

SEARCH/BACK to search results

Bookmark Reprints

This is the property of the Daily Journal Corporation and fully protected by copyright. It is made available only to Daily Journal subscribers for personal or collaborative purposes and may not be distributed, reproduced, modified, stored or transferred without written permission. Please click "Reprint" to order presentation-ready copies to distribute to clients or use in commercial marketing materials or for permission to post on a website.

Thursday, May 17, 2012

Treble punitive damages for elder abuse: are you claiming them?

Brian S. Kabateck is a consumer rights attorney and founder of Kabateck Brown Kellner LLP in Los Angeles. President-elect of the Consumer Attorneys of California, he represents plaintiffs in personal injury, mass torts litigation, class actions, insurance bad faith, insurance litigation and commercial contingency litigation.



Joshua H. Haffner is an associate at Kabateck Brown Kellner LLP. His practice focuses on representing plaintiffs, including in class actions, in cases involving insurance bad faith, consumer fraud, unfair business practices, unlawful real estate settlement practices and personal injury. He has handled numerous cases through trial and appeal.



In insurance bad faith actions, a plaintiff is generally allowed to claim and recover punitive damages against an insurance company, if the standard of proof is met. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910. California statutory law provides a strong basis for also asserting a financial elder abuse claim for treble punitive damages when representing a senior or disabled plaintiff in an insurance bad faith action.

Civil Code Section 3345 applies "in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons ... to redress unfair and deceptive acts or practices or unfair methods of competition." It is a discretionary multiplier that allows a trier of fact to impose up to three times the amount of a statutory fine, penalty or other

remedy "the purpose or effect of which is to punish or deter." The trier of fact is allowed to impose the treble multiplier whenever it makes a finding as to one or more of the following factors: whether defendant knew or should have known its conduct was directed at a senior or disabled person; whether defendant caused a senior or disabled person to suffer loss or encumbrance of residence, employment, source of income, substantial loss of property set aside for retirement, personal or family care, substantial loss of retirement or pension payments, or assets essential to their health and welfare; or whether the senior or disabled person was substantially more vulnerable than other members of the public to defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage.

Although no California court has directly ruled on the issue, multiple federal district courts in California have held that Section 3345 can be used to treble punitive damages in an insurance bad faith action.

In *Ross v. Pioneer Life Insurance Company* (C.D.Cal. 2008) 545 F.Supp.2d 1061, an 80-year-old woman brought a bad faith action against her insurance company in connection with the handling of her injury claim. She alleged a claim for punitive damages, and then brought a motion to amend to add a claim for treble punitive damages under Section 3345. The insurance company opposed the motion, arguing that "Civil Code [Section] 3345 does not apply to common law actions where punitive damages are awarded." In rejecting the insurer's argument, *Ross* held: "A review of the Legislative History of Civil Code [Section] 3345 indicates that when it was enacted it was expressly foreseen that the provision would be applied to a trebling of punitive damages under Civil Code [Section] 3294." *Ross* concluded that "punitive damages are 'fines and penalties,' within the meaning of Civil Code [Section] 3345," and allowed the amendment.

In *Hood v. Hartford Life and Accident Insurance Company* (E.D.Cal. 2008) 567 F.Supp.2d 1221, decided just a few months after *Ross*, the court conducted a detailed analysis of Section 3345. The defendant insurance company argued that treble punitive

damages under Section 3345 are unconstitutional. *Hood* rejected the insurer's challenge, noting the absence of any "authority holding that trebled punitive damages are per se unconstitutional," and stating that the discretion of the trier of fact regarding whether to treble punitive damages "creates an additional level of protection from an unconstitutionally excessive damages award." *Hood* also rejected the insurer's assertion that Section 3345 only applied "with respect to consumer fraud" under the Consumer Legal Remedies Act or Unfair Competition Law, holding that a "bad faith cause of action, alleged against defendant while engaging in its business activities, is deemed to be an unfair practice within the meaning of Section 3345"

California statutory law provides a strong basis for also asserting a financial elder abuse claim for treble punitive damages when representing a senior or disabled plaintiff in an insurance bad faith action.

In *Novick, M.D. v. Unum Life Insurance Company of America* (C.D.Cal. 2008) 570 F.Supp.2d 1207, the court rejected an insurer's motion to strike a claim for treble punitive damages under Section 3345, holding that "treble punitive damages [under Section 3345] are available as part of a bad faith claim."

Finally, in *Jemigan v. Continental Cas. Co.* (N.D. Cal. 2009) 2009 WL 593216, another California federal district court addressed the issue of treble punitive damages pursuant to Section 3345 in a bad faith action, and held:

"As other courts have found, the legislative history of [Section] 3345 indicates that it was expressly foreseen that the provision would be applied to a trebling of punitive damages under Civil Code [Section] 3294.' Thus, the trebling of punitive damages is available under [Section] 3345 as long as the underlying cause of action seeks to redress 'unfair and deceptive acts or practices or unfair methods of competition.' A claim for breach of the covenant of good faith and fair dealing under California common law seeks to redress unfair practices within the meaning of [Section] 3345."

Thus, the California federal district courts, which have examined the legislative history and structure of the statute, have uniformly found that Section 3345 can be applied in an insurance bad faith action to treble punitive damages.

As stated above, no state decision has *directly* addressed the issue of treble punitive damages under Section 3345 in an insurance bad faith cause of action. However, a recent state Supreme Court decision addressing Section 3345 in connection with a Unfair Competition Law claim against an insurer, *Clark v. Superior Court* (2010) 50 Cal.4th 605, supports the conclusion reached by the above federal district courts - i.e., that Section 3345 allows for trebling punitive damages pursuant to a bad faith cause of action. In *Clark*, the insured brought an Unfair Competition Law - but not a bad faith - claim alleging the insurer used "deceptive business practices to induce senior citizens to buy high-commission annuity contracts with large penalties for 'early surrenders.'" *Clark* described the issue it was addressing as "the applicability of [Section 3345] to the unfair competition law, which generally limits a private party's available remedies to injunctions and restitution."

Ultimately, *Clark* held that Section 3345 could not be applied to a Unfair Competition Law claim because the only monetary award available was restitution, and Section 3345, "subdivision (b)'s 'deter' language must be read as pertaining to a remedy that is designed to punish." *Clark* concluded that "trebled recovery may be awarded under Civil Code Section 3345, subdivision (b) only if the statute under which recovery is sought permits a remedy that is in the nature of a penalty."

Clark's reasoning and holding is consistent with the California federal district court decisions and supports application of Section 3345 to treble a punitive damage claim in an insurance bad faith action. This is because punitive damages are unquestionable "designed to punish" and are "in the nature of a penalty."

In sum, in California, there is strong statutory and case law support for a claim for treble punitive damages in an insurance bad faith cause of action brought on behalf of an elderly or disabled plaintiff. Given this powerful remedy, it is a claim worth considering.