The senior swindlers:
Identifying financial elder abuse scams and holding financial institutions liable

By Kirsten M. Fish and Deena Zacharin

Freida, age 79, never married and with no children, believed she had finally met the love of her life while shopping at a grocery store one day.[1] The man was kind and helpful as they chatted in the store. After exchanging phone numbers and building what she thought was a romantic relationship during numerous phone calls, dinners and meetings in the park over the next several months, her "boyfriend" began asking her for money. The requests were for a myriad of different reasons, all of which pulled on Freida's heartstrings. First, his grandson was sick with cancer and he asked to borrow money for the medical treatments. He assured her he would be able to pay her back once the insurance company approved the treatments. Next his car broke down and he needed money to buy a new one so that he could continue to visit his sick grandson in the hospital. Again, he promised he would pay her back. Each time he asked, Freida walked into her longtime bank branch and walked out with thousands – or even tens of thousands – of dollars in cash that she then gave to her "boyfriend." Although her savings were dwindling, she was certain that she was helping him and that the two would soon get married and be together forever.

George, who even at age 86 had always handled his own finances, received a pop up message on his computer one day indicating that his bank account had been compromised. After calling the number on the screen and speaking to a person who identified himself as a "fraud protection specialist," George agreed to send dozens of wire transfers from his regular bank to an offshore account so that the "fraud" could be cleared up and he could safely wire his life savings back into his account. While all of the international wire transfers out of his account – totaling over $2,500,000 – went through, the attempted wire transfers of his money back into his account did not, and the "fraud protection specialist" who George thought had been helping him all along could now no longer be reached.

Marie, an 83-year-old longtime widow and volunteer with her church, received a call notifying her that she had won a major sweepstakes worth millions of dollars. All she needed to do to collect her winnings was wire funds out of state to help cover the fees, taxes, etc. The calls requesting these funds became more and more frequent. After each call, Marie would ask her financial advisor to transfer money from her investment account to her checking account, from which she would then wire the requested funds – totaling close to $300,000 – to the callers who kept insisting that her big prize payout was only one more wire transfer away.

While there are too many variations of these stories to list here, the end result is always the same – the elder ends up falling victim to a financial scam that robs them of their entire life savings at a time when they need those funds the most. While deceiving older adults is not a new problem, it is one that is growing in prevalence. In fact, millions of elderly Americans each year will fall victim to some type of financial scam, including romance scams, lottery and sweepstakes scams, charity scams, government impersonation scams and tech support scams, just to name a few.

Typically, their family and friends have no idea this is happening until it is too late, causing the victims' families to ask questions such as – how could she have fallen for that? Why would he believe some guy

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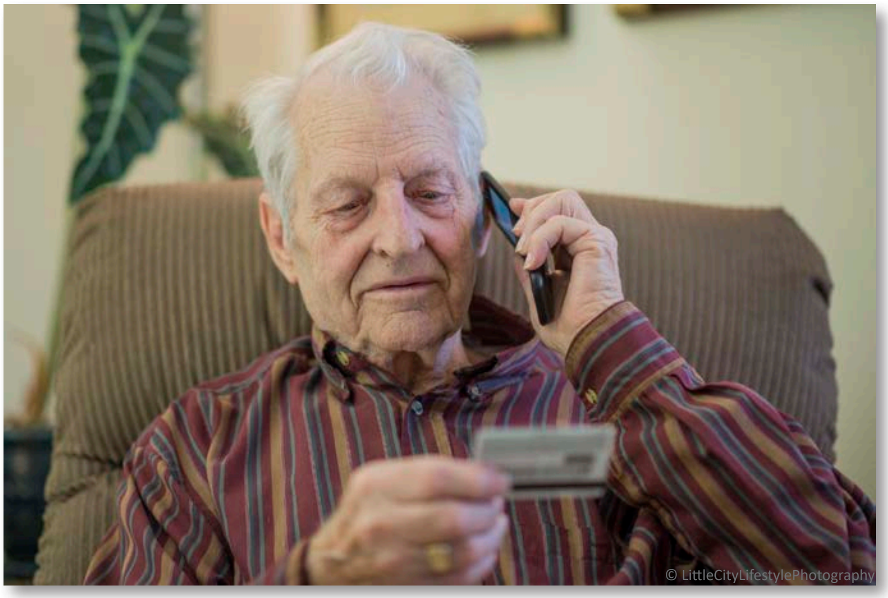

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he didn't know on the phone? Why didn't she tell me before doing this?

It is not surprising if you have that reaction upon hearing one of these stories. Yet it is estimated that one in five seniors will become a victim of some sort of financial scam in their lifetime.[2] Thus, whether you have an elderly parent or elderly clients, you are bound to hear about one of these financial scams at some point in your legal career. It is important to know when confronted with a victim of a financial elder scam that it is not uncommon – in fact, there is a neuropsychological basis for such behavior.[3] It is also important to know that it may be possible to obtain a recovery of the elder's money arguing that under California's Elder Abuse Act, the elder's financial institution knew or should have known that the elder's large, frequent, and uncharacteristic withdrawals or wire transfers were due to financial abuse.

Elders are particularly vulnerable

Financial decision-making often declines over time among older adults, which factors into the quality of elders' subsequent decision-making performance, susceptibility to scams and psychological well-being. Moreover, it is now understood that dementia syndromes may have an onset that lasts decades with relatively "mild" symptoms emerging years prior to a full blown dementia syndrome. In some cases, the "mild" symptoms do not progress, but persist, resulting in subtle declines that may be hard to notice on the surface. With mild cognitive impairment, cognitive deficits are present, but day-to-day functioning is relatively intact.

In many ways, individuals with pre-dementia or mild cognitive impairment are the perfect victims for financial scams. They retain control of their often sizeable assets and are out in the community, increasing their exposure to potential scammers. The scammers are therefore able to groom the elder, using in-person visits, online media, emails and phone calls, in order to develop a close relationship with the victim. And this communication is often frequent and intense – over periods of weeks, months or even years – until the elder finally succumbs to the pressure and starts acquiescing and providing the scammers with more and more money that the elder either withdraws from their bank accounts in cash or wires directly to the scammers. In either situation, the elder is often making large, frequent, and uncharacteristic transactions by way of face-to-face transactions with their bank's tellers and/or managers which are clear "red flags" of financial elder abuse.

Financial institutions are on notice

For at least the past decade the federal government has made it clear to financial institutions that they are the "first line of defense" against financial elder abuse and have advised the industry to identify the abuse at its outset, *before* the elder's assets have been dissipated.

For example, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued an advisory to financial institutions in 2011 "to assist the financial industry in reporting instances of financial exploitation of the elderly, a form of elder abuse."[4] The advisory informed banks that "Financial institutions can play a key role in addressing elder financial exploitation due to the nature of the client relationship. Often, financial institutions are quick to suspect elder financial exploitation based on bank personnel familiarity with their elderly customers." FinCEN's advisory also contains examples of the "red flags" of financial exploitation of the elderly, including "erratic or unusual banking transactions or changes in banking patterns."

In 2013, seven federal agencies jointly issued guidance advising financial institutions that they play a key role in preventing and detecting elder financial exploitation because "a financial institution's familiarity with older adults it encounters may enable it to spot irregular transactions, account activity, or behavior."[5]

In 2016, the Consumer Financial Protection Bureau issued recommendations to financial institutions to prevent, detect, and respond to the financial exploitation of older people, including among others to "develop, implement and maintain internal protocols and procedures"; "train management and staff to prevent, detect, and respond to elder financial exploitation"; and "detect elder financial exploitation by harnessing technology." These advisories are helpful to show not only what the banks were on notice of, but also to lay out a discovery plan for the plaintiff's attorney in financial elder abuse cases.

Financial institutions may be liable

When reviewing a potential financial elder abuse case, there are usually at least two categories of defendants: the scammer who convinces the elder to part with their life savings – who often cannot be located – and the financial institution from which the elder repeatedly withdraws or wires the cash to send to the scammer. The California Legislature has acknowledged the devastating effect of financial abuse on elders and has provided a remedy – including attorney's fees and costs pursuant to Welfare & Institutions Code § 15657.5 – where it is proven by a preponderance of the evidence that a financial institution is liable for financial abuse, which is defined in Welfare & Institutions Code § 15610.30 as follows:

> (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
> (1) 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.
> (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a *wrongful use* or with intent to defraud, or both.
> (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.
> (b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a *wrongful use* if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property *and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult*.
> (c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.
> (d) For purposes of this section, "representative" means a person or entity that is either of the following:
> (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.
> (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney. (Emphasis added.)

The remedial nature of the financial elder abuse statutes is clear from the Elder Abuse Act's "Legislative Findings and Intent" language, i.e., "[t]he Legislature recognizes that elders and dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect these persons," and the case law interpreting it. (See, e.g., *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1315, *as modified on denial of reh'g* ["The Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code § 15600 et seq.) was enacted to provide for the "private, civil enforcement of laws against elder abuse and neglect"], *citing Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) Moreover, as a remedial statute it is axiomatic that the Elder Abuse Act must be liberally construed to benefit the protected class. (See *Mahan v. Charles W. Chan Ins. Co.* (2017) 14 Cal.App.5th 841, 860-61 ["a remedial statute is to be 'liberally construed on behalf of the class of persons it is designed to protect'"]; *Ring v. Harmon* (2021) 72 Cal.App.5th 844, 853 [holding in a financial elder abuse case that "[w]here there is room for debate regarding the meaning of the statutory text of the [financial elder abuse statute], it should be 'liberally construed on behalf of the class of persons it is designed to protect,' and in a manner compatible with its 'overall remedial purpose'"].) That is why, in order to better protect elders and dependent adults, the Legislature amended Welfare & Institutions Code § 15610.30 in 2000 to "include not only the persons committing the prohibited acts but also anyone who assists in committing the prohibited acts," and noted that "[t]he changes to the definition are intended to make it easier to prosecute financial abuse of the elderly and dependent adults." (AB 2107, as amended August 7, 2000.)

It is clear that without the assistance of the elder's financial institution, these financial scams against the elderly could not be effected by the scammers. With the depth of guidance and direction given to financial institutions regarding the "red flags" of financial elder abuse, they are clearly on notice about such abuse by third parties. In fact, financial institutions often claim in their marketing materials that they are actively working to protect elders by implementing systems to detect, deter and respond to the hallmarks of financial elder abuse, using this as a sales tool to solicit senior customers who they know often have substantial assets. Thus, when a financial institution has knowledge of the hallmarks of financial exploitation of the elderly, including "erratic or unusual banking transactions," and yet assists with such transactions anyway, the financial institution arguably knows that its conduct is likely to be harmful to the elder.

Further, when a scam is discovered and the elder requests reimbursement by the bank for failing to prevent, detect, and respond to the elder financial exploitation, the financial institution may try to claw back a wire transfer, but otherwise generally refuses to reimburse the elder. Under Welfare & Institutions Code § 15657.6, this refusal may also form the basis for a financial abuse claim. The statute states in pertinent part: "A person or entity that takes … or assists in taking … the real or personal property of an elder … when the elder … lacks capacity pursuant to Section 812 of the Probate Code, or is of unsound mind, but not entirely without understanding, pursuant to Section 39 of the Civil Code, shall, upon demand by the elder … return the property and if that person or entity fails to return the property, the elder … shall be entitled to the remedies provided by Section 15657.5, including attorney's fees and costs." Arguably, falling victim to a financial scam meets the definition of incapacity in Probate Code § 812 which states:

> Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make

a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision.

Lastly, a claim of direct financial elder abuse against a financial institution can also be maintained under Welfare & Institutions Code § 15610.30(a)(1) when a bank is charging the elder fees for the wire transfers being made to the scammers or is receiving commissions on stock sales in order to liquidate cash for the elder to give to the third party abuser.

Conclusion

The federal agencies referenced above have clearly given financial institutions the information they need to protect their elderly customers. Accordingly, banks should not only have policies and procedures on preventing, detecting and responding to financial elder abuse, but they should also be training their frontline bank staff and corporate fraud detection departments on the red flags to watch for in order to prevent the depletion of their elderly clients' life savings. Unfortunately, many financial institutions fail repeatedly at this task, openly shirking their responsibilities to their elderly customers. They will even go so far as to blame the victim, in addition to claiming that specifically watching out for seniors constitutes age discrimination and arguing that the banking statutes require them to honor customer withdrawals no matter how many obvious red flags are raised in the process. Given the banking industry's longstanding failures in this respect, plaintiff's attorneys must therefore use the protective and remedial financial abuse statutes found in California's Elder Abuse Act to prove them wrong.

In the meantime, talk to your elderly parents, grandparents, aunts, uncles and friends about these different types of financial elder abuse scams and warn them to never give personal information to anyone over the phone or internet and to never give or send anyone money without speaking to a trusted friend or relative first. If the banks are not going to step up to protect our elders once they have fallen victim to these scams, at the very least we can arm our loved ones with the information they need so that they can hopefully avoid these "senior swindlers" in the first place. ■

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1 The names and facts in this article are an amalgam of stories we hear from potential clients and do not reflect any particular case.

2 https://www.aba.com/-/media/documents/about/foundation/2017-older-americans-benchmark-report.pdf?rev=f9ea08e97bc84996aa77e90c24ffe04f&hash=69177116DF64155675C02B3CA4FFC664.

3 The neuropsychological research addressing vulnerability to financial scams is outside the scope of this article.

4 https://www.fincen.gov/sites/default/files/advisory/fin-2011-a003.pdf.

5 https://www.sec.gov/news/press/2013/elder-abuse-guidance.pdf.