

THE CIVIL LITIGATION RESPONSE TO FINANCIAL EXPLOITATION

I. Introduction

Elder abuse is a serious and growing problem affecting millions of elderly people across the country. According to the National Center on Elder Abuse, the number of reported instances of domestic elder abuse rose 150% from 1986 to 1996.¹ While most readily associate elder abuse with physical, sexual and emotional abuse, of the total number of reports of domestic elder abuse, 12.3% involved financial/material exploitation.² By 2005, estimates indicated at least 5,000,000 financial abuse victims each year.³

While these numbers are staggering, the true number of victims is yet unknown as there are no official national statistics due to multiple issues including under reporting by abuse victims, the variety of definitions of abuse, a lack of a uniform reporting system and a lack of comprehensive data.⁴ In fact, there is “wide consensus that a clear picture of the incidence and prevalence of elder abuse in the United States is sadly lacking.”⁵ The statistics then, can only represent a small portion of the numbers of victims of abuse, including the victims of financial exploitation. The question is no longer whether financial exploitation of elders is a growing problem but how to best respond to that problem.

While a thorough analysis of litigation in all 50 states cannot be addressed in this article, the response of several leading states in the battle against financial exploitation and abuse deserve particular attention.⁶ California, Florida and Arizona have determined to fight elder abuse and exploitation with specific civil causes of action for financial exploitation and specific criminal statutes that include civil remedies.⁷ The statutory schemes in these states, and resulting civil litigation responses will be analyzed and contrasted against those available in states like Texas, which, despite being among the top four states with populations 65 and over,⁸ does not provide a specific civil cause of action for financial abuse, and outside of the care giver context,

does not have a specific penal code provision criminalizing the financial exploitation of elderly or disabled residents.⁹ The goal of this article then is to advocate the necessity of legislation similar to that of California, Florida and Arizona, and to analyze the elements of effective civil litigation in response to financial exploitation. Finally, recommendations for handling will be specified for the trial lawyer representing victims of financial exploitation.

II. The Many Faces of Financial Exploitation

Almost 20 years ago, the *New York Times* ran a front page article written by John Nordheimer spotlighting financial abuse of the elderly.¹⁰ In the article, Nordheimer called financial exploitation “the crime of the 90's.” With the advent of new technology and the resulting increased access to older adults, the “crime of the 90's” is surely “the crime of the 2000's” as well. So what is financial exploitation, and how does it appear?

While financial abuse has many faces,¹¹ it is most commonly defined as the wrongful use of an elder's resources for another person's profit or advantage.¹² Highlighting its broad spectrum, Florida statutes define “exploitation” as including but not limited to: “1) breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale or transfer of property; 2) unauthorized taking of personal assets; 3) misappropriation, misuse or transfer of monies belonging to a vulnerable adult from a personal or joint account; or 4) intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.”¹³ It is evident that financial exploitation takes on many forms and faces, including the faces of trusted children and family members, the faces of unscrupulous salesmen preying on the vulnerability of the lonely and isolated, and even the faces of fiduciaries whose duty it is to protect the rights and assets elders.

Sadly, news stories routinely tell the stories of elders and vulnerable adults who are victimized by strangers and family members alike. The old stories of “aluminum siding salesmen” are being replaced with intricate frauds and scams perpetrated through the use of modern technology. In 2003, the National Consumer League reported that 26% of telemarketing victims were age 60 and older,¹⁴ and Congress estimates that consumers lose more than \$40 billion annually to telemarketing fraud alone wherein as many as one in ten may be fraudulent.¹⁵

As computer technology has become more available and less intimidating to older adults, Web-based exploitation has grown. In 2002, the National Fraud Information Center received reports of internet fraud totaling \$14, 674,933,¹⁶ and internet fraud complaints in 2008 were up 33.1% over 2007.¹⁷ From e-mails from stranded “college students” in Europe desperately seeking a few thousand dollars to get home, to gold coin investment scam artists preying on the fears of an economic turndown, senior adults are becoming more and more susceptible to exploitation. The fight against financial exploitation has been waged at both the Federal and State levels, so before analyzing the civil litigation response, a brief historical review of the national response is warranted. **III. The**

Federal Response to Financial Exploitation

At the Federal level, the response to elder abuse lagged significantly behind the fight against child abuse.¹⁸ While initial studies of elder abuse emerged in the late 70's,¹⁹ it wasn't until 1981 and 1990 that several congressional reports identified elder abuse as a widespread problem.²⁰ Even though initial studies indicated that the number of financial abuse cases was relatively small compared to other forms of abuse,²¹ the incidence of financial abuse was nevertheless significant enough to raise concern.²²

In 1996, the National Elder Abuse Incidence Study was mandated by Congress to study the issue.²³ Shortly thereafter, the National Center on Elder Abuse was established in an effort to

determine an effective response to the problem,²⁴ and Legislation began to solidify around what was being called “the “Elder Justice Proposal.”²⁵

In 2003, Senator John B. Breaux and Senator Orring Hatch,²⁶ in outlining the highlights of the Elder Justice Proposal, stated: “[n]early a quarter century has passed since the First Congressional Hearings on Elder Abuse declared it to be a national disgrace. However, congressional action remains illusive, and not one single Federal employee works full-time on elder abuse, neglect and exploitation issues.”²⁷ The Senators declared that “Congress must act now to provide Federal leadership to those on the front lines who are fighting elder abuse with scarce resources and fragmented systems.”²⁸

As a result of the research and recommendations made to fight the problem of elder abuse, the long-awaited Elder Justice Act was finally enacted on the 23day of March , 2010.²⁹ The Act recognized that enhancing the law enforcement response was required, but it specifically refused to create a private cause of action.³⁰ While the Elder Justice Act is a positive step in response to our “national disgrace,” without promulgating a private cause of action, the Act is limited in its scope and susceptible to being reduced to mere administrative inquiries without real accountability. An Act which does little more than creating long and tangled webs of administrative procedure runs the risk of having little or no effect on the welfare of those it seeks to protect. Ultimately, then, it is left to the states to battle elder abuse, including the abuse of financial exploitation.

IV. The States’ Legislative Response to Financial Exploitation

A detailed analysis of the varied legislative responses at the state level is beyond the scope of this paper, but a state-by-state compilation of the statutes addressing physical abuse is available.³¹ An overview reveals that fundamentally, the legislative response to financial

exploitation at the state level provides protection in three basic ways: through Guardianships, Adult Protective Services, and criminal penalties.

A. Guardianship Protection in Response to Financial Exploitation

The first broad avenue of protection is provided through the Guardianship of adults with diminished capacity. The framework for this protection lies in the *parens patriae* of the state, which acts to protect the right of its citizens to live a life in which basic needs are met and free from abuse.³² Guardianship is an important and effective tool in protecting those with diminished capacity,³³ with protection put into place for the well being of the incompetent person.³⁴

However, the limited scope of guardianship protection is readily apparent. A person over 65 years of age who is otherwise competent, or whose mental capacity is beyond the state's definition of incapacity, would not have guardianship protection, nor would he wish to have this protection as significant liberties are removed for the sake of the protection afforded. So the fight against financial exploitation through Guardianship protection does not address the full breadth of the problem.

B. Adult Protective Services Protection in Response to Financial Exploitation

Similarly, Adult Protective Services ("APS") statutes typically provide a "last resort" protection for seriously impaired adults with no family or friends to protect them.³⁵ A brief review of Texas' use of Adult Protective Services is warranted by way of example in highlighting the narrow scope of the protection afforded, and the inherent limitations in providing the designed protection.

For example, in the State of Texas, the Department of Family and Protective Services is charged with the duty of investigating the financial exploitation of elders.³⁶ Then in cases of alleged financial exploitation, a "comprehensive assessment of the person's ... financial

condition, social interaction and support and need for legal intervention [is required] in assessing whether an elderly or disabled person is in “*imminent* risk of ... exploitation”³⁷ [emphasis added]

While there is no argument that such an investigation is relevant and necessary, the effectiveness of a lengthy investigation by APS before responding to an “imminent risk of exploitation” can hardly be debated. Even then, once the case worker is confident an imminent risk exists, he is still constrained to operate under the working definition of “exploitation,” defined as “an illegal or improper act or process of a caretaker, family member, or other individual who has an *ongoing relationship* with the elderly or disabled person using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.” [emphasis added]³⁸ If no ongoing relationship is found, the assistance available from Adult Protective Services to the “imminent risk” would by definition not be available.

Consequently, victims of an exploitive telemarketer, the promoter of a fraudulent investment scheme, or even the classic “aluminum siding salesman,” would fall outside of the APS assessment criteria, and the victim remains the victim. Like the protection afforded through Guardianships, the protection provided through Adult Protective Services is limited, and in the State of Texas, is not designed to protect against exploitation perpetrated by someone who does not have an “ongoing relationship” with the elder.

C. Criminal Penalties for Financial Exploitation The last broad avenue of legislative response in the fight against financial abuse is found within criminal statutes. Here, the states' criminal statutes vary significantly, with some states promulgating specific criminal violations for financial exploitation, with others incorporating sentencing enhancements when the victim is over 65 years of age.³⁹ Once again, a brief analysis of the Texas criminal law is given by way of example.

In the Texas Penal Code, an "elderly individual" is defined as a person 65 years of age or older, without any additional requirement of incapacity or vulnerability.⁴⁰ "Exploitation" is defined as the "illegal or improper use of an individual or of the resources of the individual for monetary or personal benefit, profit or gain."⁴¹ However, an analysis reveals that while physical abuse of an elder is a crime,⁴² exploitation of an "elderly individual" is a crime only in limited circumstances.

In the Texas, exploitation of a citizen 65 and older is a crime *only* if the person committing the offense is "an owner, operator, or employee of a group home, nursing facility, assisted living facility, intermediate care facility for persons with mental retardation, or other institutional care facility"⁴³ Exploitation is inexplicably omitted from the general criminal offense of "injury to an elderly individual" within the Texas Penal Code.⁴⁴

Even in states that do not have such limited definitions of exploitation, elders relying on government agencies or prosecutors to pursue cases of financial exploitation are presented with historic delays. Agencies assigned with the responsibility of addressing abuse and exploitation are historically overwhelmed,⁴⁵ and the ability and willingness of prosecutors to pursue cases of elder abuse have also been brought into question, resulting in "advocacy for a multi-disciplinary approach to fight elder abuse, neglect and exploitation."⁴⁶ There can be little doubt that the backlog of cases being handled through agencies and district attorneys' offices have only

increased over the last decade, further diminishing the effectiveness. The only remaining hope in the fight against financial exploitation is civil litigation.

V. The Civil Litigation Response to Financial Exploitation

The limited scope of protection as outlined above makes it incumbent upon civil trial lawyers to step in and take up the cause of elder abuse and financial exploitation. Because of the variety of state statutes dealing with exploitation, an attorney evaluating a the financial exploitation case must first carefully examine the state's statutes to determine if a specific cause of action for financial exploitation exists, and whether the violation a criminal statute also establishes a civil cause of action. If not, common law causes of action such as breach of contract, fraud, breach of fiduciary duty and undue influence must be explored and included when appropriate in any action.

Regardless of the legislative scheme, an attorney preparing to initiate a civil cause of action for financial exploitation must thoroughly explore all common law and statutory causes of action and be prepared to present all avenues of recovery within a single action. In the remaining portion of this article, the litigation options available California, Florida, and Arizona, which have implemented statutes specifically addressing the financial exploitation of elders, will be analyzed and compared to the laws of Texas, which to date have no such civil actions and remedies.

A. Litigating Financial Exploitation in the State of California

In a recent study conducted by the Elder Financial Abuse Task Team Report to the California Commission on Aging, statistics indicated that people over 65 were heavily targeted by financial predators.⁴⁷ In fact, the Report found that over 70% of people over the age of 50 had been approached fraudulently, with no less than \$3.8 billion lost by seniors to financial scams.⁴⁸ Not surprisingly then, California's financial elder abuse statute recognized that "elder

and dependent adult abuse is ... indiscriminate ... and factors such as one's social economic status, gender, race, ethnicity, educational background and geographic location do not provide an impregnable barrier against its broad, horrible reach."⁴⁹ In response, California enacted specific civil causes of action for financial exploitation, as well as criminal statutes which allow for civil remedies. The result is to encourage attorneys to fight financial exploitation through civil litigation, through a broad and diversified response.

California's Elder Abuse and Civil Protection Act provides a specific civil cause of action for financial exploitation.⁵⁰ Under the Act, elder abuse specifically includes financial abuse⁵¹ of any resident 65 years of age or older.⁵² This civil cause of action is available without regard to the issue of mental or physical capacity.⁵³ The Act also includes civil remedies for the criminal exploitation of a "dependent adult," defined as "a person between the ages of 18 and 64 with issues of diminished capacity."⁵⁴ Financial exploitation of an elder or dependent adult occurs not only "when a person 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*,"⁵⁵ but also when "any person who takes advantage of the elderly ... refuses without good faith to disgorge the property."⁵⁶ [emphasis added] It is important to note that "wrongful use" also occurs when assets are taken and the person or entity knew or should have known that the conduct was likely to be harmful to the elder or dependent adult.⁵⁷

By establishing a specific civil cause of action for financial exploitation without the additional elements of intent or diminished capacity, and a criminal statute which provides civil remedies for incapacitated elders, the civil litigation attorney has powerful and effective weapons in fighting exploitation. It is also important to note that under the California scheme, the burden of proof required is only by a preponderance of the evidence.⁵⁸ However, if proven by clear and convincing evidence that the defendant is guilty of recklessness, oppression, fraud or malice in

the commission of the financial abuse, the limitations on damages that might otherwise exist do not apply.⁵⁹

With respect to recoverable damages, not only is the victim entitled to compensatory damages and any other remedies otherwise provided, but also recovery of reasonable attorney fees and costs.⁶⁰ While costs are typically awarded to a prevailing party in a civil case, allowing the recovery of attorney fees recognizes two important realities. First, it recognizes that elders victimized by financial abuse will likely be unable to pay attorney fees. Second, it recognizes that elders will not be made whole even in victory, if attorneys are compensated through contingent fees which must be taken from any recovery. California, then, has taken critical steps to ensure that attorneys can realistically take up the cause of financially exploited elders.

Of course the California litigator should also look to any other consumer statutes and common law remedies available, including any causes of action for breach of contract, breach of fiduciary duty, fraud or undue influence. However, these various causes of action have different elements and burdens of proof and may or may not allow the recovery of attorney fees. This reality highlights the importance of the direct cause of action for financial exploitation.

In addition, California also provides enhanced damages in cases involving “senior citizens” or disabled persons victimized by deceptive acts or practices or unfair methods of competition.⁶¹ Once again capacity is not a prerequisite, making enhanced damages available in any action on behalf of a person who is 65 years of age or older.⁶² Under this enhancing statute, the trier of fact may award up to three times the amount the trier of fact would otherwise impose if it is found that “the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.”⁶³ Allowing treble damages presents not only a deterrent to exploitation, but also a well-deserved penalty for the exploiter.

By creating a direct civil cause of action for financial exploitation, civil remedies for criminal violations and the enhancement of damages otherwise available, California has taken important steps in the fight against elder abuse, and has presented the civil trial attorney with effective tools in representing victims of financial exploitation.

B. Litigating Financial Exploitation in the State of Florida

Like California, Florida has determined to fight abuse and exploitation by enacting a specific civil cause of action for exploitation, but the Florida action applies to the exploitation of “vulnerable adults.”⁶⁴ As a result, the attorney must be prepared to offer testimony on both prongs of the action and prove that his client is both a “vulnerable adult” and a victim of “exploitation.”

A “vulnerable adult” is defined as a person 18 years of age or older “whose ability to perform the normal activities of daily living, or to provide for his or her own care or protection, is impaired due to mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging.”⁶⁵ “Exploitation” is defined as obtaining or using, or endeavoring to obtain or use the vulnerable adult’s funds, assets or property for the benefit of someone other than the vulnerable adult by: 1) a person “who stands in a position of trust and confidence with a vulnerable adult,” or 2) by a person who “knows or should know that the vulnerable adult lacks the capacity to consent.”⁶⁶

Therefore, in order to take advantage of Florida’s direct civil cause of action, the attorney must first determine whether he is representing a “vulnerable adult.” This requires a thorough investigation of the client’s capacity and should begin with an investigation of any previous assessment conducted by health care professionals. If no assessment has yet been performed, and the attorney believes that capacity issues exist, it will be necessary to obtain a professional assessment and be prepared to present evidence through expert testimony that the client is a

“vulnerable adult” as defined by Florida law. In addition, the testimony of family members, care givers and friends would provide important testimony on this issue.

The next step is to determine if the facts constitute “exploitation” as defined under the statute.

Here, the attorney must carefully analyze the relationship that existed between the client and the defendant to determine if a confidential or trusted relationship existed.. If a confidential or trusted relationship existed, such as in a fiduciary relationship under a trust, power of attorney or guardianship, the remaining issue would be whether the funds were used for the benefit of someone other than the vulnerable adult. If no confidential or trusted relationship existed, an action may nevertheless be brought under the direct statute if the attorney can prove that the defendant knew or should have known that the client lacked the capacity to consent and thereafter used the funds for the benefit of someone other than the vulnerable adult. Lay testimony, as well as expert testimony from health care professionals, would be appropriate in establishing the lack of capacity to consent, and just as importantly, the red flags of incapacity that should have been evident even to a lay person. The final question to be answered by the attorney before filing suit is who can bring the action on behalf of the vulnerable adult.

Interestingly, the Florida statute provides that an action on behalf of a vulnerable adult who has been abused, neglected or exploited may be brought by the vulnerable adult, the guardian of the adult or a person or organization acting on behalf of the adult with consent.⁶⁷

The fact that the cause of action may be brought by the vulnerable adult himself indicates a recognition that the capacity of the vulnerable adult does not have to be so diminished as to first require the appointment of a Guardian. Additionally, allowing the action to be brought by a person or organization “acting on behalf of the vulnerable adult with the consent of that person,” presents an interesting issue if the attorney is attempting to establish exploitation by proving that

the defendant knew or should have known that the vulnerable adult lacked the capacity to consent. Nevertheless, it is clear that the civil trial attorney in Florida is not required to first establish a guardianship prior to bringing an action under the statute.

With respect to damages, the Florida statute provides that a vulnerable adult who has been abused, neglected or exploited may recover both actual and punitive damages “for any deprivation of or infringement on the rights of a vulnerable adult.”⁶⁸ Like California, the prevailing party may be entitled to recover “reasonable attorney’s fees, costs of the action, and damages.”⁶⁹ As discussed above, allowing recovery of attorney fees is an important element of damages for elders who would not be made whole even in victory if contingent attorney fees are taken from the recovery.

In addition to the civil remedies expressed above, Florida statutes also provide elders with civil remedies for financial exploitation which also constitutes a criminal violation.⁷⁰ Under this provision, where it is proven by clear and convincing evidence that the elder is a victim of “theft, robbery and crimes related thereto,” a cause of action with damages of “three-fold the actual damages sustained, together with reasonable attorney’s fees and court costs,” is available.⁷¹

Is it important to note that the definition of “exploitation” within Florida’s civil statute, and the definition of “theft” under its criminal statute, are strikingly similar, yet with one critical difference. While within the definition of each, the offender “obtains or uses or endeavors to obtain or use the property of another for the benefit of someone other than the victim,”⁷² in the criminal statute, there is no requirement that the victim be a “vulnerable adult”, so an individual over the age of 65, who would otherwise not be defined as a “vulnerable adult” under the civil statute, may bring a civil action for exploitation under the criminal statute, as long as the facts otherwise meet the definition of “theft.”⁷³

The Florida attorney, then, is provided with options in presenting causes of action for the financial exploitation of individuals 65 years of age and older regardless of capacity. Florida also provides that in civil actions in which a party is over the age of 65, he may move the court to advance the trial on the docket.⁷⁴ Like California, creating a direct civil cause of action for financial exploitation, and providing civil remedies for criminal violations, Florida has taken important steps in the fight against elder abuse, and has presented the civil trial attorney with effective tools in responding to financial abuse.

C. Litigating Financial Exploitation in the State of Arizona

Arizona is characterized as having some of the toughest criminal and civil elder abuse laws in the nation,⁷⁵ and the Arizona courts have recognized the state's intention to permit civil compensation for the violation of criminal statutes for over 10 years.⁷⁶

Like California and Florida, attorneys in Arizona have at their disposal a specific civil cause of action for financial exploitation.⁷⁷ Arizona's statute is similar to that of Florida and applies to vulnerable adults whose assets have been used by a person in a position of trust and confidence for the benefit of another.⁷⁸ As a result, the attorney in Arizona must determine whether his client is a "vulnerable adult" who has been victimized by "exploitation."

A "vulnerable adult" is defined as an individual 18 years of age or older "unable to protect himself from abuse, neglect or exploitation by others because of physical or mental impairment."⁷⁹ Therefore, the use of expert testimony will be important in establishing whether the client is "unable to protect himself as a result of physical or mental impairment." Medical records and psychiatric records should be obtained, and if none exist, an assessment of the client should be arranged with appropriate professionals.

Once the Arizona attorney has gathered evidence that his client is a "vulnerable adult," he must still determine whether he is a victim of "exploitation." Arizona defines "exploitation" as

“the illegal or improper use of a vulnerable adult or his resources for another’s profit or advantage.”⁸⁰ In establishing evidence of the exploitation, all records regarding the assets and the use of the assets by the defendant should be gathered, and appropriate experts such as forensic accountants may be required to establish this element of the action.

The final element in the Arizona cause of action is whether the defendant was “in a position of trust and confidence.” Under the Arizona statute, a person is in such a position if he has assumed a duty to provide care to the vulnerable adult, is a joint tenant or tenant in common with the vulnerable adult, has a fiduciary relationship with the vulnerable adult including a defacto guardian or defacto conservator relationship, or is in a confidential relationship with the vulnerable adult.⁸¹ The issue of whether a confidential relationship exists is determine by the court.⁸²

The attorney litigating financial exploitation in Arizona also has significant damages available as a result of the exploitation. The Arizona statute includes not only the recovery of actual damages, but also recovery of up to two times the amount of the actual damages.⁸³ The Arizona court may also order “forfeiture and revocation of significant rights, titles and interests” of the perpetrator in punishment for the financial exploitation.⁸⁴ Additionally, the recovery of attorney’s fees is specifically allowed in actions against caretakers and others with a legal duty to protect the vulnerable adult.⁸⁵ As a result the litigator in Arizona must determine whether such individuals have caused or allowed the exploitation to occur. If so, attorney’s fees are recoverable under the statute. If the exploitation is at the hands of a third party without such a duty, common law causes of action must be explored in order to recover attorney’s fees for exploitation.

Like California and Florida, Arizona provides civil remedies for violation of its criminal theft statute.⁸⁶ Under the statute, a person in a position of confidence who financially exploits a

vulnerable adult in the State of Arizona is subject to both criminal penalties and civil damages for the same conduct.⁸⁷ However, unlike the California scheme, the specific civil statute for exploitation will not be applicable to an adult over 65 who is not a “vulnerable adult.”⁸⁸ In this case, common law and statutory consumer statutes must be utilized in prosecuting exploitation. The attorney representing a vulnerable adult for exploitation in Arizona will therefore have a wide array of avenues to effectively prosecute exploitation both under the civil and criminal statutes.

D. Litigating Financial Exploitation in the State of Texas

While having the fourth largest population of individuals over 65 years of age,⁸⁹ in 2004, Texas had the nation’s highest reported rate of substantiated elder abuse reports - 72.4%.⁹⁰ Nevertheless, Texas has yet to follow the lead of California, Florida, and Arizona in promulgating a specific civil cause of action for financial exploitation. A thorough search of all Texas laws for “financial exploitation” or “exploitation” reveals that the only civil cause of action for exploitation is on behalf of the victims of *sexual* exploitation by mental health services providers.⁹¹

In a recent weekly Attorney General newspaper column entitled “Protecting Seniors from Financial Exploitation,” Texas Attorney General Greg Abbott stated, “Protecting the elderly is a top priority for my administration. Our agency is responsible for enforcing nursing home standards and for investigating and prosecuting Medicaid fraud. *But as many of you know, senior Texans also need our support and protection in the area of financial exploitation.*” [emphasis added]⁹² Nevertheless, the State of Texas has failed to enact a single statute authorizing civil litigation specifically in response to the financial exploitation of Texas seniors. In fact, the only criminal statute specifically addressing financial exploitation applies only if the person committing the offense is “an owner, operator, or employee of a group home, nursing

facility, assisted living facility, intermediate care facility for persons with mental retardation, or other institutional care facility”⁹³ “Exploitation” is conspicuously admitted out of the general penal provision of injury to an elderly individual within the Texas Penal Code.⁹⁴ Even the protection provided by the Adult Protective Services under the Texas Human Resources Code is limited to exploitation “that constitutes a criminal offense under any law, including §22.04 Penal Code”⁹⁵

The result is clear. Texas has no civil litigation statute specifically addressing financial exploitation of elder or vulnerable adults, and no criminal statute punishing financial exploitation outside of the exploitation of a care giver in a nursing home or assisted living facility. The attorney pursuing a financial exploitation case in the State of Texas, then must rely solely on common law remedies such as breach of contract, breach of fiduciary duty, fraud and undue influence. Accordingly, in the State of Texas, litigators must evaluate the application of these common law causes of action in order to pursue an effective financial exploitation case, and even so, the opportunities to make Texas seniors whole are limited, compared to California, Florida and Arizona.

VI. Recommendations for Handling

In order to effectively pursue financial exploitation cases, the trial attorney must first have access to a client base which may be difficult because financial abuse is difficult to detect,⁹⁶ and all too often victims are overwhelmed by the situation and too embarrassed to admit financial abuse.⁹⁷ These facts highlight the reason that only one in 25 cases of financial exploitation is reported.⁹⁸ This inevitably means that the number of elders who will initiate phone calls to the attorney will be minimal. However, each state is required to have an Adult Protective Services agency as mandated by the Social Security Act in 1974.⁹⁹ Because most states have enacted statutes requiring mandatory reporting of suspected abuse,¹⁰⁰ attorneys would

be wise to begin by establishing a relationship with the APS caseworker involved with the reporting process after carefully reviewing their state's ethical mandates. The lawyer who makes himself available to APS caseworkers as an additional resource in the battle against financial exploitation will likely find increased opportunities to assist the victims of financial exploitation.

The next step is a thorough investigation of the facts of the claim. In the investigation process, it is important for the attorney to remember that it is the victim who is his client and not the victim's family members.¹⁰¹ This means that in the investigation of the claim, attorney-client privilege with the victim must be maintained, and written authorization to communicate otherwise privileged information to family members should be obtained.¹⁰²

Finally, the litigator must carefully review his state's statutory scheme to determine if it is similar to those of California, Florida and Arizona, which provide direct causes of action for financial exploitation, and civil remedies for the violation of criminal exploitation of persons over 65 years of age. Even in states with direct causes of action, it is important to conduct a careful analysis of state law to determine if capacity is an element of the cause of action. In any event, all common law causes of action and statutory consumer actions should be explored by the civil litigation attorney.

In states with statutory schemes similar to Texas, which do not provide specific civil causes of action for financial exploitation, and do not provide civil remedies for criminal violations, the attorney must rely on all applicable common law causes of actions and statutory consumer actions to determine the remedies and damages available.

VII. CONCLUSION

In the battle against financial exploitation, civil litigation is the final and most comprehensive line of defense. Federal legislation has yet to include a civil cause of action, and the states' criminal statutes and protection provided through Guardianships and Adult Protective

Services is limited at best and is plagued with overwhelming case loads and lengthy delays. This leaves civil litigation as the last hope for an effective response.

A review of the laws of California, Florida Arizona, and Texas, shows that California, Florida and Arizona have determined to fight financial exploitation by implementing specific civil causes of action and providing civil remedies for criminal exploitation. In contrast, Texas, despite having the nation's fourth largest population of residents 65 and over, has no specific cause of action for financial exploitation and has yet to have a single penal code provision criminalizing the financial exploitation of elders outside the care giver context. Until a comprehensive legislative authorizing specific civil remedies for exploitation and abuse of our nation's elders is implemented by the states, the battle will rage on without the full benefit of its most effective and versatile weapon: civil litigation.

Endnotes

1. National Center on Elder Abuse (March 1999). Elder Abuse Information Series No. 1.
2. Id.
3. National Center on Elder Abuse (2005). Elder Abuse Prevalence and Incidence due to the prevalence of under-reporting, the estimates of financial exploitation were only one in 25 cases, suggesting that there may be as many as 5,000,000 victims each year of financial exploitation alone; JOHN F. WASIK, THE FLEECING OF AMERICA'S ELDERLY, CONSUMERS DIG. (Mar./Apr. 2000).
4. Id.
5. ERICA F. WOOD, THE AVAILABILITY AND UTILITY OF INTERDISCIPLINARY DATA ON ELDER ABUSE: A WHITE PAPER FOR THE NATIONAL CENTER ON ELDER ABUSE, NCEA (May 2006).
6. *See, e.g.*, California Welfare and Institutions Code §§ 15600, et. seq., 15610.63 and 15657.5, et. seq.; FLA STAT. tit. XLV, Torts, ch. 772, "Civil Remedies for Criminal Practices"; ARIZ. STAT. § 46-456.
7. Id.
8. Table 1, Estimates of the Resident Population by Selected Age Groups for the United States, States and Puerto Rico: July 1, 2009 (SC-EST 2009-01), U.S. Census Bureau, Population Division, Release Date June 2010.
9. *See* Tex. Penal Code § 22.04(a-1).
10. Nordheimer, John, "A New Abuse of the Elderly: Theft by Kin and Friends," *New York Times*, 12/16/91, pp. 1, 16.
11. *See, e.g.*, LAWRENCE FROLIK AND RICHARD KAPLAN, ELDER LAW IN A NUTSHELL, 394 (1999) (defining financial abuse as the "repeated, improper or illegal use" of assets).
12. See, e.g., ARIZ. REV. STAT. §46-451(A)(4); TEX. HUM. RES. CODE. ANN. § 48.002(3); FLA. STAT. ANN § 415.102(8)(a).
13. FLA. STAT. ANN. § 415.102(8)b).
14. National Consumer League. 2003. Credit Card Scams Bump Prizes and Sweepstakes as #1 Telemarketing Fraud, Wash., D.C.
15. Congressional Record Vol. 148, Pt. 4, April 11, 2002 to April 24, 2002, tit. V. § 2(a)(7) and (8).
16. National Fraud Information Center, 2003. *Internet Fraud Statistics*, Wash., D.C.: National Consumer League.
17. Internet Fraud, Scam and Crime Statistics, Internet Crime Complaint Center 2009.
18. *See* Audrey S. Garfield, Note, Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California, 42 HASTINGS L.J. 861, 863-64 (1990).

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19. *See, e.g.*, The Battered Elder Syndrome: An Exploratory Study (M. Block & J. Sinnott eds., 1979); LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, Elder Abuse in Massachusetts: A Survey of Professionals and Paraprofessionals (1979) (prepared by H. O'Malley, H. Segars, R. Perez, V. Mitchell & G. Kneupfel).
20. *See* House Subcomm. on Health & Long-Term Care, 101st Cong., Elder Abuse: A Decade of Shame and Inaction (Comm. Print 1990). The 1990 House Report was the followup to a 1981 report: House Select Comm. on Aging, 97th Cong., Elder Abuse: An Examination of a Hidden Problem (Comm. Print 1981).
21. Toshio Tatara & Lisa Blumerman, Nat'l Center on Elder Abuse, Summaries of the Statistical Data on Elder Abuse in Domestic Settings: An Exploratory Study of State Statistics for FY 93 and FY 94 (1996) (noting that twelve percent of substantiated abuse reports for 1993 and 1994 were reports of financial abuse).
22. *See, e.g.*, Hannie C. Comijs et al., Elder Abuse in the Community: Prevalence and Consequences, 46 J. AM. GERIATRICS SOC'Y 885 (1998) (noting that 1.4 percent of the study sample had experienced financial abuse).
23. Administration on Aging, U.S. Dept. of Health and Human Services. Introduction at <http://www.aoa.dhas.gov/abuse/reportD:intro.html>.
24. *See* U.S. Dept. of Health and Human Services, HHS Announces New National Center on Elder Abuse, M2 Presswire, Oct. 9, 1998, *available at* 1998 WL 16527054.
25. *Hearing on Elder Justice: Protecting Seniors from Abuse and Neglect: Hearing before the Committee on Finance, U.S. Senate*, 107th Cong. (S. Hrg. 107-734) (2002). Retrieved from <http://finance.senate.gov/hearings/hearing/download/?id=896dca7-0206-47c2-9796-30f39aedd2>.
26. Sen. John Breaux (D-La) was the Ranking Member of the U.S. Senate Special Committee on Aging and is a Senior Member of the Committee on Finance. Sen. Orring Hatch (R-Ut) was the Chairman of the U.S. Senate Committee on the Judiciary and is a Member of the Senate Special Committee on Aging.
27. Sen. John Breaux, Sen. Orring Hatch, ELDER L.J., Vol. XI, p. 207, 04/18/03.
28. *Id.*, p. 208.
29. EJA (Elder Justice Act) P.L. 111-148 (enacted March 23, 2010 as part of the Patient Protection and Affordable Care Act (H.R. 3590)).
30. 42 U.S.C.A. 1397 m-5. The Elder Justice Act expressly states that “nothing in this division shall be construed as - 2) creating a private cause of action for a violation of this division.”
31. For a state-by-state compilation of statutes addressing financial abuse, *see* Carolyn L. Dessin, Financial Exploitation Statutes' Impact on Domestic Relations Practice, 16 J. AM. ACAD. MATRIMONIAL LAW 379 (2000).
32. *See* Marshall B. Kapp, Key Words in Ethics, Law, and Aging: A Guide to Contemporary Usage 51-52 (1995). “The *Parens Patriae* power is the inherent authority of a state to take action to protect persons who cannot or will not protect themselves from harm.” *Id.* at 51.
33. *See* Black's Law Dictionary 712 (7th ed. 1999) (defining “guardian” as “[o]ne who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability.”).
34. *See* Sally Balch Hurme & Erica Wood, Guardian Accountability Then and Now: Tracing Tenets for an Active

Court Role, 31 STETSON L. REV. 867 (2002); *see also* Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts § 7 (4th ed. 1987).

35. Carolyn L. Dessin, Financial Abuse of the Elderly: Is the Solution a Problem? 34 MCGEORGE L. REV. (Winter 2003) 267, 282.

36. Tex. Hum. Res. Code § 48.001.

37. Tex. Hum. Res. Code § 48.004.

38. Tex. Hum. Res. Code § 48.002(a)(3).

39. *See* Carolyn L. Dessin, Financial Abuse of the Elderly: Is the Solution a Problem? supra, p. 288.

40. Tex. Penal Code § 22.04(c)(2).

41. Tex. Penal Code § 22.04(c)(4).

42. Tex. Penal Code § 22.04 “Injury to a Child, Elderly Individual, or Disabled Individual.”

43. Tex. Penal Code § 22.04(a-1).

44. Tex. Penal Code § 22.04(a)

45. Tracy Wilson, “Elder Abuse is a Tragedy on the Rise,” *LA Times* (Aug. 9, 1998) at B1 (noting that agencies responsible for handling abuse reports are only able to respond to a fraction of complaints because of limited staff and funding).

46. Suzanne J. Levitt and Rebecca J. O’Neill, SA: A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect and Exploitation: One Legal Clinic’s Experience, 5 ELDER L.J. 195, 207 (1997).

47. Elder Financial Abuse Task Team Report to the California Commission on Aging, *available at* http://ccoa.ca.gov/pdf/Elder_Financial_Abuse.pdf (last accessed June 26, 2007).

48. Id.

49. 2005 CA A.C.R. 8.

50. *See* CA WELF. & INST. CODE § 15610-15610.65.

51. CA WELF. & INST. CODE § 15610.07(a).

52. CA WELF. & INST. CODE § 15610.27.

53. Id., p. 19.

54. CA WELF. & INST. CODE § 15610.23.

55. CA WELF. & INST. CODE § 15610.30.

56. CA WELF. & INST. CODE § 15610.30 *amended by* 1997 CAL. STAT. ch. 724 (A. B. 1172).

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57. CA WELF. & INST. CODE § 15610.30 (b) and (c).
58. CA WELF. & INST. CODE § 15657.5(a).
59. CA WELF. & INST. CODE § 15657.5(b).
60. CA WELF. & INST. CODE § 15657.5(a)(b).
61. 2009 CA CIV., CODE § 3345, Penal Damages.
62. 2009 CA CIV., CODE § 1761(f).
63. 2009 CA CIV., CODE § 3345(b)(1).
64. FLA. ANN. STAT. § 415.1111. Civil actions 2010.
65. FLA. ANN. STAT. § 415.102(27).
66. FLA. ANN. STAT. § 415.102(8)(a)(1) and (2); (8)(b).
67. FLA. ANN. STAT. § 415.1111.
68. Id., § 415.1111.
69. Id., § 415.1111.
70. FLA. ANN. STAT. § 772.11.
71. FLA. ANN. STAT. § 772.11(1).
72. *Cf.* FLA. ANN. STAT. ch. 812.014 (theft), with FLA. ANN. STAT. § 415.102(8).
73. FLA. ANN. STAT. ch. 812.014.
74. FLA. ANN. STAT. § 415.1115.
75. *See* Seymour H. Moskowitz, Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education, 47 LOI. L. REV. 191, 211 (2001); *see, e.g., Denton v. American Family Care Corporation*, 945 P.2d 1283 (Ariz. 1997).
76. Id.
77. ARIZ. REV. STAT. § 46-456, et. seq.
78. Id., §46-456(A).
79. ARIZ. REV. STAT. § 451(A)(9).
80. ARIZ. REV. STAT. § 46-451(A)(4).
81. ARIZ. REV. STAT. § 46-456(I)(4)(a)-(d).

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82. ARIZ. REV. STAT. § 46-456(I)(4)(d).
83. ARIZ. REV. STAT. § 46-456(B).
84. ARIZ. REV. STAT. §46-456(C)(1), (2), (3) and (D) and (E).
85. ARIZ. REV. STAT. § 46-455(B).
86. ARIZ. REV. STAT. § 46-456(B).
87. ARIZ. REV. STAT. § 13-1802(B).
88. Id.
89. 2005 Census Estimates of the Older Population per State, Administration on Aging, *available at* <http://www.census.gov/prod/2006pubs/p23-209.pdf>.120table5-1.
90. Pamela B. Teaster, et al, The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older, Graduate Cen. for Gerontology, U. Ky. (2006) *available at* http://www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/2-14-06%20FINAL%2060+REPORT.pdf.
91. CIVIL PRACTICE & REMEDIES CODE ch. 81.
92. www.oag.state.tx.us/agency/weeklyag/weekly_columns_view.php?id=185.
93. Tex. Penal Code § 22.04(a-1).
94. Tex. Penal Code § 22.04(a).
95. Tex. Hum. Res. Code § 48.1522.
96. Seymour Moskowitz, “Saving Granny from the Wolf: Elder Abuse and Neglect - The Legal Framework,” 31 CONN. L. REV. 77 at 79. Elder abuse usually occurs “in private residences against persons who have limited contact with outsiders.”
97. Shelby A. D. Moore and Jeanette Schaefer, “Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse,” 41 SAN DIEGO L. REV. 505 at 524, citing Robert A. Polisky, Criminalizing Physical and Emotional Elder Abuse, 3 ELDER L.J. 377, 278 (1995).
98. The National Center for Elder Abuse, *supra*, note FN 1.
99. *See* Social Services Amendment of 1974, Tub. L. No. 93-647, 2001-2006, 88 Stat. 2337-48 (codified at 42 U.S.C.A. § 1397(a)-(e) (West Supp. 1988)).
100. *See* House Subcomm. on Health Long-Term Care, 101st Cong., 2d Sess., “Elder Abuse: A Decade of Shame and Inaction” (Comm. Print 1990) at 66.
101. ABA Model Rules, Rule 1.14(a) (2009).
102. ABA Model Rules, Rule 1.6, *see, e.g.*, Comment [5].