:

(a) An action upon a liability created by statute, other than a penalty or forfeiture.”

And section 340 provides:

“Within one year:

(a) An action upon a statute for a penalty or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitations.”

Both sections 338 and 340 are applicable to actions “upon a statute.” A right, and its corresponding obligation, is created by statute if it is fixed by the statute itself or if it exists only because of the statute.⁹ However, a statute which merely codifies an existing common law right does not create a cause of “action upon a statute” for limitation purposes.¹⁰ Thus, the elder abuse statutes must create the right pursued for sections 338 or 340 to apply. While conduct giving rise to elder financial abuse claims often supports similar and more traditional claims for fraud, conversion, and the like, clearly the intent of the Legislature and the text of EADACPA create rights not previously recognized at common law. First and foremost, elder financial abuse pursuant to W & I § 15610.30 differs from fraud in that it does not require a showing that the victim justifiably relied on the wrongdoer’s misrepresentation. The ability to recover damages from a wrongdoer with some lower level of intent and culpability than specific intent would of course be an even more radical addition to victims’ rights. Also, attorney’s fees are available in elder financial abuse actions but not in traditional non-contract actions. That EADACPA

⁴ For example, an action pursuant to B & P § 17200 (Unfair Competition) specifies a four year period of limitations in B & P § 17208.

⁵ CCP §§ 335-349-3/4.

⁶ CCP § 335.1.

⁷ CCP § 339.

⁸ CCP § 343.

⁹ *Raymond v. Christian* (1937) 24 Cal.App.2d 92, 114.

¹⁰ *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 759.

creates new causes of action has been recognized in dictum in several recent decisions.¹¹ Accordingly, it seems likely that an action for elder financial abuse is an action upon a statute.

2. The one year period of limitations of CCP § 340(a) applies to actions which seek civil penalties while the three year period of limitations of CCP § 338(a) applies to actions which seek remedies other than civil penalties.

What distinguishes the application of the one year period of section 340 from the three year period of section 338 is the remedy sought. Presumably, the shorter period of limitations of section 338 reflects the public policy assessment that the risk of a penalty being imposed both increases the stakes for a defendant while reducing the interest of a plaintiff. In other words, a penalty subjects a defendant to a greater more arbitrary risk of loss while a plaintiff's right to recover a penalty is less compelling than his right to recover compensatory damages; thus, a shorter period of limitations may be justified in balancing the defendant's right to be free of a stale claim with the plaintiff's right to a remedy.

EADACPA does not specify a particular period of limitations for financial abuse. Accordingly, whether such an action must be commenced within one year (CCP § 340(a)) or within three years (CCP § 338(a)) depends upon whether elder financial abuse is characterized as an action "for a penalty or forfeiture."

3. None of the remedies available under EADACPA for elder financial abuse constitute a forfeiture.

A forfeiture is generally regarded as the loss of a person's property or legal rights as a result of some error, fault, offense, or crime and is in the nature of a confiscation.¹² Forfeitures are directed to claims of a penal nature.¹³ Thus, a forfeiture is the divestiture of property without compensation or the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.¹⁴ The remedies available for a victim of elder financial abuse, and accordingly the corresponding loss to which a defendant might be subject, include the payment of compensatory damages, attorney's fees, costs, and punitive damages. None of these involves the penal confiscation of a defendant's property or rights. Accordingly, an action for elder financial abuse is not an action upon a statute for a forfeiture.

¹¹ *Delaney v. Baker* (1999) 20 Cal.4th 23, 31; *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82. While these cases contain language suggesting that elder abuse under EADACPA creates new and independent causes of action, neither involved claims of financial abuse.

¹² *Black's Law Dictionary*; CC § 3275; see also *City of Los Angeles v. County of Los Angeles* (1989) 216 Cal.App.3d 916, 923.

¹³ *Low v. Lan* (2002) 96 Cal.App.4th 1371, 1381.

¹⁴ *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353.

4. Civil penalties are damages prescribed directly by the Legislature for conduct which is in the nature of a public wrong. Even where civil penalties are clearly sought, the one year statute of limitations does not apply where the award of such penalties is discretionary rather than mandatory.

Some statutory schemes provide for the imposition of civil penalties for conduct which is in the nature of a public wrong. Thus, civil penalties lie somewhere between criminal punishment and civil compensation.¹⁵ A civil penalty is typically characterized by a recovery from the wrongdoer without reference to the actual injury to the plaintiff and is imposed to punish and deter the conduct.¹⁶ For example, in *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, potential class actions were filed against real estate lenders who failed to clear title after borrowers had repaid loans pursuant to Civil Code § 2941, which provides for the award of \$300 for each such loan. The actions were filed more than one year but less than three years after the loans were repaid. In holding that the one year period of limitations applied, the Fourth District recognized that the statutory purpose of the \$300 sum is to encourage prompt reconveyance by penalizing unwarranted delay with a civil penalty which is fixed without reference to the actual damages sustained. Other statutory schemes provide that the measure of a civil penalty is to be determined as a multiple of actual damages. For example, a plaintiff who pays a creditor interest on a loan at a usurious rate is entitled to recover treble the amount so paid.¹⁷ Still other statutes provide for remedies which combine features of a specified amount with a multiplier. For example, a wrongdoer who engages in discriminatory conduct contrary to the Unruh Civil Rights Act, is liable for actual damages, up to a maximum of three times the amount of actual damages, but in no case less than \$4,000.¹⁸

Not all situations in which a statute provides for the recovery of a civil penalty are governed by the one year statute of limitations of CCP § 340(a). In *Holland v. Nelson* (1970) 5 Cal.App.3d 308, a plaintiff sued a dance studio for charging amounts in violation of Civil Code § 1812.50 *et seq.*,¹⁹ which provides that, in addition to the recovery of actual damages, “[j]udgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney fees.”²⁰ The action was brought more than one year after its accrual. In holding that the one year period of limitations of CCP § 340(a) is inapplicable, the First District stated:

“It appears to us, however, that the provision [of the Dance Act] allowing to the court the option of granting judgment for treble damages, is not to be construed as converting the statutory right of action into one for penal damages. To adopt the contrary construction would either apply a shorter period of limitation than that established by Code of Civil Procedure section 338, subdivision 1, for actions on

¹⁵ 36 *Am. Jur.* 2d, Forfeitures and Penalties § 2.

¹⁶ *County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596.

¹⁷ CC § 1916.12-3(a).

¹⁸ Civil Code § 52(a).

¹⁹ The Dance Act, CC §§ 1812.50-1812.69.

²⁰ CC § 1812.94 re-enacted as CC § 1812.62(a).

other statutory liabilities or would put a plaintiff in the position of being unable to determine which statute of limitations applies to his cause until, after trial, the court determined in its discretion whether to allow treble damages.” (*Id.* at 312.)

In part, the court reached this conclusion based upon similar results under the Fair Labor Standards Act,²¹ under the Servicemen’s Readjustment Act of 1944,²² and under the Sherman Act.²³ Similarly, in *Mitchell v. Leslie* (1995) 39 Cal.App.4th Supp. 7, a court declined to apply the one year period of limitations in a tenant’s action seeking the recovery of excess rent paid and treble damages pursuant to a local ordinance. In doing so, the court observed:

“Appellants contend all claims brought pursuant to [the ordinance] are penal in nature because that section provides for recovery of treble damages in addition to actual damages, fees and costs. However, the cases upon which appellants rely, [*Menefee* and *G.H.I.I.*], are distinguishable. In both *Menefee* and *G.H.I.I.*, an award of treble damages was mandatory upon a finding that the statute sued upon was violated. In *Menefee* . . . the Court of Appeal indicated that if the statute upon which the claim is based does not grant the trial court discretion to award only actual damages, and requires an award of treble damages, the statute is subject to a one-year limitations period pursuant to Code of Civil Procedure section 340, subdivision (1). Here, since the trial court was not required to award treble damages upon a finding that appellants violated [the ordinance] and because restitution of excess rent is not a penalty, we conclude appellant’s claim for actual damages was subject to the three-year statute of limitations set forth in Code of Civil Procedure section 338, subdivision (a).” (*Id.* at 311-12.)

Similar reasoning was employed in *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 133, with the court observing:

“If the one-year limitations period applied to discretionary penalties, a plaintiff would be placed in the untenable position of being unable to determine the applicable statute of limitations until after trial, when the court determined whether to allow up to double damages [citing *Holland.*] The key question is whether the penalty is mandatory or discretionary”

It has similarly been observed that statutory schemes which may include civil penalties but which may be primarily characterized as remedial rather than penal are not governed by the one year period of limitations.²⁴

²¹ 29 U.S.C.A. § 216(b); see *Culver v. Bell & Loffland* (1945) 146 F.2d 29.

²² 38 U.S.C.A. § 1822; see *Farris v. San Diego Federal Sav. & Loan Assn.* (1956) 140 F.Supp. 703.

²³ 15 U.S.C.A. § 1; see *Burnham Chemical Co. v. Borax Consol., Ltd.* (1948) 170 F.2d 569.

²⁴ *Low v. Lan* (2002) 96 Cal.App.4th 1371, 1381, citing *Willcox v. Edwards* (1912) 162 Cal. 455, 463-64.

5. Punitive damages and civil penalties are distinct legal concepts and should not be equated, although both serve to motivate compliance with the law and punish wrongdoers. Because punitive damages are distinct from civil penalties and because they are always discretionary, the three year statute of limitations should apply.

Notwithstanding these decisions, it has also been often repeated that a penalty includes any law by which a defendant is compelled to pay a plaintiff amounts other than what is necessary to compensate the plaintiff for the legal damage caused by the defendant's conduct.²⁵ Punitive damages are non-compensatory since they are awarded not to make a victim whole, but to punish and deter culpable conduct which may be characterized as oppressive, fraudulent, or malicious. Thus, punitive damages are clearly not compensatory and share a similar purpose to civil penalties. While neither punitive damages nor civil penalties are imposed to compensate the victim, they nevertheless are distinct legal concepts and should not be equated, although both serve to motivate compliance with the law and punish wrongdoers.²⁶ Moreover, an award of punitive damages is always discretionary,²⁷ while civil penalties, as previously discussed, are sometimes mandatory and sometimes discretionary. Where mandatory, the civil penalty is set by the Legislature, and while the fact-finder must still determine whether any damages are to be awarded, if they are granted the amount is fixed by statute.²⁸ Thus, in an action for a mandatory civil penalty, if the plaintiff proves the right to recover, the court must impose the specified civil penalty.

6. The mandatory costs and attorney's fees provision of W & I § 15657.5(a) can not be characterized as a penalty because costs pursuant to CCP § 1032 are recoverable by a prevailing party as a matter of right in every action.

Where a plaintiff proves elder financial abuse by a preponderance of the evidence, the recovery of reasonable attorney's fees and costs is mandatory,²⁹ and such an award is not considered punitive.³⁰ When authorized by statute, attorney's fees are a component of costs.³¹ Specifically, CCP § 1033.5(c)(5) provides:

“When any statute of this state refers to the award of ‘costs and attorney’s fees,’ attorney’s fees are an item and component of the costs to be awarded and are allowable as costs”

A prevailing party is entitled as a matter of right to recover costs in any action,³² and the recovery of costs is entirely statutory.³³ Accordingly, if costs (including attorney's fees

²⁵ *People ex rel. Dept. of Conservation v. Triplett* (1996) 48 Cal.App.4th 233, 252; *G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 277; *Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243.

²⁶ *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597.

²⁷ *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 387-388.

²⁸ *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597.

²⁹ W & I § 15657.5(a).

³⁰ *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1064.

³¹ CCP § 1033.5(a)(10)(B).

³² CCP § 1032(b).

³³ *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 597.

where authorized by statute) were characterized as a penalty, the one year period of limitations would necessarily apply to every action based upon a statute. Not only would this create an absurd result, it would render meaningless the three year limitations period of CCP § 338(a). Therefore, the recovery of attorney's fees pursuant to W & I § 15657.5 can not be characterized as a penalty.

7. No published appellate decision has resolved which period of limitations applies to elder financial abuse. However, sound authority supports a determination that the three year period of limitations of CCP § 338(a) controls.

There are no reported decisions resolving whether the one year or the three year period of limitations applies to elder financial abuse actions. However, in a recent unpublished decision³⁴ arising in the First District, the trial court applied the one year statute and thereupon granted the defendant summary judgment. While the Court of Appeal reversed, it did so on other grounds and without deciding this issue. It would appear that the correct analysis is that none of the remedies potentially available in connection with an elder financial abuse action (compensatory damages, attorney's fees, costs, and punitive damages) may properly be characterized as a penalty and therefore the three year period of section 338 controls. Moreover, even if punitive damages might be regarded as a penalty, the one year period of section 340 still should not apply because punitive damages are never mandatory. To hold otherwise, would mean that some parties would be required to litigate elder financial abuse claims without knowing whether the claims are time barred until, after trial, it is determined whether punitive damages are to be recovered. This could also create the anomalous situation where two plaintiffs pursue elder financial abuse claims more than one year but less than three years after accrual and both recover compensatory damages. However, the plaintiff who goes on to prove and recover punitive damages would have his entire claim barred by the one year statute while the plaintiff who fails to prove punitive damages would at least recover compensatory damages, attorney's fees, and costs under the three year statute. This would of course be an absurd result.

Welfare & Institutions Code §§ 15610.30 and 15657.5. create the right to pursue an action for elder financial abuse. Citations to these sections reveal only four published appellate decisions,³⁵ none of which illuminate the many ambiguities of these sections. In the years ahead, it will fall primarily to the courts to resolve these ambiguities. One question which will undoubtedly be resolved sooner, rather than later, is the applicable period of limitation. For attorneys seeking to protect and preserve the rights of victims of elder financial abuse, sound authority supports a determination that the three year period of limitations of CCP § 338(a) controls.

³⁴ 2005 WL 2293898, *Benesch v. Tandler* (A104260)

³⁵ As of April 27, 2006.