

2013 WL 6163480 (S.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. California.

Patricia JOHNSTON, Plaintiff,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation, Defendant.

No. 13-CV-00574-MMA-BLM.
May 21, 2013.

Allstate's Reply Memorandum in Support of Its Motion to Dismiss

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Date: May 28, 2013

Time: 2:30 p.m.

Ctrm: 3A

I. Introduction

A claim for **financial elder abuse** can only exist if the defendant takes or retains property from the plaintiff. This case, however, is about whether Allstate should have paid plaintiff more money for her claim or paid her sooner. It is not about Allstate taking anything from plaintiff and her trying to get it back. Therefore, she cannot state a claim for **financial elder abuse**.

Based on the express language of the statute, the Ninth Circuit and the California Supreme Court have made clear that Civil Code Section 3325 provides only for the trebling of statutory fines or penalties, but not for the trebling of compensatory damages. Thus, the court should dismiss plaintiff's claims for treble compensatory damages.

II. Plaintiff cannot state a claim for **elder abuse**

Plaintiff does not dispute that to state a claim for **financial elder abuse**, she must allege that Allstate wrongfully took or retained property from her. [Cal. Welf. & Inst. Code § 15610.30](#). Instead, she spends most of her opposition arguing that her claim for insurance benefits is property. But even if it is, plaintiff still must allege that Allstate *took or retained* that property from her. That she cannot do.

Plaintiff does not and cannot allege that Allstate took insurance benefits from her. That would make no sense. Plaintiff is claiming that Allstate should have *paid benefits to her*, not that Allstate took benefits from her. And since Allstate did not take the benefits from plaintiff, it could not have retained them either. See [Cal. Welf. & Inst. Code § 15657.6](#) (mandating that one who takes property from an **elder** must “return the property”; one can only “return” something that he actually takes from the **elder**). Simply put, one sues an insurance company for failing to pay a claim, not for “taking or retaining payment” on a claim.

None of the cases cited by plaintiff involved a lawsuit against an insurer for failing to pay a claim. And none held that such allegations could support a claim for **financial elder abuse**.

Fisher v. Aviva Life & Annuity Co., 2010 WL 3582559 (E.D. Cal. Sept. 10, 2010), involved a claim that the defendant improperly terminated the plaintiffs' life insurance policies and deceptively failed to offer replacement policies comparable to the original ones. The plaintiffs cashed out their policies and received less than their original investment. *Id.* at * 1-2. The court ruled that because the defendants had allegedly retained the economic benefits of seven years of premiums and had continued to collect fees for a year before terminating the policies, the plaintiffs could allege a claim for **financial elder abuse**. *Id.* at *5-6. But, unlike this case, *Fisher* did not involve a dispute over the payment of a claim. And here, plaintiff is not claiming that Allstate tricked her into buying a policy or charged an improper premium.

In *Negrete v. Fid. & Guar. Life Ins. Co.*, 444 F. Supp. 2d 998 (CD. Cal. 2006), the plaintiffs alleged that the defendants deceptively sold deferred annuities without disclosing that annuities would not begin to be paid until after the annuitants' actuarial life expectancy (i.e., until after they would likely die), and that the defendants also churned the investments to deplete their cash value. *Id.* at 999-1000. Not surprisingly, the court ruled that these allegations, if true, could constitute the wrongful taking of property -- the plaintiffs' payments for the annuities. *Id.* at 1002-1003. Once again, however, plaintiff does not allege anything remotely similar here. Plaintiff simply contends that Allstate should have paid her claim or paid it sooner.

Tellingly, plaintiff does not cite any case holding that a dispute over an insurer's denial of a claim, or delay in paying a claim, can support a claim for **financial elder abuse**. That's because such disputes do not involve the taking or retaining of the insured's property. Here, then, the court should dismiss the fourth cause of action for **elder abuse**.

III. Plaintiff cannot seek treble compensatory damages

It was logical for Allstate to interpret the fifth cause of action as one for violation of the CLRA. That's because the CLRA and [Civil Code Section 3345](#) expressly cross-reference each other, and because [Section 3345](#) does not itself provide an independent cause of action.

Now plaintiff has clarified that she does not intend the fifth cause of action to be a separate claim; she just alleges it in order to triple the damages available under other claims. Therefore, the court should dismiss that cause of action. See *Ramsour v. JP Morgan Chase Bank*, 2011 WL 3739377 at *5 (S.D. Cal. Aug. 23, 2011) (dismissing separate cause of action for violation of [Section 3345](#) because “California Civil Code § 3345 ... is not an independent cause of action and will only apply if Plaintiff successfully prove [s] liability under [another] claim”), citing *Gwin v. Pac. Coast Fin. Servs.*, 2010 WL 1691567, at *7 (S.D. Cal. Apr. 23, 2010).

But, even if not asserted as a separate claim, the court should still dismiss plaintiff's request to triple her compensatory damages. The Ninth Circuit and the California Supreme Court have both held that [Section 3345](#) applies only to fines and penalties authorized by a statute to punish or deter; it does not apply to common law or statutory claims for compensatory damages. Plaintiff ignores this controlling authority.

In *Sanchez v. Monumental Life Ins. Co.*, 102 F. 3d 398 (9th Cir. 1996), the Ninth Circuit explained: “On its face, therefore, this statute allows for the trebling, in certain cases involving senior citizens and disabled individuals, of fines or penalties which are otherwise ‘authorized by a statute.’ ” Therefore, the court ruled that [Section 3325](#) did not allow the plaintiff to treble a claim for contract damages. *Id.* at 405.

Similarly, in *Clark v. Superior Court*, 50 Cal. 4th 605 (2010), the California Supreme Court held: “Civil Code section 3345 authorizes the trebling of a remedy only when it is in the nature of a penalty.” *Id.* at 609. Thus, the court ruled that a claim for restitution under [California Business and Professions Code Section 17200 et. seq.](#), which is compensatory and not punitive in nature, could not be trebled.

Here, then, plaintiff cannot claim treble her damages under the **elder abuse** statute. As demonstrated above, that claim fails in its entirety. But even if it could survive, the claim could not support treble damages. Unlike the CLRA -- which provides for a \$5000 penalty, [Cal. Civil Code § 1780 \(b\)\(1\)](#) -- the **elder abuse** statute does not provide for fines or penalties. Beyond otherwise recoverable damages, it simply provides for attorney's fees. [Cal. Welf. & Inst. Code § 15657.5](#).

Plaintiff also cannot treble any compensatory damages available for breach of contract or bad faith. Such damages are not fines or penalties authorized by statute. [Sanchez, 102 F. 3d at 405](#). As this District has ruled:

Defendant correctly observes there is no statute authorizing fines, penalties or other remedies for bad faith to serve as a “predicate for invoking [Section 3345](#),” as bad faith is a creature of common law. Defendant's motion to strike Plaintiff's prayer for treble damages is therefore granted as to this claim.

[Schwartz v. Life Ins. Co. of North America, 2006 WL 6185656 at *5 \(S.D. Cal. September 14, 2006\)](#) (footnote omitted).

The cases relied on by plaintiff hold that punitive damages, but not compensatory damages, on a bad faith claim can be trebled under [Section 3345](#). [Novick v. UNUM Life Ins. Co., 570 F. Supp. 2d 1207, 1210 \(C.D. Cal. 2008\)](#); [Jernigan v. Continental Cas. Co., 2009 WL 593216 at *3 \(N.D. Cal. March 4, 2009\)](#). That's because punitive damages are in the nature of a penalty and are specifically authorized by statute -- [California Civil Code Section 3294](#). Plaintiff cites no case holding that compensatory damages for bad faith can be trebled under [Section 3345](#). They can't be.

Thus, the court should dismiss plaintiff's claim to treble any compensatory damages.

IV. Conclusion

The Court should dismiss the fourth and fifth causes of action and the claim for treble compensatory damages.

DATED: May 21, 2013

McKENNA LONG & ALDRIDGE LLP

By: /s/Marc J. Feldman

Marc J. Feldman

Attorneys for Defendant

Allstate Insurance Company