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Protecting seniors from financial abuse

Sales of dubious financial products by unscrupulous and manipulative agents increasingly target vulnerable elderly consumers. Here's how to fight back.

INGRID M. EVANS AND DAVID L. CHENG

Some years ago, Rosa, a lonely 76-year-old widow with limited English skills living on a meager, fixed income, received a flyer offering information that she desperately wanted about her state's Medicare program and estate planning.¹ Believing the flyer to be from a government program, Rosa called the number on it and spoke with Steve.

Steve never told Rosa that he was an insurance agent who made commissions selling insurance products to senior citizens. Rather, he said he was a "certified senior adviser" interested in helping seniors with their financial problems.² Taking Rosa to dinner, stopping by her house, and even mailing her a birthday card with a picture of his family, Steve gained her trust.

He also gained access to Rosa's finances and advised her to obtain a reverse mortgage to purchase a risky, long-term investment product with severe penalties for early withdrawal. Steve earned a commission on the investment.

Rosa did not need the money from the investment, as she owned her house with a small mortgage. And although Rosa told Steve that she wanted to leave her home to her children when she

died, the accrued interest on the reverse mortgage depleted almost all the equity that she had in the house. To get the house, her children would have to repay the entire mortgage within 12 months of Rosa's death.

Rosa suspected wrongdoing when she received statements showing that the reverse mortgage was costing more than \$1,200 a month. Because its proceeds were tied up in Steve's investment, which she could not surrender without incurring a huge penalty, she could not pay it off. Rosa became depressed, feeling foolish for having gotten herself into such a predicament.

Rosa's is the new and increasingly common face of elder abuse. Although many seniors suffer physical or emotional abuse at the hands of caretakers, even more are put at risk financially, mostly by family members or friends.³

With millions of baby boomers in or nearing their retirement years, investment companies have started shifting their marketing efforts and product lines to target this rising demographic. The growth in the senior market has also meant a corresponding growth in corrupt players looking for a quick and easy way to make money off seniors.

Rosa's story is more extreme than most, but it involves a typical scenario: the sale of a complex financial product that is difficult to comprehend, especially with respect to its disadvantages, which are downplayed by the agent selling the product. Instead, the agent uses enticing words to lead the senior consumer to believe the product is safe or provides superior returns. Such incidents have increased dramatically, particularly in states with large senior populations, such as Arizona, California, Florida, Pennsylvania, and Texas.⁴

Legal protections

Many states have passed laws designed specifically to protect seniors from financial abuse; they range from protective services and criminal statutes to civil claim statutes.⁵ The laws, and their afforded protections and available remedies, vary widely in each jurisdiction.

For example, California's Elder Abuse and Dependent Adult Civil Protection

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Act defines elder financial abuse broadly, reaching not only fiduciaries but also any person or entity who “takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.” The law also applies to anyone who helps someone else commit these acts.⁶ California allows plaintiffs to recover attorney fees and costs, punitive damages, and treble damages under certain circumstances.⁷

Some states allow for private enforcement of either state statutes or other consumer protection laws. Alternatively, violations of these laws can be used as predicate act violations under the states’ unfair and fraudulent practices acts. For example, in some cases, Georgia allows seniors to recover actual and punitive damages and attorney fees for injury resulting from a person’s or entity’s unfair or deceptive business practices.⁸

Federal laws also provide protection. For example, if Steve received a referral fee from the real estate broker or reverse mortgage company, that violates the Real Estate Settlement Procedures Act (RESPA), which states that a business entity is prohibited from paying any other business entity or the employees of any other business entity for the referral of settlement service business.⁹

In addition to providing a path toward more traditional common law claims—such as negligence, fraud, and breach of fiduciary duties—a state’s elder abuse statute can be a valuable weapon against rogue insurance agents, real estate agents or brokers, or any other person or entity looking to make a quick buck at the expense of seniors.

Claims can be filed against perpetrators using common law agency principles, by saying, for example, “An agent, in whom trust is reposed by the principal, owes an obligation of diligent and faithful service, a duty of loyalty, and must not take advantage of the confidentiality of the relationship.”¹⁰ A state’s elder abuse statute can be used to enhance the potential recovery in that situation.

In Nevada, for example, the offender could be ordered to pay two times the

actual damages incurred and attorney fees and costs if the offender acted with recklessness, oppression, fraud, or malice.¹¹ The possibility of punitive damages, attorney fees, and other penalties could deter a perpetrator from committing financial abuse.

Successful strategies

A number of tricky issues come up regularly in elder financial abuse cases. With proper handling of these concerns, attorneys can bring justice to elderly people who cannot protect

In elder financial abuse cases, the complexities of financial products are often downplayed by sales agents, who entice seniors to believe the products are safe or will provide a good return.

themselves.

Prefiling preparation and investigation. Conducting thorough preparations and investigations before filing will help you not only determine the case’s merits but also examine other issues, such as the client’s health, demeanor, financial situation, and relationship with family or friends.

One of the most critical issues at this stage is ensuring that both you and the senior client have common expectations regarding representation. Seniors who have been financially abused are often reluctant to turn to an attorney. Although these potential clients may recognize that they have been duped and are troubled by it, many want to minimize or ignore what happened.

Elderly victims may be overwhelmed by the abusive situation and embarrassed to acknowledge it. Even if shame does not prevent them from acting on their own behalf, they are unlikely to know how or whom to sue, or what laws exist to help them.¹²

Take time to clearly explain to clients the time, costs, and effort needed to undertake their fight. Remember, you need a willing client prepared to go the distance. This can be the senior client, a conservator, or anyone who has power of

attorney over financial matters, such as a family member. When the case is not clearly explained, you run the risk of having the senior client drop it halfway through litigation.

At the beginning, take time to conduct a thorough fact-finding investigation into your client’s claims, requesting that he or she bring, if possible, all relevant documents, a list of potential witnesses and family members with contact information, and any correspondence he or she may have had with others regarding the case.

More so than with other types of litigation, elder financial abuse cases need witnesses who can corroborate, or provide documentary evidence to support, the victim’s testimony. Many seniors have difficulty remembering specific facts that can be important to their case, such as whom they spoke to, what was discussed, and when. In some cases, the senior client represented by a conservator or an executor may have already lost his or her mental capacity—or is dead and therefore unable to testify.

Conducting a thorough investigation also helps when drafting a potential senior client’s complaint. Most elder financial abuse claims are grounded in fraud, which requires that the claims be pleaded with particularity in federal and some state courts.

Often, clients want their family members to participate in meetings with you. Take precautions to avoid any claim that the attorney-client privilege is nullified through familial involvement at these meetings by drafting correspondence and retainer agreements (with the necessary conflict disclosures) that specify that family members are acting as the seniors’ agents. Also, explain to senior clients the status of their cases, and meet privately with them occasion-

ally, to avoid a later claim that family members exerted undue influence on them.

Finally, keep in mind that succession issues may sometimes arise in elder financial abuse cases. Use your investigation to determine who can continue the litigation in the event of your senior client's death, whether it is the client's executor, successor trustee, or someone else in charge of the client's estate.

Pleading and statute of limitations. A major concern with litigating these cas-

es is the length of time that usually passes before senior clients bring their claims forward. Typically, most elder financial abuse occurs without the client's knowledge and is not discovered until years later. In those cases, time is of the essence, and cases need to be brought promptly to avoid statute-of-limitations issues.

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Notes

1. To protect privacy, names have been changed and facts slightly altered. However, the situation described is similar to that of many senior citizens.

2. After a newspaper investigation into the deceptive nature of the title "certified senior adviser" and hearings in the U.S. Senate, some states, including Massachusetts, have initiated legislation that would ban the use of such misleading titles. See Charles Duhigg, *For Elderly Investors, Instant Experts Abound*, N.Y. Times A1 (July 8, 2007).

3. Cal. Atty. Gen. Off. Crime & Violence Prevention Ctr., *The Financial Abuse of Seniors* 18, www.safestate.org/shop/index.cfm?cat=2&

navid=107&action=list#Elder%20Abuse.

4. See Natl. Comm. for Prevention of Elder Abuse & Natl. Adult Protective Servs. Assn., *2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older* 19, 21 (prepared for Natl. Ctr. Elder Abuse Feb. 2006), www.apnetwork.org/Resources/docs/AbuseAdults60.pdf; Roman Lillie, *Elder Abuse on the Rise in Florida*, WCTV News (Jun 23, 2008), www.wctv.tv/news/headlines/20664929.html; Jon Johnson, *Adult Protective Services Addresses Elder Abuse*, E. Ariz. Courier (Jan. 14, 2009), www.eacourier.com/articles/2009/01/14/news/doc496d381f3a303676762454.txt; Press Release, Rep. Joe Sestak (D-Pa.), *Cong. Joe Sestak Testifies on Elder Abuse* (Apr. 23, 2008), http://sestak.house.gov/list/press/pa07_sestak/080423_ElderAbuse.shtml; Brenda K. Uekert, *Elder Abuse and Neglect* (Natl. Ctr. St. Cts. 2003), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=218> (indicating a 300 percent rise in reported cases of elder abuse since 1986, with 90 percent of the perpetrators being family members).

5. For a general survey, see Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 San Diego L. Rev. 505, 556-91 (2004).

6. Cal. Welf. & Inst. Code Ann. §§15600, 15610.30 (Westlaw current through 2008 Reg. Sess.).

7. See Cal. Civ. Code Ann. §3345 (West 1997); Cal. Welf. & Inst. Code Ann. §15657.5 (Westlaw current through 2008 Reg. Sess.). California also restricts specific conduct—for example, it requires insurance agents to identify themselves in writing as such before they make at-home solicitations. Cal. Ins. Code Ann. §789.10 (2005).

8. See Ga. Code Ann. §§10-1-850, 10-1-853 (1993).

9. See 24 C.F.R. §3500.14 (2008); 12 U.S.C. §2607 (2006). Brokers in reverse mortgage schemes as a matter of course receive large kickbacks from lenders, which must be properly disclosed under federal law. Although reverse mortgage and brokerage firms are well aware of these reprehensible practices, many of them encourage this bad behavior by paying the insurance and real estate agents' marketing expenses and then feigning ignorance of the abuses.

10. See generally *Restatement (Second) of Agency* §393 (1958).

11. Nev. Rev. Stat. §§41.1395 (1997), 598.0977 (1993).

12. Moore & Schaefer, *supra* n. 5, at 524.

13. Steven Riess, *Does Your Elder Have Standing?* (St. Bar Cal. 2008), www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10705&id=7102 (available to members only).

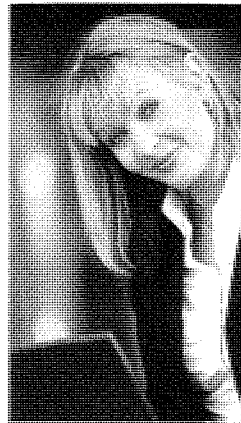
14. *Saks v. Damon Raiké & Co.*, 8 Cal. Rptr. 2d 869, 874-76 (App. 1992).

15. Riess, *supra* n. 13.

16. Cal. Civ. Proc. Code Ann. §36(a) (West 2006).

17. For a detailed description of other financial fraud schemes affecting seniors, see Moore & Schaefer, *supra* n. 5, at 532-51.

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