

**The New Elder Financial Abuse Law:  
Big Changes Are Coming!**  
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Notwithstanding a record breaking budget impasse and the considerable lack of trust and cooperation it generated between the Legislature and the Governor, a remarkable accomplishment was attained this session with the enactment and chaptering of Senate Bill 1140, a groundbreaking expansion of the rights of financially exploited elders. Senate Bill 1140, effective January 1, 2009, was authored by Darrell Steinberg, District 6 senator and in-coming Senate President Pro Tem. Senator Steinberg has long championed elder abuse reform and during the 2007 session authored Senate Bill 611, which extended the provisional remedy of attachment to victims of financial abuse. Senate Bill 1140 now represents the most far-reaching and comprehensive revision of the rights of victims of elder financial abuse since the Legislature first began to address the problem in 1982. The new law substantially alters the legal landscape and has the potential for significantly assisting victims of financial abuse.

Elder abuse often occurs in a domestic context in which a family member, care custodian, or neighbor exploits the vulnerability of an infirm or isolated elder. However, elder abuse is equally common in a commercial context involving the sale of an unsuitable or excessively expensive product, such as an annuity, life insurance policy, reverse mortgage, or long-term health plan. While domestic abuse is generally a wrong of opportunity and typically involves a single event for the perpetrator, commercial abuse is an on-going enterprise with the perpetrator methodically exploiting the senior community. In addition, domestic abuse tends to involve donative and testamentary

transfers while commercial abuse involves transactions which are often indistinguishable from routine commercial transactions. The current law of financial abuse requires that the elder's property be taken for a wrongful use or with the intent to defraud; however in many instances, particularly those involving commercial abuse, the perpetrator does not exploit the elder through overt fraud but by unduly manipulating and influencing their decisions. Proving an intent to defraud in such cases can be very difficult.

Senate Bill 1140 supplements the definition of financial abuse by including undue influence as a basis for financial abuse. Undue influence is defined by Civil Code section 1575 and involves taking unfair advantage of a person's weakness of mind or the confidence he might repose in the perpetrator. Under current law, undue influence simply negates contractual consent and entitles the victim to rescission. Rescission is a particularly inappropriate remedy for victims of elder financial abuse because damages and the cost of litigation are not recoverable. A predator who is forced through litigation to rescind an agreement merely disgorges his ill-gotten gains but is otherwise undeterred from future predatory acts. As a practical matter, defendants in such actions can often exhaust elderly litigants and obtain deeply discounted settlements. By including undue influence as a basis for financial abuse, Senate Bill 1140 authorizes the recovery of damages, attorney's fees, and costs and provides victims with a potent tool for speeding recovery.

A similar impediment currently exists with regard to the sale of unsuitable or abusive products to elders of diminished capacity. As with undue influence, lack of capacity negates contractual consent. Accordingly, the remedy for the sale of an unsuitable product to an elder who lacks capacity is rescission. Senate Bill 1140 changes

this by requiring a perpetrator to return upon demand property taken from an elder who lacks capacity. Failing to do so promptly subjects the perpetrator to the same remedies available for financial abuse, namely, damages, attorney's fees, and costs.

Perhaps most significantly, Senate Bill 1140 changes the statutory definition of wrongful use. The term "wrongful use" in the current statute has always been problematic as it is ambiguously defined as the bad faith failure to return an elder's property where the perpetrator knew or should have known that the elder was entitled to its possession. This definition is particularly troublesome in a commercial context where a seller may reasonably contend that, in the absence of judgment, an elder is not entitled to possession of money or property voluntarily transferred. Senate Bill 1140 retains the term wrongful use but defines it in remarkably expansive terms. Wrongful use will now mean the taking of an elder's property where the perpetrator knew or should have known that doing so would likely be harmful to the elder. This new definition fundamentally changes the obligations of those who would contract with elders. No longer will the only limitation on aggressive sales be a prohibition against material misrepresentations and let the elder beware. Rather, a seller may be liable for damages and attorney's fees where he 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. Since all transactions involve risks from unforeseen events, 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 deal would be harmful.

Senate Bill 1140 makes other significant changes to current law. It expressly recognizes that a victim of financial abuse may recover consequential damages. It holds an employer vicariously liable for financial abuse damages and attorney's fees resulting from the wrongful conduct of an employee committed in the course and scope of employment. And it provides a four year statute of limitations which commences when the plaintiff discovers, or should discover, the facts constituting the financial abuse. Senate Bill 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. Its deterrent effect on those who prey upon elders remains to be seen.

\*Steven Riess is a San Francisco attorney specializing in elder financial abuse. In 2007, he wrote Senate Bill 611 (authorizing attachment in elder financial abuse); in 2008, he wrote Senate Bill 1140 (expanding financial abuse laws) and Senate Bill 1136 (revising the Consumers' Legal Remedies Act to prohibit the sale of exorbitantly priced Medi-Cal eligibility planning to seniors).