

[Financial Abuse of Elders and the Recovery of Attorneys' Fees](#)

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Financial elder abuse claims are on the rise in California.^[1] Companies engaging in financial transactions with people over the age of 65, like insurance or financial services companies that sell products to elders, are increasingly targets of the plaintiff's bar.

This is largely due to the fact that the [California Elder and Dependent Adult Civil Protection Act](#) (EADACPA) includes a mandatory provision for the recovery of attorneys' fees and costs; if the plaintiff proves by a preponderance of the evidence (more likely than not to be true) that the defendant committed financial elder abuse, the court must award attorneys' fees.^[2] This fee-shifting provision is unilateral; a prevailing defendant may not recover attorneys' fees. [Wood v. Santa Monica Escrow Company](#), 151 Cal. App. 4th 1186 (2007).

While the ability to recover attorneys' fees is clear, in some instances, the amount of fees that may reasonably be awarded is not. First, there is no provision in the EADACPA that provides guidance on the reasonableness of attorneys' fees in cases involving financial elder abuse claims. [Welfare & Institutions Code sec. 15657.1](#) does set forth factors to provide guidance on attorneys' fees awards:

- The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained;
- Whether the defendant took reasonable and timely steps to determine the likelihood and the extent of liability; and
- The reasonableness and timeliness of any written offer in compromise made by a party to the action.

Unfortunately, these factors do not expressly apply to financial elder abuse claims; they expressly apply only to claims involving physical abuse and neglect. The absence of an analogous provision for financial elder abuse appears to be a legislative oversight, since the same types of awards (e.g., attorney fees, punitive damages, etc...) are recoverable for both types of elder abuse claims.

For the time being though, until the Legislature corrects its oversight, plaintiffs' attorneys prosecuting financial elder abuse claims may continue to argue that their fee claims need not be subject to scrutiny against these factors.

Plaintiffs may even seek an enhancement of attorneys' fees, by relying on [Civil Code Sec. 3345](#). This statute allows for trebling to redress unfair or deceptive practices committed against an elder where a statute imposes a fine, penalty or remedy whose purpose or effect is to punish or deter.

Plaintiffs have argued in favor of treble attorneys' fees, asserting that the attorneys' fees provisions of the EADACPA are statutes intended to redress unfair practices committed against

an elder and that the purpose of those fee-shifting provisions is to punish or deter further wrongful conduct.

Allowing the recovery of treble attorneys' fees is problematic. For one, it would violate standards of professionalism prohibiting attorneys from being compensated for work not done or receiving unearned fees. Unfortunately, neither the EADACPA nor sec. 3345 provides any guidance on this issue.

Compounding the lack of statutory guidance, little case law exists to better define the parameters for attorney fee recoveries by plaintiffs.

Only one case to date discusses the reasonableness of attorneys' fees for a prevailing plaintiff who successfully asserted a financial elder abuse claim. In *In re Levitt*, 93 Cal. App. 4th 544 (2002), the [Second Appellate District](#) opined that the size of the estate at issue may be a factor in determining the reasonableness of attorneys' fees sought.

In *Levitt*, a prominent attorney, who was the drafter of the EADACPA, represented a somewhat modest estate to prosecute a financial elder abuse claim and prevailed. He, along with co-counsel, sought attorneys fees and costs in the amount of \$127,000 on an estate valued at \$370,000. The court reduced the sought-for amount to \$110,000, not because of the quality of work done, the amount of time spent or the result obtained, but rather because of the sheer size of the estate in relation to the fees incurred.

The bottom line is that while the EADACPA makes the recovery of attorney fees and costs mandatory, it provides little guidance as what fees may be reasonably recovered. Until further legislative guidance is provided, counsel defending financial elder abuse claims should apply all measures of reasonableness provided for under the rules of professional conduct, the reasonableness factors set forth in the EADACPA for attorneys fees in physical abuse and neglect claims, case law and accepted practices for attorney fee billing to reduce any mandatory attorneys' fees claims.

[1] "Financial abuse" of elders is defined as the assisting with or taking, secreting, appropriating or retaining of real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud. [Cal. Welf. & Inst. Code sec. 15657.5](#). By statute, "wrongful use" is imputed if the person or entity knew or should have known that the conduct was likely to be harmful to the elder. With such low and vague pleading standards and because little case law defines "for wrongful use," an institutional client that engaged in a legitimate business transaction with an elder could be sued for financial elder abuse by a disgruntled beneficiary or a conservator of the estate who disagrees with the suitability of the transaction.

[2] It should be noted that the burden of proof to recover attorneys' fees is lower than the clear and convincing evidence required to recover punitive damages.