

“FRAUD AND ELDER ABUSE”

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Fraud against the elderly community is a pervasive problem in our society that continues to grow as our population ages. This is particularly true in Riverside and San Bernardino Counties. Financial abuse is a form of fraud and elder abuse. Fortunately legislation is in place to protect elders. (See: *Welfare and Institutions Code*.) This collection of statutes incorporates “financial abuse” (although *Welfare and Institutions Code* Section 15657 still refers to “fiduciary abuse” despite the Legislative Counsel’s Digest confirming it should be “financial”). Financial abuse is just one the various forms of elder abuse protected under the Elder Abuse and Dependent Adult Civil Protection Act (referred to herein as the “Act”).

While the term “fraud” is not specifically referenced as part of the formal definition of “financial abuse” under the Act, it does define the terms broadly:

“Financial Abuse” (previously referred to as Fiduciary Abuse) is defined in one of two ways. First, “financial abuse” means abuse by a person who stands in a position of trust and confidence to the elder, and takes or uses the elder’s money or property for personal gain or any purpose not lawfully required to accomplish the purpose of the position of trust. Second, it can occur in any situation in which the following circumstances occur: (1) an elder or the elder’s representative requests a third party to transfer property which the third party is holding for the elder; (2) the third party, without good cause, does not transfer the property as requested; and (3) the third party acts in bad faith in not transferring the property. For purposes of application of this section, the definition of financial abuse is not limited to persons who are considered to be in a legally defined fiduciary role such as a conservator or real estate broker. (Pertinent portions of the *Welfare and Institutions Code* Section 15610.30 summarized by this author with emphasis added.)

It is critical to note that for the purposes of application of this section the definition of financial abuse is not limited to persons who are considered to be in a legally defined fiduciary role such as a conservator or real estate broker. Financial abuse applies to any person “who stands in a position of trust to the elder.” Determining

whether a culpable party is considered an “abuser” for purposes of applying the remedies under the Act, largely depends upon the facts and circumstances surrounding the transaction. While certainly traditional “fraud” committed by a legally obligated fiduciary such as a real estate broker will certainly trigger elder abuse remedies under the Act, there are numerous other scenarios that will do so as well. For example, an unscrupulous contractor or professional who is not traditionally considered a legal fiduciary but typically is in a “position of trust to the elder” (at least in certain transactions) will arguably fall within the definition of financial abuse under the Act.

It goes without saying that combating all forms of elder abuse is an important public policy. In light of the overwhelming support for this legislation, coupled with the policies supporting a more aggressive stance against abuse of the elderly by the district attorney’s office, it is foreseeable that this statute’s application will continue to expand.

As with all aspects of the Act, the remedies set forth in the statute are supplemental to those traditionally available under causes of action for constructive fraud, fraud in a commercial setting, misrepresentation, and unfair business practices under the *Business and Professions Code*. They are not mutually exclusive. The Act provides for attorney’s fees, costs, and punitive damages if abuse can be proven by the clear and convincing evidence, and plaintiff can establish recklessness, oppression, fraud, or malice in the commission of the abuse. Proving fraud or oppression during the commission of financial abuse should not be difficult. Finally, damages may be Trebled if it can be shown that *Civil Code* Section 3345 applies.

Given the number of seniors in the Cochella Valley and the general aging of our population, professionals involved in serving community associations in Riverside and San Bernardino Counties should be particularly aware of these laws. Property managers and officers and directors need to be mindful of the potential application of these laws to circumstances which may arise within any senior community. This is especially true of any association originally established to manage what has been termed or sold as a “senior community.” Frequently developers specifically design and sell single family

homes or condominium units as a “senior community” or “active adult community” in an attempt to target seniors and elderly persons as buyers.

This area of the law is growing in popularity and application and is being pursued more aggressively by consumer advocacy groups, relatives of abused seniors, and perhaps most importantly, the district attorney. Forms of financial abuse give rise to criminal prosecution as well as civil prosecution. We can expect as this area of the law continues to evolve, there will be additional judicial interpretation of the language set forth in the Act. Of course the overall goal is to protect seniors within our community from unscrupulous persons of all facets of the business world. These laws make it easier for victims to afford lawyers and to pursue their abusers for money damages.