



WINSTEAD

The Duty To Report Financial Exploitation

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Introduction

- *Elder abuse and financial exploitation are an ever increasing problem in our society.
- *Recent CFPB Report analyzed 180,000 elder financial exploitation SARs filed between 2013 and 2017 involving more than \$6 billion.
- *In 2017, financial institutions filed 63,500 SARs reporting elder financial abuse, which likely represent only a tiny fraction of the actual 3.5 million incidents of elder financial exploitation estimated to have happened that year.
- *Presentation will cover undue influence, mental competence, duty to report financial exploitation, and SARs.

Undue Influence

- *The normal view of undue influence involves threatening a person into signing a document that he otherwise would not sign, but undue influence more often arises out of seemingly kind people.
- *These are the types of actors that ingratiate themselves to the person, inserting themselves between the person and relatives, and convincing the person that the historical beneficiaries of their estate do not deserve the person's bounty due to deceit.
- *Relationship poisoning and deceit are their tools.

Undue Influence

- When undue influence is established, the document is ineffective.
- To prevail on an undue influence claim, the contestant has the burden to prove (1) the existence and exertion of an influence, (2) that subverted or overpowered the person's mind at the time he or she executed the instrument, (3) so that the person executed an instrument she would not otherwise have executed but for such influence.

Undue Influence

- A party should consider the following factors when determining the existence of undue influence:
 - (1) the nature and type of relationship existing between the person, the contestants, and the party accused of exerting such influence;
 - (2) the opportunities existing for the exertion of the type or deception possessed or employed;
 - (3) the circumstances surrounding the drafting and execution of the document;
 - (4) the existence of a fraudulent motive;

Undue Influence

- (5) whether there had been a habitual subjection of the person to the control of another;
- (6) the state of the person's mind at the time of the execution of the document;
- (7) the person's mental or physical incapacity to resist or the susceptibility of the person's mind to the type and extent of the influence exerted;
- (8) words and acts of the person;
- (9) weakness of mind and body of the person, whether produced by infirmities of age or by disease or otherwise; and
- (10) whether the document executed is unnatural in its terms of disposition of property.

Undue Influence

- A party should be on watch for the following types of evidence:
- Misrepresentations, deceit, and relationship poisoning;
- Sweeping, dramatic changes to an estate plan, bank account, etc.;
- Multiple changes over a short period of time;
- Gradual changes, starting with executing a power of attorney in favor of the perpetrator and escalating to amending an entire estate plan;
- Disinheriting other children or close family members;
- Using an attorney selected by the perpetrator;
- Mental capacity issues by the decedent;

Undue Influence

- Physical impairments and illness issues by the decedent (blind, deaf, bed-bound, etc.);
- Drug or alcohol abuse by the decedent;
- Decedent using new physicians selected by the perpetrator;
- Decedent using new banking institutions or financial advisors suggested by the perpetrator;
- Perpetrator moving in with the decedent and “caring” for the decedent;
- Perpetrator providing transportation, meals, and medicine to the decedent;
- Sudden inter vivos (during life) cash advances or transfers of assets to the perpetrator; and
- The perpetrator having a history of deceitful conduct, perjury, or fraud.

Mental Competence

- In addition to undue influence, individuals often take advantage of elderly or infirm individuals who have compromised mental status.
- A document is invalid where the party executing same does not have sufficient mental capacity.

Mental Competence

- When the issue of mental incapacity is raised, the burden of proof is on the party seeking to set aside the contract, or deed, to show that the person executing the document did not understand the nature and consequences of his act at the time.
- A lack of mental capacity may be shown by circumstantial evidence which includes: (1) the person's outward conduct, "manifesting an inward and causing condition;" (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred.

Mental Competence

- The person should show an understanding of 1) the situation as it relates to the transaction, and 2) the consequences of his decisions.
- He also should demonstrate a rational manipulation of the information presented, applying a coherent and logical thought process to analyze possible courses of action.

Mental Competence

- Is the person oriented to person, time, place, and purpose?
- Can the person remember items short term?
- Does the person understand the consequences of the transaction?
- Does the person rely on others to assist in understanding?
- Does the person “mask” incapacity by humor or other conduct?

Exploitation Statute: Definitions

- A “vulnerable adult” means someone who is sixty-five (65) years or older or a person with a disability.
- “Financial exploitation” means: “(A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person’s money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.

Exploitation Statute: Employee Reporting Obligation

- If an employee has cause to believe that financial exploitation of a vulnerable adult who is an account holder has occurred, is occurring, or has been attempted, the employee shall notify the employer of the suspected financial exploitation.
- From a practical perspective, this requires employers to educate and train employees about financial exploitation so that they know when to suspect that is occurring.

Exploitation Statute: Employer Reporting Obligation

- If an employee makes such a report or the employer otherwise has cause to believe a reportable event has occurred, then the employer shall (1) assess the suspected financial exploitation and (2) submit a report to the Department.
- The employer should submit the report not later than the earlier of: (1) the date it completes an assessment; or (2) the fifth business day after the date the employer is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted.
- May also report to a disinterested third party reasonably associated with the vulnerable person.

Exploitation Statute: Holds

- If an employer submits a report, it (1) may place a hold on any transaction that: (A) involves an account of the vulnerable adult; and (B) the employer has cause to believe is related to the suspected financial exploitation; and (2) must place a hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Department or a law enforcement agency.
- This hold generally expires ten business days after the report was submitted and the employer may extend a hold for an additional thirty business days “if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation.” *Id.*
- The employer may also petition a court to extend a hold.

Exploitation Statute: Policies

- The statute requires that an employer adopt internal policies, programs, plans, or procedures for: (1) the employees to make the notification; and (2) the employer to conduct the assessment and submit the report.
- A employer shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction.

Exploitation Statute: Immunity

- An employee or employer who makes a report to the Department or to a third party is immune from any civil or criminal liability unless they acted in bad faith or with a malicious purpose.
- An employer that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from any civil or criminal liability or disciplinary action resulting from that action or inaction.

Exploitation Statute: Related Issues

- Employers should be aware of another provision that dictates when a financial institution has notice of a breach of fiduciary duty: Texas Business and Commerce Code Section 3.307.
- There are several theories in Texas that allow a plaintiff to sue a third party for the exploiter's bad conduct: aiding and abetting breach of fiduciary duty, knowing participation in breach of fiduciary duty, and conspiracy.

Texas Human Resources Code

- The Texas Human Resources Code has a general provision that requires the reporting of the exploitation of elderly or disabled individuals.
- Section 48.051 states: “a person having cause to believe that an elderly person, a person with a disability, ... is in the state of abuse, neglect, or exploitation shall report the information ... immediately to the department.”

Texas Human Resources Code

- In the Texas Human Resources Code, the term “exploitation” means “the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person’s social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person.”
- Importantly, the Texas Human Resources Code provides a criminal penalty for not reporting the exploitation.

SARs

- The federal banking agencies have each issued regulations setting forth the circumstances under which a financial institution must file a suspicious activity report ("SAR").
- An institution must file the SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR.
- SARs are filed electronically with the Treasury Department's Financial Crimes Enforcement Network (FinCEN), through the BSA E-Filing System.
- The failure to file reports can lead to supervisory action (e.g., civil money penalties).

SARs

- SARs continue to be a valuable avenue for financial institutions to report elder financial exploitation.
- If a financial institution knows, suspects, or has reason to suspect that a transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction, the financial institution should then file a Suspicious Activity Report.

SARs

- FinCEN requests that financial institutions include the term “elder financial exploitation” in the narrative portion of all relevant SARs filed.
- The narrative should also include an explanation of why the institution knows, suspects, or has reason to suspect that the activity is suspicious.
- It is important to note that the potential victim of elder financial exploitation should not be reported as the subject of the SAR.
- Rather, all available information on the victim should be included in the narrative portion of the SAR.

SARs

- Erratic or unusual banking transactions, or changes in banking patterns:
- Frequent large withdrawals, including daily maximum currency withdrawals from an ATM;
- Sudden Non-Sufficient Fund activity;
- Uncharacteristic nonpayment for services, which may indicate a loss of funds or access to funds;
- Debit transactions that are inconsistent for the elder;
- Uncharacteristic attempts to wire large sums of money;
- Closing of CDs or accounts without regard to penalties.

SARs

- Interactions with customers or caregivers:
- A caregiver or other individual shows excessive interest in the elder's finances or assets, does not allow the elder to speak for himself, or is reluctant to leave the elder's side during conversations;
- The elder shows an unusual degree of fear or submissiveness toward a caregiver, or expresses a fear of eviction or nursing home placement if money is not given to a caretaker;
- The financial institution is unable to speak directly with the elder, despite repeated attempts to contact him or her;
- A new caretaker, relative, or friend suddenly begins conducting financial transactions on behalf of the elder without proper documentation;
- The customer moves away from existing relationships and toward new associations with other "friends" or strangers;
- The elderly individual's financial management changes suddenly, such as through a change of power of attorney to a different family member or a new individual;
- The elderly customer lacks knowledge about his or her financial status, or shows a sudden reluctance to discuss financial matters.

DPOA Statute: Duty To Accept

- A person who is presented with and asked to accept a durable power of attorney by an agent shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification or an opinion of counsel not later than the 10th business day after the date the power of attorney is presented; or (B) request an English translation not later than the fifth business day after the date the power of attorney is presented.
- A person who requests an agent's certification or an opinion of counsel must accept the DPOA not later than the seventh business day after the date the person receives the requested certification or opinion.
- These periods can be extended by agreement.

DPOA Statute: Rejecting DPOA

- A person is not required to accept a power of attorney if: “... the person filed a SAR regarding the principal or agent or the principal or agent has prior criminal activity; ...the person has knowledge that a complaint has been raised to the proper authorities that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent...”

DPOA Statute: Rejecting DPOA

- If a person refuses to accept a DPOA, then it should provide a written statement setting forth the reason for the refusal.
- However, if the person is refusing the DPOA due to a reason set forth in Section 751.206(2) or (3), then the person shall provide a written statement signed by the person under penalty of perjury stating that the reason for the refusal is a reason described by Section 751.206(2) or (3), and the person is not required to provide any additional explanation.
- Are SAR reports to be kept confidential under federal law?
- This response must be provided to the agent on or before the date the person would otherwise be required to accept the DPOA.

Conclusion

- Financial institutions should be aware of financial exploitation and the concepts of undue influence and mental competence.
- Regarding the use of powers of attorneys, it is a whole new world for financial institutions.
- There are onerous statutes that create duties to investigate and report financial exploitation.
- Financial institutions should seek out legal advice concerning transactions where there are doubts.