

2011 WL 8088397 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Sherrie KRAMER and Philip Kramer, Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, Rosalinda Murphy and Does 1 through 50, inclusive, Defendants.

No. CV11-7079 GAF (FFMx).
December 19, 2011.

**Allstate's Memorandum of Points and Authorities in Support of Its Motion
to Dismiss the Third Cause of Action from the Third Amended Complaint**

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Hon. Gary A. Feess.

Assigned to the Hon. Gary A. Feess Courtroom 740

[Federal Rules of Civil Procedure, Rule 12(b)(6)]

DATE: January 23, 2012

TIME: 9:30 a.m.

CTRM: 740

Complaint Filed: January 24, 2011

**[Notice of Motion and Motion to Dismiss Third Cause of Action From Third Amended Complaint; and Proposed
Order Filed Concurrently Herewith]**

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This Court should dismiss the Third Cause of Action of the Third Amended Complaint for **Elder Abuse** because despite being given not one, but three proverbial “bites at the apple,” Plaintiffs have continually failed to state a cause of action for **Elder Abuse**.

Most recently, the Court may recall that Plaintiffs were granted leave to amend the **Elder Abuse** cause of action to allege a cause of action under the *Welfare and Institutions Code*, as opposed to the *Civil Code*. Yet, other than changing the heading of that cause of action to indicate *Welfare and Institutions Code* §§15610.30, 15657.5 et seq., Plaintiffs have failed to specify said Sections within the body of the Complaint itself.¹

More significantly, no where in the Third Amended Complaint is it alleged that Allstate “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,” as required to state a cause of action for financial **elder abuse** under said Statute nor could it be so alleged. This is, after all, a case involving a “legitimate dispute” as to coverage under a policy of insurance. Therefore, the Court should dismiss this cause of action from the Third Amended Complaint, with prejudice.

2. THIS COURT SHOULD DISMISS THE THIRD CAUSE OF ACTION FROM THE THIRD AMENDED COMPLAINT BECAUSE IT FAILS TO ADEQUATELY STATE A CAUSE OF ACTION FOR **ELDER ABUSE UNDER THE WELFARE AND INSTITUTIONS CODE**

A. Plaintiffs Have Failed to Amend The Allegations Within the Body of The Complaint to Allege A Violation of the Welfare and Institutions Code, And Therefore, Have Not Sufficiently Amended The Complaint to State a Cause of Action for **Elder Abuse Under That Section**

As noted above, despite being granted leave to amend the Complaint to allege a cause of action for **Elder Abuse** under *Welfare and Institutions Code* §§15610.30, 15657.5, Plaintiffs have failed to allege a violation of those Sections of the *Welfare and Institutions Code* within the body of the Complaint.

Specifically, as the Court may recall, in issuing its order dismissing Plaintiffs prior cause of action for **Elder Abuse** under the *California Civil Code*, the Court stated, in relevant part:

“If Plaintiffs wish to state a claim under the Welfare and Institutions Code, they must do so by amending their complaint. Accordingly, Plaintiff’s fourth cause of action, for **elder abuse**, is **DISMISSED**. Plaintiffs will be given *one additional opportunity to amend* this cause of action in order to properly state a claim.”²

Yet, although Plaintiffs have added new allegations to the Third Amended Complaint, no where within the body of the Complaint have they alleged a violation of *Welfare and Institutions Code* §§15610.30, 15657.5. Rather, Plaintiffs have only changed the heading of said cause of action to reflect a violation of these Sections, and as noted above, headings are not technically considered part of a pleading under *FRCP Rule 10*. See, *Winkler-Koch, surpa.* at 1019. In fact, Plaintiffs still allege that Plaintiffs are senior citizens and Phillip Kramer is a disabled person under the *California Civil Code*. See, Third Amended Complaint ¶39. As such, Plaintiffs have once again failed to state a cause of action for violation of *Welfare and Institutions Code* §§15610.30, 15657.5.

B. Plaintiffs Fail to State A Cause Of Action For **Elder Abuse Under *Welfare and Institutions Code* §§15610.30, 15657.5 Because They Have Failed to Allege That Allstate Has Wrongfully Taken, Secreted And/Or Retained Property With The Intent to Defraud Plaintiffs, As Required To State A Cause Oc Action Under The Welfare and Institutions Code**

Welfare and Institutions Code §§15610.30 provides, in relevant part:

“(a) ‘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](#).”

As the Court in [Teselle v. McLoughlin](#), 173 Cal.App.4th 156, 174 (2009) further elaborated:

“As noted, the issues are determined by the pleadings, the rules of pleadings, and the substantive law. The substantive law of **elder abuse** provides that financial **abuse** of an **elder** occurs when any person or entity takes, secretes, appropriates, or retains real or personal property of an **elder** adult to a wrongful use or with an intent to defraud, or both. A wrongful use is defined as taking, secreting, appropriating, or retaining property in bad faith. Bad faith occurs where the person or entity knew or should have known that the **elder** had the right to have the property transferred or made readily available to the **elder** or to his or her representative.”

Here, although Plaintiffs did add additional paragraphs to bolster their bad faith claims against Allstate under this cause of action, nowhere is it alleged that Allstate “secreted, appropriated or retained” property in bad faith. *See*, Third Amended Complaint ¶¶41(a)-(h). Indeed, notably, no where do such allegations appear within the Third Amended Complaint.

Yet, more importantly, even if Plaintiffs had specifically so alleged, the factual allegations and underpinnings of Plaintiffs' claims against Allstate would not support such a contention. After all, to the extent that the entire action revolves around a “legitimate dispute” as to whether there is coverage under a policy of insurance Allstate issued to Plaintiffs, such conclusory allegations would not support a contrary allegation that Allstate wrongfully “secreted, appropriated or retained” property that belonged to Plaintiffs. Consequently, Plaintiffs cannot state a cause of action for **Elder Abuse** under [Welfare and Institutions Code §§15610.30 et seq.](#) Therefore, the Court should grant Allstate's motion to dismiss this cause of action from the Third Amended Complaint.

3. THIS COURT SHOULD NOT GRANT LEAVE TO AMEND A FOURTH TIME

Moreover, because Plaintiffs have now been given three (3) opportunities to amend the Complaint to allege a cause of action for **Elder Abuse** and have been unable to do so, this Court should grant Allstate's motion to dismiss *without leave to amend*. Notwithstanding the policy favoring amendments, as noted above, the Court previously indicated that Plaintiffs would be “given *one additional opportunity to amend*.” Emphasis in original. Suffice it to say, Plaintiffs have now been given that opportunity, and once again, have failed to state a cause of action for **Elder Abuse**. Accordingly, this Court should dismiss the Third Cause of Action of the Third Amended Complaint, without leave to amend, once and for all.

4. CONCLUSION

Because Plaintiffs have been given not one, but three opportunities now to amend their Complaint to state a cause of action for **Elder Abuse**, and have repeatedly failed to do so, this Court should dismiss the Third Cause of Action of the Third Amended Complaint for **Elder Abuse**, without leave to amend.

DATED: December 19, 2011

Respectfully submitted,

MacGREGOR & BERTHEL

By _____

Joshua N. Willis

Attorneys for Defendants

Allstate Insurance Company

Footnotes

- 1 Technically, headings are not part of the Complaint since they violate [Rule 10 of the Federal Rules of Civil Procedure](#) (“*FRCP*”).
See, [Winkler-Koch Engineering Co. v. Universal Oil Products Co. \(Del.\)](#), 79 F.Supp. 1013, 1019 (S.D.N.Y. 1947).
- 2 See, Order re Motion to Dismiss, Document No. 30, page 6 of 6, of which the Court the Court is requested to take judicial notice pursuant to [Rule 201 of the Federal Rules of Evidence](#) (“*FRE*”).

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