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Trends in Preventing Senior Financial Abuse

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Exploitation of Seniors

Baby Boomers control more than 70% of the nation's disposable income and represent a growing portion of the population.[1] By 2030, nearly one in five residents of the United States will be sixty-five years or older and more vulnerable to financial abuse. According to the MetLife Study on Elder Financial Abuse, it is estimated that elders will lose at least $2.9 billion annually as victims of financial abuse. The study found that 34% of elder abuse is perpetrated by trusted persons including family, friends, and neighbors. Women were found to be nearly twice as likely to be victims of elder financial abuse compared to men, with most victims between the ages of eighty and eighty-nine.[2]

Why Does It Occur?

According to the SEC, the elderly are particularly vulnerable to financial exploitation because of health-related effects of aging and financial and retirement trends. Aging and health-related decline often become early causes of financial problems. Financial trends have shifted from a population that retired with defined benefits to one where seniors more commonly are responsible for managing their own assets.[3]

What Is Being Done to Prevent Elder Financial Abuse?

The rise in the elderly population and the concurrent rise in financial abuse of the elderly have caused regulators and the states to retool their elder abuse statutes. Increasingly, states and regulators are expanding the scope of their elder abuse statutes to include measures that empower and/or require financial institutions, their employees, and third parties that suspect elder financial abuse to take affirmative steps to help prevent it. These codified preventive measures range from reporting suspected financial abuse to a regulatory body, to obligating financial institutions to place certain transactions on hold where elder financial abuse is suspected. Among the states that have enacted such laws are Alaska, California, Delaware, Kentucky, Maine, Minnesota, Utah, and Virginia.[4]

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FINRA and the State of California have codified such preventative measures, and their respective retooled approaches are indicative of this trend. As claims of elder financial abuse continue to rise, the application and deterrent effect of these rules will be tested.

FINRA

FINRA has taken the view that the protection of senior investors is a priority, given the large number of investors that are at or approaching the age of retirement. To that end, FINRA has recently engaged in rulemaking to further protect senior investors. FINRA Rule 4512 requires member firms to make reasonable efforts to obtain the name and contact information of a trusted person upon the opening of a retail customer account or when engaged in the process of updating information. The concept behind the trusted contact is to have available resources for the firm if suspicion exists of possible senior exploitation.[5]

Similarly, FINRA has enacted Rule 2165, concerning the financial exploitation of adults, to permit member firms that reasonably believe that exploitation has occurred, or is occurring, to place a temporary hold on the disbursement of funds or securities from an account. This rule seeks to protect persons over the age of sixty-five or adults with mental or physical impairment.[6] In February 2019, FINRA's vice president and associate general counsel stated that FINRA would be looking more closely at the adoption and compliance with Rule 2165.[7] According to FINRA the goal of the follow-up examinations would be to check compliance on the new systems and processes implemented by firms to ensure that issues are properly elevated and that the firms have a team in place to handle the decision-making process under Rule 2165.[8]

California

California, like FINRA, has enacted a statute that deals with influencing third parties, including financial institutions and their employees, to take affirmative steps to prevent suspected elder financial abuse.

Section 15610.30 of the California Welfare and Institutions Code (the "Code") provides a broad definition for financial abuse of an elder or dependent adult. That section defines such financial abuse as anyone who takes, assists in taking, or uses undue influence to take the real or personal property of an elder for wrongful use or with an intent to defraud. California even extends the scope of what constitutes financial abuse to situations where the real or personal property of the elder is taken from a *representative* of an elder, such a trustee, attorney, or representative of the estate of an elder.

California case law has provided some guidance on what can constitute financial abuse. For example, a mortgage broker who convinced a seventy-nine-year-old to refinance without disclosing the terms of the loan and instructed him not to read the loan documents before signing them constituted financial abuse.[9]

In another case, the plaintiff properly alleged financial abuse where prospective purchasers of a business used undue influence to pressure an elderly trustee to sell despite knowing she was acting in a diminished capacity while suffering from (though not yet formally diagnosed with) Alzheimer's.[10]

In a third example, allegations that insurance advisors who restructured the insurance policies of elderly individuals in cognitive decline that resulted in diminished coverage at an increased cost to generate commissions constituted financial abuse.[11]

Pursuant to California Probate Code section 859, those who engage in elder financial abuse will be held liable for double damages, and, in the court's discretion, liable for attorney fees and costs. The statute further states that these remedies are in addition to any other remedies available in law to a person authorized to bring the action.

Demonstrative of how serious California is taking financial abuse of elders, the state has made it *mandatory* under the Code for employees and officers of financial institutions to report suspected financial abuse of an elder to local law enforcement or adult protective agency (the "Mandate").[12] The statute, however, is limited in two ways. First, it may only apply to bank institutions and not necessarily to brokerage or investment firms.[13] Second, it does not permit a private right of action, though failure to report suspected financial exploitation may render the financial institution liable, both criminally and civilly, through a regulatory proceeding.[14]

At present, there is only one case has that has tested the scope of mandatory reporting for officers and employees of financial institutions in earnest. In *Das v. Bank of America*,[15] the plaintiff's father, an elderly man with diminished mental capacity, fell victim to a series of lottery scams that involved him wiring significant funds from his commercial bank account to other countries.[16]

The plaintiff used the Mandate to attempt to import a duty of care onto the bank that would give rise to private right of action for the plaintiff. The court cited a section of the Mandate that states, "No action shall be brought under this section by any person other than the Attorney General, district attorney, or county counsel."[17] The court concluded that the legislature intended to preclude private rights of action, and further upheld California's position that banking institutions

California's Mandate requires employees and officers of financial institutions to report suspected financial abuse of an elder to local law enforcement or an adult protective agency.

are not fiduciaries to their customers, and the plaintiff did not allege facts sufficient to allege differently.[18] The court continued that a bank's contractual relationship with its customer does not include an implied duty to supervise account activity or to inquire into the purpose for which the funds are being used.[19]

The *Das* court, however, did not conclude that banking institutions are immune to tort liability to their customers.[20] Banking institutions can be subjected to tort liability for failing to discharge contractual duties with reasonable care and may be liable for aiding and abetting a tort when it renders "substantial assistance" to a tortfeasor.[21]

In addition, the *Das* ruling implied that parties that *are* fiduciaries to the elderly and/or have a contractual duty to supervise account activity may be held liable in negligence for failing to flag suspicious account activity.[22] Viewing this idea in the context of broker-dealers, registered investment advisers, and financial advisors, which have fiduciary relationships with their clients, it remains to be seen how the Code will impact situations where they fail to flag suspicious investment activity in the brokerage accounts of their elderly clients.

Conclusion

As the population of the United States continues to age, both state and federal regulators and self-regulatory organizations such as FINRA have an important role to play in strengthening the protection of seniors and other vulnerable people.

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NOTES

1. U.S. News & World Report, Baby Boomer Report (2015), www.usnews.com/pubfiles/USNews_Market_Insights_Boomers2015.pdf.
2. The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders (June 2011).
3. Stephen Dane, Office of Investor Advocate, Elder Financial Exploitation: Why It Is a Concern, What Regulators Are Doing About It, and Looking Ahead (June 2018) (SEC white paper), www.sec.gov/files/elder-financial-exploitation.pdf.
4. *See, e.g.*, Alaska Stat. § 47.24.900; Cal. Penal Code § 368; Cal. Welf. & Inst. Code § 15610.30; Del. Code tit. 31, § 3913; Ky. Rev. Stat. § 209.030(2); Me. Rev. Stat. Ann. tit. 17-A, § 903; Minn. Stat. § 609.2335; Utah Code Ann. § 76-5-111; Va. Code § 18.2-178.1.
5. FINRA Rule 4512 (Customer Account Information) states in pertinent part:

    (a) Each member shall maintain the following information:

    (1) for each account:

    . . .

    (F) subject to Supplementary Material .06, name of and contact information for a trusted contact person age 18 or older who may be contacted about the customer's account; provided, however, that this requirement shall not apply to an institutional account.
6. FINRA Rule 2165.
7. Greg Iacurci, *FINRA Exams to Probe Compliance with Elder Abuse Rules*, Inv. News (Feb. 5, 2019), www.investmentnews.com/article/20190205/FREE/190209978/finra-exams-to-probe-compliance-with-elder-abuse-rules.
8. *Id*.
9. Zimmer v. Nawabi, 566 F. Supp. 2d 1025 (E.D. Cal. 2008).
10. Bounds v. Superior Court, 177 Cal. Rptr. 3d 320, 322–23 (Ct. App. 2014).
11. Mahan v. Charles W. Chan Ins. Agency, Inc., 218 Cal. Rptr. 3d 808 (Ct. App. 2017).
12. *See* Cal. Welf. & Inst. Code § 15630.1.
13. *Id*. California courts have not formally opined on the scope of the meaning of "financial institution" under the Code.
14. *See* Cal. Welf. & Inst. Code § 15630.
15. Das v. Bank of Am., N.A., 112 Cal. Rptr. 3d 439 (Ct. App. 2010).
16. *Id*. at 443–44.
17. *See* Cal. Welf. & Inst. Code § 15630.1(g)(1).
18. *Das*, 112 Cal. Rptr. 3d at 450–51.
19. *Id*.
20. *Id*. at 451.
21. *Id*.
22. *Id*.