



Financial Exploitation of the Elderly: An Overview of Civil Remedies

Civil litigation is a significant tool that victims can use to secure justice where, by the very nature of the proceedings, the responsible parties can be held directly accountable to the victim. However, if victims are to ever truly have standing in our system of justice, we must reach those who make policy. One way of doing that is to educate policy makers of the future. Today's law students are tomorrow's law professors, prosecutors, defense counsel, judges and legislators.

The objective of our "Legal Scholar" feature is to encourage law students to educate themselves, and others, about the rights and potential remedies available to victims of violent crime. At the same time, it affords students an opportunity to have their efforts published. These efforts may also serve to increase the number of law schools that offer curricula on victims' rights. For these purposes, we offer this recurring feature.

Introduction

The retirement years can be among the most rewarding in a person's life. Gone are some of the everyday worries like traffic jams, deadlines, mortgage payments, the pressure to be a model employee. Retirees often have time to do the things that there was no time to do during their working years, and with a sufficient retirement fund, it can be possible to have a full and independent life.

But increased age can also lead to increased vulnerability. In a ten-year period from 1986 to 1996, reported incidents of abuse or exploitation of the elderly has more than doubled from 117,000 reports in 1986 to 293,000 in 1996.³² Out of the 1996 reported cases, about 12.4 percent were instances of financial exploitation.³³ Swindlers come in many forms, including fraudulent telemarketers and providers of bargain goods and services. Moreover, many elderly victims are cheated out of their life savings by their own relatives, caretakers, or those who pose as people who want to lend a helping hand.

Financial exploitation of the elderly has been recognized as a growing problem. There are legal means to recover some or all losses, though very few are offered at the federal level, and remedies on the state level vary from jurisdiction to jurisdiction. A lack of uniformity of legal remedies has led to a concern that many perpetrators tend to slip through the cracks because law enforcement officials have to resort to a variety of different methods to prosecute those who defraud seniors.³⁴ But criminal statutes are not the only mechanisms available to victims. This article will look briefly at three types of civil remedies available to elderly victims: civil actions, restitution orders and civil penalties.

The Civil Action

An elderly fraud victim can sue the perpetrator for damages in civil court at

both the state and federal levels. Federal causes of action are rare due to the nature of the crimes committed and size of damages sought. In order to sue in federal court, the perpetrator has to have acted across state lines, and the amount sought as compensation by the victim must exceed \$75,000.³⁵ The Racketeer-Influenced Corrupt Organizations Act's (RICO) civil remedy provision can be effective because treble damages can be obtained.³⁶ However, RICO's original intent was to fight organized crime. To win treble damages under RICO, the plaintiff has to show that a "pattern of racketeering activity" conducted through an "enterprise" injured the victim's business or property, a definition that tends to be vague.³⁷

More common are civil suits brought in state courts. Only a few states have created specific civil remedies to protect the elderly from exploitation. A few other states and the District of Columbia have not passed any elder protection laws. Several states have made it a crime to prey on the elderly, but do not offer additional civil remedies separate from existing statutory or common law tort actions for fraud and deceit.³⁸ At least ten states now have specific civil causes of action for elder fraud, including Arizona, California, Delaware, Florida, Georgia, Illinois, Oregon, Minnesota, Nevada and Washington State.³⁹ Of those jurisdictions, Delaware, Minnesota and Washington do not allow exemplary (punitive) damages.⁴⁰ California limits punitive damages to \$5,000.⁴¹ The other states have not enacted statutory limits on exemplary damages, and both Arizona and California have taken a further step by allowing the victims' relatives to collect for pain and suffering, even if the victim is deceased. An Arizona case, *In the Matter of Denton*, explains:

[t]he legislature's intent and the policy behind the elder abuse



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statute are clear...In civil actions for elder abuse, pain and suffering may be the only compensable damages the victim may recover. Because incapacitated or vulnerable adults are not employed, they cannot recover for lost earnings or diminished earning capacity... Furthermore, [because] most vulnerable or incapacitated adults are near the end of their lives[,]...the tortfeasor would have a great incentive to delay litigation until the victim dies... In 1991, California passed legislation preserving an elder abuse victim's right to recover pain and suffering damages, despite the victim's death.⁴²

Georgia's law adds an extra incentive by doubling any criminal penalty or civil damage award if it is shown that the perpetrator specifically targeted elderly victims.⁴³ Finally, Illinois offers treble damages, but any award is contingent on a

criminal charge or indictment and a written demand from the victim to the accused.⁴⁴

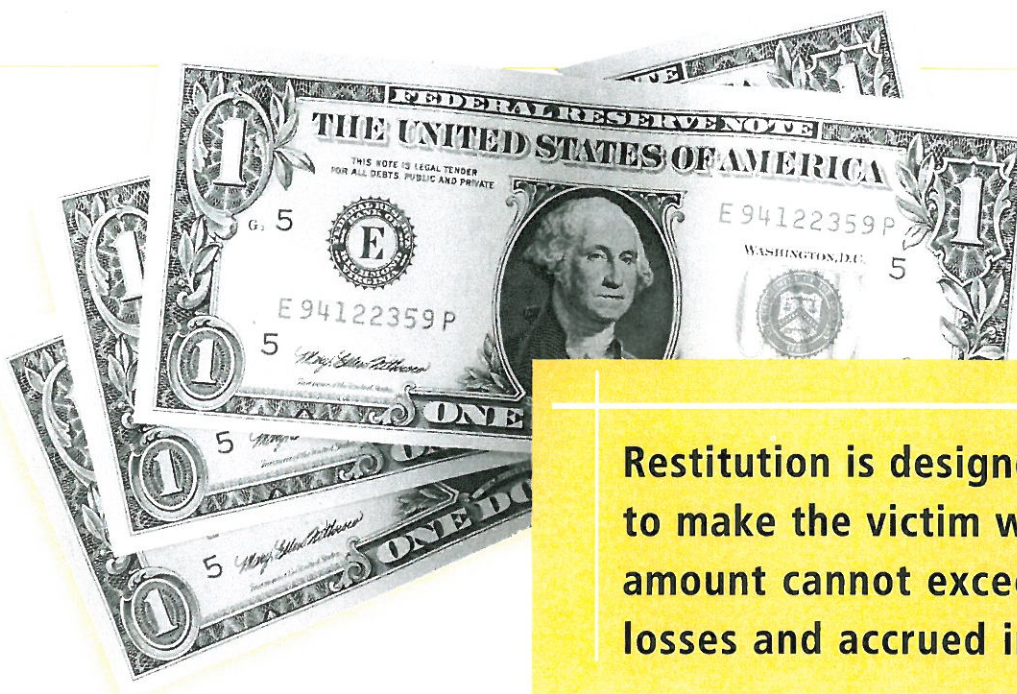
Even in states where there are no targeted elder abuse statutes, common law and statutory tort actions under existing fraud and anti-telemarketing laws are at victims' disposal, making civil remedies available to aggrieved parties. However, many victims do not seek civil remedies for a number of reasons. The cost of litigating is extremely high, especially for those who have lost everything to swindlers. Most elderly victims are retired without earnings to supplement pensions, Social Security payments, insurance benefits and life savings. Many cannot afford to pay for legal representation. Attorney fees and court costs can be recovered in most jurisdictions, but collection may be contingent on winning or settling the case.

Furthermore, many elderly are embarrassed that they had been swindled. As a group, the elderly are generally more

trusting and have a desire to be financially self-sufficient. Thus, they are more prone to be taken in by get-rich-quick scams or low-cost services or goods.⁴⁵ To learn that one was cheated can be a serious blow to the ego and can lead to fears that they will lose financial and personal independence.⁴⁶

Restitution

A more affordable remedy available to victimized seniors is an order of restitution, which, upon conviction of a crime, is payment directly to the victim by the perpetrator. Restitution is designed solely to make the victim whole so the amount cannot exceed actual losses and accrued interest. However, unlike civil remedies, in cases settled with restitution payments, victims do not have to worry about high litigation costs. The vast majority of states have no mandatory restitution statutes.⁴⁷ Under federal law, restitution is required for fraud offenses in addition to any other civil or criminal penalty that



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may potentially be imposed or previously awarded, creating a financial disincentive for perpetrators of financial crimes.⁴⁸ Under the Senior Citizens Against Marketing Scams Act,⁴⁹ a court has almost no discretion in issuing a restitution order; it can determine only how the order will be administered.⁵⁰

Similar to civil remedies, as discussed above, restitution can be limited by a number of mitigating factors. In order to prosecute, the crime must be reported, and victimized seniors may not come forward due to embarrassment and other factors. To mitigate this problem, several states have enacted mandatory reporting statutes making it a crime for certain third parties not to report elder abuse.⁵¹ But a more troublesome dilemma is that many offenders are "judgment proof" because they lack the ability to pay full restitution in the foreseeable future. In federal cases, the judge may issue an order for a nominal award.⁵² In state proceedings, where restitution is not mandatory, any recovery may be precluded by an inability to pay.

The Civil Penalty

In a criminal proceeding, the judge may order the convicted perpetrator to pay a special civil penalty on top of (or instead of) any restitution or prison time. Unlike restitution or recovery through a civil action, civil penalties do not compensate a victim directly for actual or punitive damages. Instead, the money is transferred to a separate fund to

be used to finance investigations and prosecutions of future elder fraud cases. This apparatus is designed to benefit the older population in general by providing a source of funding to protect seniors from exploitation as a group.⁵³ Recently, Arkansas, Iowa, Minnesota and New York have created such mechanisms as supplements to their criminal codes.⁵⁴ There is no similar provision in federal law.

Conclusion

This article has examined three types of civil remedies available to elderly victims of financial exploitation. Out of those three, civil remedies can be the most effective form of recovery, though the cost of litigation may make this course of action impractical for many victims. Restitution is less of a financial burden on victims, but collection may be difficult because many convicted offenders may be unable to pay. Civil penalties can help the community as a whole, but

that may be little comfort to those who cannot recover in the present.

In the end, probably the best remedy for crimes against the elderly is prevention, which may be in the form of education of potential victims, the creation of uniform laws, or increased reporting and enforcement of current laws that deter criminals. But for those who have already lost everything, life does not have to be a hopeless cause. With the proper guidance, resources and people willing to help, there still may be time to enjoy those retirement years. **W**

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32. See <http://www.gwjapan.com/NCEA/basic/p1.html>.
33. *Id.*

34. Richard A. Starnes, Note, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 Elder L.J. 201, 203 (1996) [hereinafter *Consumer Fraud*].

35. 28 U.S.C.A. § 1332.

36. Treble damages are damages given by statute in certain cases, consisting of the single damages found by the jury, actually tripled in amount. *Black's Law Dictionary* (5th Edition 1979).

37. 18 U.S.C. § 1962(c). The most problematic element is the definition of "enterprise" in 18 U.S.C. § 1961(4). For an in-depth analysis of RICO's "enterprise" requirement, see 52 A.L.R. Fed. 818.

38. See, e.g., HRS § 444-10/7 (Michie 1999); Miss. Code Ann. § 2347-19 (1998); La. R.S. 14:93.4 (1998); Mont. Code Anno., § 52-3-825 (1998); N.C. Gen. Stat. § 14-32.3 (1999).

39. See ARS § 46-455 (1998); Cal. Civ. Code § 1780(b) (Deering 1998); 6 Del. C. § 2583 (1998); Fla. Stat. § 415.1111 (1998); Ga. Code Ann. § 10-5B-6, 10-1-399; 720 ILCS 5/16-1.3(g) (1999); Minn. Stat. § 325E71 (1998); Nev. Rev. Stat. Ann. § 598.0977 (1998); ORS § 124.100(1)(b) (1997); Rev. Code. Wash. § 74.34200(3) (1999).

40. 6 Del. C. § 2583; Minn. Stat. § 325E71 (1998); Rev. Code Wash. § 74.34.200(3) (1999).

41. Cal. Civ. Code § 1780(b).

42. *In the Matter of Denton*, 190 Ariz. 152, 156, 157, 945 P.2d 1283, 1287, 1288 (Ariz. 1997).

43. Ga. Code Ann. § 10-5B-6© (1998).

44. 720 ILCS 5/16-1.3(g) (1999).

45. Diane E. Hoffman & Roger Wolf, *Financial Exploitation of the Elderly*, 32 Md. B.J. 3, 4 (1998).

46. *Id.* at 3.

47. See, e.g., 22 Okl. St. § 991a-9(2)(c) (1998) (mandates restitution upon conviction of a crime against an elderly or incapacitated victim).

48. See, e.g., 18 U.S.C. § 2327(a) (1998).

49. 18 U.S.C. § 2326 (1994).

50. *Consumer Fraud* at 220.

51. See, e.g., Mont. Code Anno. § 52-3-811, 52-3-825(1) (1998).

52. *Consumer Fraud* at 220 n.147.

53. *Consumer Fraud* at 221, 222.

54. See Ark. Code Ann. § 4-88-202(b) (Michie 1998); Iowa Code § 714.16A (1997); Minn. Stat. § 325E71 (1998).