

December 1, 2014

THE EXPANDING SCOPE OF ELDER ABUSE

Dear Clients and Friends:

The Elder Abuse and Dependent Adult Civil Protection Act (*EADACPA*) provides civil penalties when an individual age 65 or older, or a dependent adult, “is deprived of any property right, including by a means of an agreement, by a donative transfer, or testamentary bequest.” Wel. & Inst. Code section 15610.30(c). The deprivation of a property right must be for a wrongful use, with intent to defraud or by undue influence. The recent decision in *Bounds v. Superior Court*, 2014 Cal. App. Lexis 792, expands EADACPA to include ordinary business transactions.

Helen Bounds, an 88-year-old, owned commercial real property that shared a driveway and parking lot with a neighboring business. In 2012, she began negotiating with the neighboring business to sell that real property. In the fall of 2012, she hired an attorney to prepare an offer for \$3,450,000 to the neighbor. Her family discovered the potential sale and convinced her not to proceed. A family member also informed the neighbor that Mrs. Bounds suffered from diminished capacity.

In December 2012 the neighbor initiated further purchase negotiations. Mrs. Bounds signed a letter of intent to sell the property for \$1,785,000, or almost half of the prior contemplated offer. She signed the letter of intent without the benefit of counsel. She also signed escrow instructions to consummate the sale. A month later, after consulting with counsel, she terminated escrow. The attorney for Mrs. Bounds then directed the neighbor to communicate through counsel and not directly with Mrs. Bounds. The neighbor ignored the lawyer’s instruction and instead went to Mrs. Bounds demanding that she sell the property to the neighbor or risk being sued.

When Mrs. Bounds refused to comply, based upon her attorney’s advice, the neighbor sued for specific performance; e.g. to complete the sale at the \$1,785,000 price. Mrs. Bounds filed a cross-complaint that among other claims alleged the neighbor committed financial elder abuse in procuring the letter of intent and her signature on the escrow instructions. The trial court sustained the demurrer from the financial abuse claim; in plain language the trial threw out Mrs. Bounds’s claim of financial elder abuse. She appealed, arguing that she should be permitted the opportunity to prove her case. The appellate court agreed and reversed the trial court’s sustaining the demurrer.

The appellate court defined the issue as whether Mrs. Bounds's execution of the escrow instructions constituted a "taking" within the meaning of EADACPA. The neighbor argued that the mere signing of escrow instructions could not qualify as a "taking." Mrs. Bounds retained title to the property, continued to use and receive income from the property, and had the ability to enter into another sale of the property. The appellate court disagreed by observing that Mrs. Bounds would have a duty to disclose the buyer's claim as part of any sales or loan transaction. This disclosure would impair her ability to sell the property or to use the property as security for a loan. This impairment constitutes a deprivation of property rights and thus a taking under EADACPA.

The neighbor also argued that EADACPA only applies to completed transactions, because EADACPA applies to donative transfers and testamentary bequests. The *Bounds* court held that a "donative transfer" and "testamentary bequest" included gifts that are contingent or testamentary bequests that a living person may yet revoke or amend. The court did not clarify when a will or revocable testamentary bequest deprives an elder of a property right.

Bounds is another example that bad facts make bad law. The neighbor seems to have overreached. The neighbor appears to have known of Mrs. Bounds' diminished capacity and that the contract price was well below market. The allegation that the neighbor sought to do an "end run" around the attorney for Ms. Bounds was also adverse to the would-be buyer. Given these troubling allegations, the appellate court appears to have expanded EADACPA as a warning to other like-minded purchasers.

Nevertheless, the implication of *Bounds* is that *any* impairment on a property right may constitute grounds for an elder abuse claim. A third party dealing with an elder or dependent adult may be exposed to an elder abuse claim based on signed documents. The involvement of an independent agent, such as a real estate broker, accountant or attorney, may be necessary when conducting a purchase and sale transaction with an elder or dependent adult. *Caveat Emptor* now has a new meaning.

Kind regards.

Very truly yours,

HARTOG & BAER
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