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Honorable Chief Justice Ronald George
and Associate Justices
Supreme Court of California
300 South Spring Street, Second Floor
Los Angeles, California 90013

Re: Conservatorship of Joel Levitt
Conservatorship of Peggy Page
2nd Civil No. B 140538 and B 142397 [consolidated]
Supreme Court No. S 102726

**REQUEST of CONSUMERS ATTORNEYS of CALIFORNIA
THAT PETITION FOR REVIEW BE GRANTED**

Dear Chief Justice George and Associate Justices:

On behalf of the *Amicus Curiae* Committee of the Consumers Attorneys of California, the undersigned respectfully requests that this Court grant the Petition for Review filed in Conservatorship of Levitt.

This Petition bring to the fore a critical problem concerning the judicial role in assuring availability of private counsel to combat elder abuse - a public responsibility which, as the Legislature has found, public agencies have otherwise failed to meet.

There is no shortage of lawyers willing to undertake on a contingent-fee basis elder abuse cases with solvent defendants. As in other tort cases, the risk entailed by such cases is compensated by an enhanced fee. The vast majority of abuse cases, however, involve impecunious predators preying on seniors of modest economic circumstances, where the attorney's only compensation is likely to be an hourly fee determined by the probate court. The Levitt decision, rather than assuring that courts carry out the legislative mandate to assure financial incentives to attract counsel for *all* abuse cases, openly approved probate court fee practices which will inevitably deter counsel from undertaking representation of seniors with moderate estates.

Rather than apply lodestar-type criteria to assure that fees in such cases reflect actual market rates for legal services, the Levitt court approved the trial court's policy of limiting fees to one third of the estate - even when the senior is deceased - regardless of the amount of time needed to combat the predator, regardless of whether the attorney's efforts saved the senior's life, and regardless of the fact that without the attorney's efforts, the entire estate would have been looted.

Even in the best circumstances, attorneys face delay and uncertainty in recovering fees in contentious abuse cases. The message of Levitt for the plaintiffs' trial and probate bar is that these cases do not pay for themselves and the attorney who specializes in elder abuse cannot afford to take cases unless there is a wealthy or insured defendant or a wealthy senior. Not only were the fees awarded in Levitt and Page below market rates - as the trial court itself acknowledged - but the method approved by the Court of Appeal allows fees insufficient even to cover attorney overhead.

Even flagrant cases of abuse involving theft of tens of thousands of dollars will not attract counsel if, as the Court of Appeal has announced, the fee is calibrated to fit the interests of heirs rather than the actual demands that these cases make on attorney time and commitment. The rule approved by the Court of Appeal allows courts to limit fees to a percentage of the estate irrespective of the real economics of the undertaking. These cases are contentious and can make extreme demands on counsel because of litigious perpetrators with a vested interest in dragging out the case. Specialized skills are required to prove undue influence and abuse where the senior may be psychologically dependent on the perpetrator. Those preying on low-income seniors are often persistent (having no other gainful activity) and almost always judgment-proof. Whatever can be pilfered from the senior is gone permanently, requiring immediate injunctive action (as in both Levitt and Page). Counsel must be prepared to finance the case and await payment for years.

The Court of Appeal's decision gives every predator and every predator's attorney the incentive to make the litigation sufficiently complex and prolonged so that the conservator's or senior's attorney will be economically compelled to settle the case with negligible benefit or protection for the senior.

It is especially troubling that the lower courts have almost uniformly disregarded the legislative history of the Elder Abuse Act (Welfare & Institutions Code §15600 *et. seq.*) in awarding fees in abuse cases involving moderate income seniors, even after this

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Court explained in Delaney v. Baker (1999) 20 Cal.4th 23, 82 Cal.Rptr.2d 610, that a principal purpose of the Act was to improve financial incentives for private counsel to take abuse cases. As Delaney observed, the Legislature recognized the primary role of private counsel in combating elder abuse in the 1991 amendments. In contrast to the market-based approach contemplated by the legislative history, the Levitt decision affirms a fees approach that institutionalizes disincentives to attorneys undertaking these cases.

The lesson taught by the legislative history is that the traditional probate approach to awarding fees has been unsuccessful in attracting private counsel. Levitt, ignoring the legislative history, applies probate fee standards of 20 years ago even in the face of its demonstrable failure, even as the Opinion acknowledges that the manner in which probate courts presently award fees raises serious doubts as to whether the judicial system is carrying out its obligation to protect the most vulnerable in our society, the elderly.

The consequence of the Opinion is not, as the Court of Appeal seems to believe, to preserve estate assets for the conservatee or the conservatee's heirs. Without incentives sufficient to attract dedicated counsel, there will be no estate. Predators will be free to loot seniors' assets, leaving them destitute and - at best - on the public welfare rolls. One need only look to the facts of the Levitt and Page cases to see this.

Until trial courts are directed to apply the economic approach to fee awards which *the Legislature has already endorsed in the 1991 amendments to the Elder Abuse Act*, seniors will continue to suffer without access to or the protection of the judicial system.

We therefore urge the Court to grant review.

Respectfully submitted,

Ian Herzog
Chairperson, *Amicus Curiae* Committee
Consumers Attorneys of California