

Model Civil Provisions on

ELDER FINANCIAL

EXPLOITATION

THE NATIONAL CENTER FOR
Victims of Crime

National Center for Victims of Crime

The National Center for Victims of Crime is the nation's leading resource and advocacy organization dedicated to serving individuals, families, and communities harmed by crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Working with local, state, and federal partners, the National Center:

- Provides direct services and resources to victims of crime throughout the country;
- Advocates for laws and public policies that secure rights, resources, and protections for crime victims;
- Delivers training and technical assistance to victim service organizations, counselors, attorneys, criminal justice agencies, and allied professionals serving victims of crime; and
- Fosters cutting-edge thinking about the impact of crime and the ways in which each of us can help victims rebuild their lives.

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American Bar Association Commission on Law and Aging

Established in 1979, the Commission on Law and Aging is a collaborative and interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

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The National Center for Victims of Crime, in collaboration with the American Bar Association Commission on Law and Aging, developed *The Model Civil Provisions on Elder Financial Exploitation* (referenced throughout this document as “model provisions”) to assist states that are working to create and/or strengthen their civil provisions on elder financial exploitation. This report examines existing statutes and provides recommendations.

This document refers to “elders” and “elder financial exploitation” throughout, but younger adults with physical or intellectual disabilities are also highly vulnerable to financial exploitation. The terms “elder,” “elders,” and “elder financial exploitation” were chosen simply for ease of writing and reading, to maintain clarity and consistency throughout the document. This terminology choice does not imply that younger adults with disabilities should not be included in state legislation based on our model provisions. As indicated in legislative notes within the provisions, states can modify the language to be applicable to vulnerable adults as well as elders. It is recommended that states modify existing and new provisions relevant to elder financial exploitation to be inclusive of other vulnerable populations.

Elder financial exploitation is insidious and pervasive and has serious implications for its victims’ financial, emotional, and physical well-being. Although exact statistics are unknown, it is widely agreed upon by experts in the field that elder financial exploitation is underreported to investigatory agencies such as Adult Protective Services or law enforcement. Thus, it is also unlikely that victims pursue any civil remedies. This report discusses barriers to the civil justice system, and proposes some recommendations for overcoming some of those barriers.

The proposed model provisions offer legislative language that will equip advocates to strengthen existing legislation and develop new responses to elder financial exploitation. The model provisions were composed to allow states to pass provisions individually and to incorporate provisions where they most appropriately fit into current law.

How to Use This Document

The model provisions suggest legislative language that may be used to better define and address the current realities of elder financial exploitation, propose ways to hold exploiters civilly accountable, and enhance the remedies available to elderly victims.

States may use this document as a guide to analyze their current civil provisions on elder financial exploitation and to identify changes needed in their laws. The statutory language recommended in this report and the accompanying commentary are designed to help legislators, attorneys, advocates, and others work toward amending current laws by expanding their awareness of the range of options available to them and of the impact that legislative language and structure can have on the efficacy of the law.

We recognize that jurisdictions may have existing statutory provisions similar to those in this document

in their probate, civil procedure, civil code and/or evidence sections. Because of this, individual state legislators are best equipped to determine what provisions may be needed to fill the gaps in current laws and where the provisions may be most useful. The model provisions are aimed at bolstering a jurisdiction's existing statutory and common law causes of actions, such as: fraud; breach of fiduciary duty; breach of contract; wrongful death; fraudulent, deceptive, and unfair business practices; and the like. Any provision, when adopted, should be used in conjunction with these existing claims.

Overview

This document is presented in three major sections. **About Elder Financial Exploitation** provides an overview of elder financial exploitation and the need to facilitate the use of the civil justice system. **Model Provisions** provides model language for civil provisions on elder financial exploitation. **Commentary and Analysis** includes the language of the model provisions along with corresponding, extended commentary and analysis.

This report recommends that states review and, as necessary, modify their civil provisions on elder financial exploitation to:

- Broadly define financial exploitation in a way that encompasses the myriad of ways exploitation can occur, such as through undue influence and identity theft.
- Remove any procedural burden on filing a lawsuit, such as a notice and demand requirement.
- Ensure available remedies are comprehensive, including but not limited to mandatory recovery of plaintiff's attorney's fees, litigation costs,

treble damages, and punitive damages, where appropriate.

- Limit defenses and immunity to elder financial exploitation.
- Provide judges with greater discretion in granting protective orders.
- Define hearsay exceptions to allow certain statements made by an elder under particular circumstances to be considered by the jury.
- Lengthen the statute of limitations, which is to be tolled during criminal proceedings.
- Prohibit perpetrators of elder financial exploitation from further profiting from their crimes through "disinheritance."
- Disallow settlement agreements containing provisions that prohibit communication, cooperation, or submission of a complaint with any law enforcement, licensing board, state and federal agencies, and the like.
- Appropriately accommodate for elders on the court docket and during any testimony in trial.
- Provide means to enforce restitution orders as civil judgments.
- Permit judgments from elder financial exploitation cases to have priority after taxes and child support payments.

About ELDER FINANCIAL EXPLOITATION

Historical Perspective and the Need for Civil Remedies

Elder abuse—which is used generally to include physical, sexual, and psychological abuse, as well as neglect, abandonment, and financial exploitation—affects millions of older Americans each year. Financial exploitation is among the most prevalent forms of elder abuse.

Simply stated, elder financial exploitation is the improper use of an elderly person’s assets for someone else’s benefit. It covers a wide range of activities and transaction—any instance in which an asset is taken or misappropriated by deception, harassment, threats, or undue influence.

exploitation commonly co-occurs with one or more other forms of elder abuse, often physical or psychological.

Recent studies have begun to quantify the magnitude and prevalence of these crimes. A 2016 Investor Protection Trust Elder Fraud Survey found that nearly one in five older Americans have been victimized by a financial fraud.¹ One study determined that financial



Victims of financial exploitation cannot afford to have their legal needs continue to go unserved. Hopefully, attorneys in public interest and private practices will soon begin to see financial abuse cases as worthwhile, both for their clients and for themselves, and the legal profession can begin to fill the gaping void in civil legal services for victims of elder financial exploitation.

– Matthew Andres, Esq., Clinical Associate Professor of Law & Director of Elder Financial Justice Clinic, University of Illinois

Common forms of elder financial exploitation include theft, fraud, lottery scams, investment fraud, and unauthorized real estate transactions. Data and practitioners’ experiences indicate that financial

¹ Investor Protection Trust, *Elder Investment Fraud and Financial Exploitation*, March 22, 2016, available at http://www.investorprotection.org/downloads/IPT_EIFFE_Medical_Survey_Report_03-22-16.pdf.

exploitation costs seniors at least \$2.9 billion annually,² while another study estimated a cost of \$36.5 billion annually.³

The varied results of these studies are largely due to their different definitions and methodologies. While further research is needed, they demonstrate the severity and costs of the problem.

non-financial costs (such as stress, depression, frustration, and anger).⁴

The study found that among those who experienced indirect financial costs, 29 percent have estimated the cost to be greater than \$1,000.⁵ The report also found that the non-financial costs of fraud are widespread with nearly two-thirds of victims experiencing at least one type of non-financial cost to a serious degree.⁶



[Elder Financial Exploitation] is rampant, largely invisible, expensive, and lethal.

—Kathleen Quinn, at the Senate Special Committee on Aging Hearing,
Former Director of NAPSA

The effects of financial exploitation are devastating and far-reaching. Certainly, elderly victims' well-earned fiscal security can be wiped away. This adverse consequence is exacerbated by the fact that in many, if not most instances, the elder is unable to return to work to recoup and rebuild their assets, potentially driving seniors into poverty or even homelessness. Beyond the money, both the physical and mental health consequences are astounding. A 2015 FINRA Investor Education Foundation Report on the Non-Traditional Costs of Financial Fraud found that victims of financial fraud (including but not limited to elder victims) suffered from many indirect financial costs (such as legal fees and fees for bounced checks, among others) as well as

Financial fraud victims report varied negative emotional reactions to the fraudulent incident, with anger being the most common (75 percent), followed by regret (70 percent), feeling victimized (69 percent) and feeling betrayed (68 percent).⁷

Moreover, elder abuse, including financial, physical, mental and emotional abuse, triples the risk of premature death and causes unnecessary illness, injury, and suffering.⁸

Victims of elder abuse are four times more likely to be admitted to a nursing home and three times more likely to be admitted to a hospital.⁹

² MetLife Mature Market Institute, *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders*, June 2011, available at <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/rule18.pdf>.

³ TrueLink, *The TrueLink Report on Elder Financial Abuse 2015*, January 2015, available at https://www.cambiahealth.com/sites/default/files/resources/whitepapers/The%20True%20Link%20Report%20on%20Elder%20Financial%20Abuse%202015_0.pdf.

⁴ Applied Research & Consulting LLC, *The Non-Traditional Costs of Financial Fraud*, March 2015, available at http://www.finrafoundation.org/web/groups/sai/@sai/documents/sai_original_content/p602454.pdf.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Marie-Therese Connolly, Bonnie Brandl & Risa Breckman, *The Elder Justice Roadmap, A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis*, at 4 (2014), available at https://www.justice.gov/elderjustice/research/resources/EJRP_Roadmap.pdf.

⁹ *Id.*

It is likely that elder financial exploitation will increase as the elder population continues to grow exponentially. According to a 2010 publication by the Pew Research Center, 10,000 Baby Boomers will turn 65 every day and will do so for the next 19 years.¹⁰

There is a marked gap in access to the legal system when it comes to addressing elder financial exploitation. To be sure, the legal system can help victims seek redress, through criminal prosecutions, civil lawsuits, and protective orders. However, in the criminal justice system, prosecution of financial exploitation cases is rare.¹¹

As for the civil justice system, although “[t]he American public has grown more aware of the growing threat of elder financial exploitation, counterintuitively, civil representation for victims of elder financial [exploitation] has not become more readily available.”¹²

The reasons for the gap in the criminal and civil legal systems’ responses to elder financial exploitation are varied and complex, and are briefly discussed below.

Criminal Justice System

Law enforcement, prosecutors, and criminal court judges have an important role in combating elder

financial exploitation. The criminal justice system can offer victims of elder financial exploitation vindication, and help deter criminal conduct. Police, with their investigative powers and their ability to freeze accounts, can motivate the return of stolen funds to the extent that the funds have not been fully depleted. Nonetheless, financial exploitation presents numerous challenges to the criminal justice system, resulting in few prosecutions in elder abuse cases.

Even when a perpetrator is convicted of elder financial exploitation or related crimes, sentencing is not guaranteed to help victims rebuild their lives. Restitution orders, when properly requested and ordered, may not ever be collected. In addition, restitution is typically limited to actual loss and does not cover additional damages. Civil provisions, alternatively, can provide coverage for indirect costs of financial crime and can more accurately reflect damages suffered by the victim.

Victim compensation, another means of recovery, is also limited. Police reports—often required for eligibility—can be difficult to obtain. More problematically, victim compensation funds are typically reserved for victims of violent crime; most do not reimburse for property loss, including financial loss as a result of exploitation. The civil justice system can provide for monetary recovery of ancillary damages in cases where the victim compensation and the criminal justice system cannot.

Civil Justice System

Access to the civil justice system is an opportunity—and in certain cases, the only opportunity—for victims to be made whole without facing as many of the obstacles presented by the criminal justice system. Unfortunately, there is far too little civil legal assistance

¹⁰ Russell Heimlich, *Baby Boomers Retire*, Pew Research Center, (December 29, 2010), <http://www.pewresearch.org/daily-number/baby-boomers-retire>.

¹¹ Matt Andres, *Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law’s Elder Financial Justice Clinic*, 23 *ELDER L.J.* 297, 307 (2016); see also Shelly L. Jackson & Thomas L. Hafemeister, *Pure Financial Exploitation vs. Hybrid Financial Exploitation Co-Occurring with Physical Abuse and/or Neglect of Elderly Persons*, *PSYCHOL. OF VIOLENCE* 1, 1-6 (2012); Adria E. Navarro, Zachary D. Gassoumis & Kathleen H. Wilber, *Holding Abusers Accountable: An Elder Abuse Forensic Center Increases Criminal Prosecution of Financial Exploitation*, 53 *THE GERONTOLOGIST* 303, 303-04 (2013); Lisa Nerenberg, *Forgotten Victims of Elder Financial Crime and Abuse: A Report and Recommendations*, *NAT’LCTR. ON ELDER ABUSE* 3, 17 (1999), available at <http://ncea.aoa.gov/Resources/Publication/docs/fvfeqa.pdf>.

¹² *Id.* at 298.

available, and very few cases of financial exploitation are litigated.¹³

While not a panacea, the civil justice system can provide a victim-centered response to elder financial exploitation with a higher chance of financial recovery. Civil attorneys, unlike prosecutors who represent their particular state, represent the victim and the victim's best interests. To be sure, prosecutors' and civil attorneys' goals are often aligned and a synergetic relationship can be beneficial. They can share information and evidence gathered by forensic accountants and other experts. Prosecutors, however, have discretion in determining whether to file charges and move forward with the criminal case. In a civil case, victims are afforded the opportunity to make many of the decisions about their cases, and attorneys are not likely to withdraw after filing a lawsuit.

Civil attorneys also have the advantage of facing a lower burden of proof, usually a preponderance of the evidence standard (which means "more likely than not"), rather than the criminal system's beyond a reasonable doubt standard. Moreover, civil attorneys usually have more resources and incentive to conduct asset searches and to enforce judgments, increasing the likelihood of recovery.

The current civil justice system, however, makes it very difficult to succeed in elder financial exploitation cases. A fundamental problem is that the costs and fees associated with a typical case make it cost-prohibitive for a civil attorney to accept such cases. This leaves the task to legal aid providers who are overtaxed and usually restricted from filing lawsuits for fee-generating cases. While legal aid organizations may be able to assist with recovering the exploited property and assets, they typically cannot initiate lawsuits that request punitive or treble damages. The costs to retain

a forensic accountant, evaluate the merits of a case, file a complaint, conduct discovery, search assets, and the like, will often far exceed the amount of financial loss. Attorneys must also analyze and determine what statutes or common law claims may be asserted. Many causes of action do not carry an attorney's fee provision, which permits a prevailing party to recover attorneys' fees incurred in bringing the lawsuit.

To increase the opportunity for victims of elder financial exploitation to use and recover through the civil justice system, victims, litigators, and legislators must all find effective approaches to raising awareness about the availability of civil remedies, ensure the existence of viable causes of action that can be used as vehicles of recovery, and create an environment where attorneys are able to take on these difficult and often cost-prohibitive cases. The model provisions were drafted to further these goals, but they are only one step in the process of ensuring that victims of elder financial exploitation have better means to financial recovery. Access to civil justice is vital in cases involving elder financial exploitation. Ensuring that attorneys' fees and litigation costs do not preclude victims of elder financial exploitation from pursuing civil cases is essential to providing such access.

Process of Developing Model Civil Provisions on Elder Financial Exploitation

Literature review

The first effort in the development of the model provisions entailed a comprehensive review of the legal literature regarding elder financial exploitation. The goal of the literature review was to identify barriers to preventing and combating elder financial exploitation, the role of the legal system, and what specific issues should be considered as model provisions. We would like to highlight several publications that are particu-

¹³ *Id.* at 314; see also Seymour Moskowitz, *Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, 47 *LOY. L. REV.* 191, 194 (2001).

larly illuminating: *Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips From the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic* by Matthew Andres; and *Undue Influence: Definitions and Applications* by Mary Joy Quinn, Eileen Goldman, Lisa Nerenberg, and Deana Piazza.

Scope of Legal Research and Analysis

Our primary focus has been on legal research and analysis. Each state's provisions related to or directly addressing elder financial exploitation were examined. As described in the section "Commentary and Analysis," notable states with standalone civil statutes on elder financial exploitation were particularly illuminating. Other jurisdictions had provisions that provided important contributions to this project.

Expert Interviews

Leaders in combating elder financial exploitation, including those with experience as civil litigators or former prosecutors, provided their insights. The experts were generally asked about their thoughts on the following: 1) the greatest barriers and challenges to initiating a civil lawsuit, criminal prosecution, or presiding over an elder financial exploitation case; 2) how a set of civil provisions would affect their efforts; and 3) what provisions would be essential. Additional questions were prompted based on the interviewee's background. For example, those working in civil justice were asked about the typical fee arrangements (i.e., contingency, hourly) and what threshold amount of damages (i.e., amount of financial loss) was required to be retained. A few common threads emerged from these discussions.

First, it was of paramount importance to these experts that financial exploitation be defined

Examples of Financial Exploitation that the Model Statutory Laws Should Cover

The following list of activities and transactions, though in no way exhaustive, provides the range of issues that should be covered under the model civil provisions.

- Theft of money or property by family or caregiver
- Power of Attorney abuse
- Taking an elder's property by forgery or other unauthorized sale or transfer of property
- Selling of unsuitable and/or inappropriate products
- Financial exploitation perpetrated through undue influence
- Mass marketing scams, such as lottery, grandparent, and romance scams
- Contractors who receive payment but fail to initiate or properly complete the project
- Phishing, as well as other phone and email scams
- Identity theft
- Investment fraud
- Financial exploitation/abuse in institutional settings

broadly to reflect the complex and evolving nature of financial abuse. Previously, concern about financial exploitation focused on fraud committed by fiduciaries. However, elder financial exploitation can be committed in many ways and may not fall neatly under definitions of fraud. It has become increasingly clear that elder financial exploitation is often committed by family, friends, and caregivers. Thus, the model provisions should not be aimed solely at fiduciaries or those who are fiscal agents; rather, it should contemplate a wide variety of transactions and parties that may be civilly culpable.

Second, the availability of civil remedies was viewed as the crux of any model, as it is very costly to file lawsuits for elder financial exploitation. It was widely agreed that attorneys' fees must be recoverable under a model provision. This would accomplish an important objective of encouraging civil lawsuits by mollifying civil attorneys' concerns that taking on such cases would be cost-prohibitive. As most states do not permit attorneys to recover their fees from the defendant after winning a civil financial abuse case using the causes of action currently available, attorneys often decline to represent victims when the costs related to

trying the case are greater than the amount of financial loss. Moreover, many victims of elder financial exploitation cannot pay an hourly and/or retainer fee; thus, encouraging attorneys to take such cases by providing for recoverable attorneys' fees is vital. The interviewees agreed that treble damages must also be available; however, there was disagreement whether the imposition of such damages should be mandatory, or if it should be reserved for particularly egregious cases.

Lastly, the interviewees, like many experts in the field, affirmed that model provisions would make a meaningful impact in the field of elder abuse, and specifically financial exploitation. The potential for victims to achieve recovery and justice due to the adoption of one or more of these provisions is tangible.¹⁴

¹⁴ Particular thanks to interviewees Steve Reiss, Liz Loewy, Hon. Julie Conger, Erin Olson, Jaye Martin, and Denis Culley for their insights and generosity.

MODEL

PROVISIONS

Model Civil Provisions on Elder Financial Exploitation

This section provides the text for the model civil provisions which states are encouraged to adopt or adapt in order to improve their existing laws on elder financial exploitation. Also provided is a model purpose or findings statement.

The provisions are presented separately, rather than as a unified model statute, to encourage and facilitate legislative flexibility when determining which provisions to pass, and where to place them within existing state law.

The section that follows the provisions offers detailed commentary and analysis about each provision.



Model Civil Provisions on Elder Financial Exploitation

Purpose

- A. The Legislature finds and declares that elder financial exploitation is an insidious and rampant problem.
- B. Elder financial exploitation is broadly defined as the improper use of an elderly person's assets.
- C. Cognitive impairment reduces financial capacity, increasing risk of financial exploitation.
- D. Elder financial exploitation often escalates and co-occurs with other forms of elder abuse.
- E. Elder financial exploitation is a malfeasance that causes a long-lasting impact on the victim's quality of life, and can lead to premature death.
- F. Elder financial exploitation is underreported and often does not come to the attention of the criminal justice system.
- G. The civil justice system offers hope for victims of elder financial exploitation to seek redress and to recover.

Cause of Action

An elder who has been financially exploited has a cause of action against the perpetrator and/or any other responsible person or entity.

Parties

- A. An action under this section may be brought by the elder, the elder's guardian or conservator, other court-appointed decision-maker, a person or organization acting on behalf of the elder with the consent of that elder or that elder's guardian, or the personal representative of the estate of the deceased elder without regard to whether the cause of death resulted from the exploitation.
- B. An action under this section may be brought against any person or entity who has financially exploited an elder or facilitated such exploitation.

Definition – Elder

"Elder" means [include state definition here].

Definition – Financial exploitation

"Financial exploitation" is when a person or entity:

- A. Obtains by deception, coercion, intimidation, threats, duress, or undue influence the property of an elder, with the intent to deprive the elder of the elder's property; or
- B. Violates any provision of law proscribing misappropriation, theft, larceny, extortion, embezzlement, forgery, fraud, or identity theft with respect to the property or personal identifying information of an elder.

Legislative Note: If a jurisdiction has previously defined "financial exploitation," the jurisdiction may reference that decision when necessary. However, jurisdictions should revisit any previously enumerated definition to ensure that it is both broad and inclusive.

Remedies

- A. The Court shall award to a plaintiff who prevails in an action under this section:
 - Compensatory damages (general and special/economic and non-economic);
 - Treble damages;
 - Reasonable attorneys' fees;
 - Litigation costs;
 - Costs include, but are not limited to, the reasonable fees for a conservator, guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.
 - Prejudgment interest; and
 - Where appropriate, punitive damages.
- B. Relief available: Where a court finds that a contract, transfer of property, or execution of a guaranty was the result of undue influence, it shall grant appropriate relief enabling the elder to avoid the contract, transfer or execution, including the rescission or reformation of a deed or other instrument, the imposition of a constructive trust on property or an order enjoining the use of or entry on property or commanding the return of property and/or disgorgement of any profit. Nothing in this section may be construed to abrogate any other relief at law or equity to which an elder is entitled under other law or at common law.

Defenses

The transaction that was required by Court order.

Protective Order

- A. An elder who has been financially exploited, or a designated representative, may seek protective orders.
- B. The court may order the respondent to pay the petitioner for losses suffered as a direct result of the financial exploitation. Such losses shall include, but not be limited to, medical expenses, lost earnings or other support, repair or replacement of property damaged or taken, reasonable attorney's fees, court costs,

and moving or other travel expenses, including additional reasonable expenses for temporary shelter and restaurant meals.

Legislative Note: Jurisdictions should incorporate this model provision into relevant statutes regarding protective orders. Existing statutes should be amended to explicitly include language providing that protective orders can be obtained in cases solely involving financial exploitation.

Evidence – Hearsay exception pertaining to civil actions

- A An out of court statement by an elder who has been diagnosed by a physician to suffer from (i) any form of dementia, developmental disability, or other form of mental capacity or (ii) any physical infirmity which prevents the elder’s appearance in court, describing any act of financial exploitation, or testimony by an elder of an out of court statement made by the elder that he or she complained of such acts to another, is admissible in any civil proceeding if:
 - The Court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and
 - The elder either (A) testifies at the proceeding, or (B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.
- B If a statement is admitted pursuant to this section, the Court shall instruct the jury that it is for the jury to determine the weight and credibility to be given to the statement and that in making its determination, it shall consider the condition of the elder, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.
- C The proponent of the statement shall give the adverse party reasonable notice of the intention to offer the statement and the particulars of the statement.

Statute of Limitations

- A An action for damages under this section shall be commenced within five years after the elder or elder’s representative discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting financial exploitation.
- B Tolling/Suspension of limitations during criminal proceedings.
 - If a criminal prosecution is commenced arising out of the same facts as a civil action under this section, the time such prosecution is pending shall not be computed as part of the period within which such a civil action may be brought. For the purposes of this subsection, the time during which a prosecution is pending shall be calculated from: the date of the issuance of a warrant, summons or capias, the return or filing of an indictment or information, or the defendant’s first appearance in any court as an accused in such a prosecution, whichever date occurs first; until date of the final judgment or order in which the trial court, the date of final disposition of any direct appeal in state court, or the date on which the time for noting an appeal has expired, whichever date

occurs last. Thereafter, the civil action may be brought within the remaining period of the statute or within one year, whichever is longer.

- If a criminal prosecution is commenced and a grand jury indictment is returned or a grand jury indictment is waived after the period within which a civil action arising out of the same set of facts may be brought, a civil action may be brought within one year of the date of the final judgment or order in the trial court, the date of the final disposition of any direct appeal in state court, or the date on which the time for noting an appeal has expired, whichever date occurs last.

Disinheritance

- A Any person or entity found liable under this section shall not receive any property or acquire any benefit as the direct or indirect result of the financial exploitation of the elder. The Court may order any person or entity found liable under this section to forfeit all or a portion of the person's interest in any government instrument.
- B Notwithstanding any inconsistent provision of the estates, powers, and trusts law or the civil practice law and rules with respect to the timely bringing of an action, any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim, or the representative of that convicted person, within three years of the discovery of any profits from a crime.
 - "Profits from a crime" means (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, a crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

Settlements

- A An agreement to settle a civil action under this section shall not include any of the following provisions, whether the agreement is made before or after filing the action, as they are contrary to public policy:
 - A provision that prohibits any party to the dispute from contacting or cooperating with adult protective services; state or local law enforcement agencies; the long-term care ombudsman program; the state or local office on aging; the state attorney general; the state agency that licenses and certifies long-term care facilities and/or residential care facilities and/or hospitals; the state public health agency; the state agency or agencies that provide services to persons with physical, mental, or intellectual disabilities; a licensing or regulatory agency that has jurisdiction over the license or certification of the defendant; any other governmental entity or agency; a protection and

advocacy agency; or the defendant's current or future employer if the defendant's job responsibilities include contact with elders, minors, or persons with disabilities.

- A provision that prohibits any party to the dispute from filing a complaint with, or reporting any violation of law to, adult protective services; state or local law enforcement agencies; the long-term care ombudsman program; the state or local office on aging; the state attorney general; the state agency that licenses and certifies long-term care facilities and/or residential care facilities and/or hospitals; the state public health agency; the state agency or agencies that provide services to persons with physical, mental, or intellectual disabilities; a licensing or regulatory agency that has jurisdiction over the license or certification of the defendant; any other governmental entity or agency; a protection and advocacy agency; or the defendant's current or future employer if the defendant's job responsibilities include contact with elders, minors, or persons with disabilities.
- A provision that requires any party to the dispute to withdraw a complaint he or she has filed with, or a violation he or she has reported to, adult protective services; state or local law enforcement agencies; the long-term care ombudsman program; the state or local office on aging; the state attorney general; the state agency that licenses and certifies long-term care facilities and/or residential care facilities and/or hospitals; the state public health agency; the state agency or agencies that provide services to persons with physical, mental, or intellectual disabilities; a licensing or regulatory agency that has jurisdiction over the license or certification of the defendant; any other governmental entity or agency; a protection and advocacy agency; or the defendant's current or future employer if the defendant's job responsibilities include contact with elders, minors, or persons with disabilities.

Accommodations – Speedy trial

In a civil action in which an elder is a party alleging a cause of action under this section, such party may move the court to advance the trial on the docket. The presiding judge, after consideration of the age and health of the party and/or the financial capacity of the elder may advance the trial on the docket. The motion may be filed and served with the complaint or at any time thereafter.

Withholding priority

A judgment for a plaintiff under this section and docketed with the Court Clerk shall be a lien against the net proceeds of any settlement negotiated prior or subsequent to the filing of a lawsuit, civil judgment, civil arbitration award, inheritance or workers' compensation award. The lien shall have priority over all other levies and garnishments against the net proceeds of any settlement negotiated prior or subsequent to the filing of a lawsuit, civil judgment, civil arbitration award, inheritance, or workers' compensation award unless otherwise provided by the Court. The lien shall not have priority over levies to recover unpaid taxes owed or for child support. The lien shall stay the distribution of the net proceeds to the prevailing party until the civil judgment rendered in an elder financial exploitation case is satisfied.

COMMENTARY

and ANALYSIS

This section offers detailed commentary and analysis about each provision, along with the text of the provisions. The commentary explains the reasoning behind including each provision and the sources that were utilized in creating each provision, among other relevant information.



Detailed Commentary on Model Civil Provisions on Elder Financial Exploitation

Purpose

- A. The Legislature finds and declares that elder financial exploitation is an insidious and rampant problem.
- B. Elder financial exploitation is broadly defined as the improper use of an elderly person's assets.
- C. Cognitive impairment reduces financial capacity, increasing risk of financial exploitation.
- D. Elder financial exploitation often escalates and co-occurs with other forms of elder abuse.
- E. Elder financial exploitation is a malfeasance that causes a long-lasting impact on the victim's quality of life, and can lead to premature death.
- F. Elder financial exploitation is underreported and often does not come to the attention of the criminal justice system.
- G. The civil justice system offers hope for victims of elder financial exploitation to seek redress and to recover.

Commentary: Each state should set forth its legislature's intent to recognize elder financial exploitation as a serious malfeasance, encourage civil remedies, and encompass a wide range of acts and transactions as potentially exploitative. As a model, California's legislative intent is comprehensive.¹⁵ It provides, in part, that the California 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. California's policymakers further articulate that the Legislature desires to direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of abuse.

This model provision deviates slightly from California's legislative intent. As an initial matter, the model legislative intent is more succinct, emphasizing the three key elements: First, an acknowledgment that elder abuse is a serious and rampant problem. Second, that elder financial exploitation should be viewed broadly, as it often co-occurs with other forms of abuse. And lastly, it highlights some unique issues, specifically regarding cognitive decline. Those three fundamentals are the most critical to underscore.

States should include a comprehensive section on legislative intent along with any statute addressing elder financial exploitation. This section should provide some explanation of the issue, supported by facts, and the reason for the statute's enactment. This section should also reflect public policy interests, and should align with other similar state statutes that address elder issues. For example, Vermont's legislative intent, in the

¹⁵ Cal. Wic. Code §15600 (Deering 2017).

criminal context, is particularly illuminating. Vermont provides that “[v]ulnerable adults are one of the most abused segments of our population” and that “84 percent of abuse or neglect was never reported.”¹⁶

Cause of Action

An elder who has been financially exploited has a cause of action against the perpetrator and/or any other responsible person or entity.

Commentary: This provision is critical in that it provides the crux of civil liability. This provision clearly articulates elder financial exploitation as a basis for a civil lawsuit. One requirement that is intentionally omitted is a demand for return of the money or property in issue. Illinois recently eliminated a requirement that demanded a return of stolen money or property before a civil lawsuit can be filed. Previously, Illinois law required the victim to write a letter to the perpetrator demanding the return of stolen property, and if it is not returned within 60 days, the victim may bring a civil law suit. Illinois Public Act 0099-272 came into effect on January 1, 2016 and omitted this demand notice, regardless of whether or not criminal charges have been filed.¹⁷ Eliminating the requirement to demand the return of property is in line with the national trend and is more victim-centered, as victims are not burdened with a perfunctory demand.

Parties

- A An action under this section may be brought by the elder, the elder’s guardian or conservator, other court-appointed decision-maker, a person or organization acting on behalf of the elder with the consent of that elder or that elder’s guardian, or the personal representative of the estate of the deceased elder without regard to whether the cause of death resulted from the exploitation.
- B An action under this section may be brought against any person or entity who has financially exploited an elder or facilitated such exploitation.

Commentary: By broadly defining parties, the model provision encourages redress by way of a civil lawsuit even if the victim himself or herself is unable to bring a lawsuit. Moreover, this provision allows responsible parties—including third parties who facilitate such actions—to be held liable. The breadth of this provision is similar to Washington’s statute, which provides that an action for certain elder abuse, including financial exploitation, “shall be available where the defendant is or was a corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or any individual provider.”¹⁸ By including the terms “any person or entity,” it is intended that the defendant can be an individual or an entity of any corporate structure.

¹⁶ 2005 79 Vt. Adv. Legis. Serv. 163 (LexisNexis).

¹⁷ 720 Ill. Comp. Stat. 5/17-56 (2016).

¹⁸ Wash. Rev. Code § 74.34.200 (2017).

Similar to Oregon’s survival provision, causes of actions arising out of the damages caused by the wrongful act or omission of another shall not abate upon the death of the person, and the personal representatives can maintain an action against the wrongdoer.¹⁹

Definition - Elder

“Elder” means [include state definition here].

Commentary: States should utilize their individual definition of elder after determining the best way to include those who should be protected under similar provisions. This may involve the evaluation of age requirements and whether other vulnerable populations should be included. In addition, any residency requirement should be intentionally omitted. Due to the nature of financial crimes, in that they are often perpetrated by wire transfer or other electronic means, a residency requirement could further burden victims seeking reparations.

Definition – Financial exploitation

“Financial exploitation” is when a person or entity:

- A Obtains by deception, coercion, intimidation, threats, duress, or undue influence the property of an elder, with the intent to deprive the elder of the elder’s property; or
- B Violates any provision of law proscribing misappropriation, theft, larceny, extortion, embezzlement, forgery, fraud, or identity theft with respect to the property or personal identifying information of an elder.

Legislative Note: If a jurisdiction has previously defined “financial exploitation,” the jurisdiction may reference that decision when necessary. However, jurisdictions should revisit any previously enumerated definition to ensure that it is both broad and inclusive.

Commentary: Consistent with the model legislative intent articulated above, elder financial exploitation is broadly defined. The first notable feature of the section is that financial exploitation is not limited to those actions by a fiduciary. This reflects the reality that financial exploitation is committed not just by fiduciaries, but non-fiduciary family members, caretakers, and strangers. As stated in Oregon’s statute, Civil Action for Abuse of Vulnerable Person, an action may be brought for financial abuse “[w]hen a person wrongfully takes or appropriates money or property of a vulnerable person, without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the vulnerable person.”²⁰ This model provision is derived from Virginia, Washington, and Wisconsin’s definition.

Vermont’s statute defines “exploitation” as follows: “(A) willfully using, withholding, transferring, or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another; (B) acquiring possession or control of or an interest in funds or property of vulnerable adult through the

¹⁹ Or. Rev. Stat. § 30.075 (2017).

²⁰ § 124.110.

use of undue influence, harassment, duress, or fraud; (C) the act of forcing or compelling a vulnerable adult against his or her will to perform services for the profit or advantage of another...²¹

Washington's definition broadly defines financial exploitation as the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage.²² The examples provided, however, may be limiting. For instance, financial exploitation is defined as the use of deception by a "person or entity in a position of trust and confidence" or a breach of a "fiduciary duty."²³ The model definition does not limit financial exploitation to perpetrators who are in a position of trust and/or those who are fiduciaries to the elder. The model provisions, unlike Washington's definition, do not take into consideration the perpetrator's knowledge of the victim's capacity. The fact of depriving the vulnerable adult or misappropriating their assets is sufficient to fall within the broad definition without delving into what the perpetrator knew, or should have known, as to the victim's capacity. That knowledge, to be sure, may be relevant to other sections of the model provisions, such as the imposition of treble and/or punitive damages.

Wisconsin's statute includes "[u]nauthorized use of an individual's personal identifying information or documents."²⁴ This model provision also incorporates identity theft into its definition of financial exploitation.

Remedies

A. The Court shall award to a plaintiff who prevails in an action under this section:

- Compensatory damages (general and special/economic and non-economic);
- Treble damages;
- Reasonable attorneys' fees;

Commentary: The grant of attorneys' fees is not discretionary with the trial judge, but mandated as a matter of public policy.

This provision is mainly derived from Oregon's Elderly Persons and Persons with Disabilities Abuse Prevention Act (EDPAPA), which provides that in cases involving a vulnerable person who "suffers injury, damage or death by reasons of physical abuse or financial exploitation" ... "[t]he court shall award the following to a plaintiff who prevails in an action under this section:

- (a) An amount equal to three times all economic damages ... or \$500, whichever amount is greater.
- (b) An amount equal to three times all noneconomic damages
- (c) Reasonable attorney fees incurred by the plaintiff.

²¹ Vt. Stat. Ann. tit. 33, § 6902 (2016)

²² Wash. Rev. Code §94.34.020.

²³ Id.

²⁴ Wis. Stat. § 46.90

- (d) Reasonable fees for the services of a conservator or guardian ad litem incurred by reason of the litigation of a claim brought under this section.²⁵

As aforementioned, practitioners and attorneys who provided input emphasized that treble damages are important for many reasons. First, without treble damages, many cases are cost-prohibitive and thus attorneys are not able to take on the cases. Providing for treble damages will make representing such clients more economical. Secondly, treble damages can potentially help deter elder financial exploitation. Lastly, treble damages may also encourage settlement negotiations, which is helpful in ensuring a faster process and avoiding stressful litigation that can take a toll on the elder's physical and mental health.

Where an elder (or any person or entity representing the elder) pleads but fails to prove financial exploitation, the prevailing defendant may not recover attorney's fees from the elder even if an independent basis for their recovery exists. A California Court of Appeals affirmed a holding that California's elder financial exploitation statute provides for an "award of fees in elder abuse cases only to a prevailing plaintiff. There is no reciprocal fee provision for a prevailing defendant."²⁶

- **Litigation costs;**
 - **Costs include, but are not limited to, the reasonable fees for a conservator, guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.**

Commentary: Washington law provides that "in an action by a vulnerable adult who has been subject to abandonment, financial exploitation, neglect, or other types of abuse either while living in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby...In an action brought under this section, a prevailing party shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorney's fee. The term 'costs' includes, but is not limited to the reasonable fees for a guardian, guardian ad litem, and experts, if any that may be necessary to the litigation of a claim under this section."²⁷

- **Prejudgment interest; and**
 - **Where appropriate, punitive damages.**
- B. **Relief available: Where a court finds that a contract, transfer of property, or execution of a guaranty was the result of undue influence, it shall grant appropriate relief enabling the elder to avoid the contract, transfer or execution, including the rescission or reformation of a deed or other instrument, the imposition of a constructive trust on property or an order enjoining the use of or entry on property or commanding the return of property and/or disgorgement of any profit. Nothing in this section may be construed to abrogate any other relief at law or equity to which an elder is entitled under other law or at common law.**

²⁵ Or. Rev. Stat. §§ 124.005-124.990 (2017).

²⁶ *Wood v. Santa Monica Escrow Company* (2007) 151 Cal.App.4th 1186.

²⁷ Wash. Rev. Code § 74.34.200.

Commentary: This is modeled after Maine’s Improvident Transfer of Title, which provides in part:

When a court finds that a transfer of property or execution of a guaranty was the result of undue influence, it shall grant appropriate relief enabling the elderly dependent person to avoid the transfer or execution, including the rescission or reformation of a deed or other instrument, the imposition of a constructive trust on property or an order enjoining the use of or entry on property or commanding the return of property. When the court finds that undue influence is a good and valid defense to a transferee’s suit on a contract to transfer the property or a suit of a person who benefits from the execution of a guaranty on that guaranty, the court shall refuse to enforce the transfer or guaranty.

No relief obtained or granted under this section may in any way affect or limit the right, title and interest of good faith purchasers, mortgagees, holders of security interests or other 3rd parties who obtain an interest in the transferred property for the value after its transfer from the elderly person. No relief obtained or granted under this section may affect any mortgage deed to the extent of value given by the mortgage.²⁸

The following section provides that “[n]othing in this chapter may be construed to abrogate any other cause of action or relief at law or equity to which the elderly dependent persons are entitled under other laws or at common law.”²⁹

In addition to the relief provided for in Maine’s Improvident Transfer of Title, the model provision extends the relief to rescind contracts that are not based in real property. For example, if an offender financially exploited an elder by selling him or her an inappropriate annuities contract, the Court may rescind the contract effectuating the annuity.

Defenses

The transaction that was required by Court order.

Commentary: The defense provided in this model provision is limited by design. Various defenses were evaluated and ultimately rejected. For example, because the model provision does not require scienter—that the defendant acted wrongfully and knowingly—any demonstration that the defendant did not know or should have known that the conduct or transaction would be likely harmful to the plaintiff, should fall on deaf ears. Moreover, in some jurisdictions such as Massachusetts, consent by the victim may be a defense. Consent however, is not an acceptable defense in the context of the model provisions, because consent may not be able to be conveyed when the occurrences involves a vulnerable adult. Moreover, in cases where financial exploitation occurs through undue influence, the victim technically may consent to the transaction or taking, but such consent under duress or undue influence is negated.

Protective Order

A *An elder who has been financially exploited, or a designated representative, may seek protective orders.*

²⁸ Me. Stat. tit. 33 § 1023 (2017).

²⁹ Tit. 33, § 1024.

- B The court may order the respondent to pay the petitioner for losses suffered as a direct result of the financial exploitation. Such losses shall include, but not be limited to, medical expenses, lost earnings or other support, repair or replacement of property damaged or taken, reasonable attorney’s fees, court costs, and moving or other travel expenses, including additional reasonable expenses for temporary shelter and restaurant meals.

Commentary: A provision on protective orders is important in the context of the model provisions because many states’ statutes pertaining to protective orders are not applicable unless physical violence or the threat of physical violence exists. In many elder financial exploitation cases, such violence is not present, and threats may not be explicit enough to merit a protective order geared towards protecting a victim from physical harm. However, a protective order can be vital in such cases. A protective order could prevent future exploitative behavior, and could protect the victim from the perpetrator’s influence during the course of litigation. States are encouraged to consider expanding current statutes to enable victims of elder financial exploitation who may not be protected under the existing law, to apply for protective orders.

Illinois recently amended protective order provisions within its Domestic Violence Act to allow courts to order payment to petitioners for certain losses, including those directly related to exploitation. This is a novel and progressive approach, and could potentially provide victims with some financial support while pursuing a criminal or civil case. It should be noted that such a provision alone does not negate the need for other civil provisions, as this provision does not provide for treble or punitive damages.³⁰

California Welfare & Institutions Code, effective July 1, 2016, provides the substantive and procedural basis for a protective order. It provides in part that an abused elder may seek protective orders and that “a petition may be brought on behalf of an abused elder.”³¹ The California provision states that, upon filing a petition for protective order, the petitioner may obtain a temporary restraining order in accordance with Section 527 of the California Code of Civil Procedure. California’s provision provides that “[t]his subdivision does not apply in a case in which a protective order issued under this section was made solely on the basis of financial abuse unaccompanied by force, threat, harassment, intimidation, or any form of abuse.”³² Such limitation is not provided here because financial exploitation is often effectuated through undue influence and there may not be a threat of a physical nature. Virginia’s statute is also informative.³³ When seeking relief from abuse, neglect or exploitation by filing a petition, a filing fee is not required.

Evidence – Hearsay exception pertaining to civil actions

- A An out of court statement by an elder who has been diagnosed by a physician to suffer from (i) any form of dementia, developmental disability, or other form of mental capacity or (ii) any physical infirmity which prevents the elder’s appearance in court, describing any act of financial exploitation, or testimony by an

³⁰ 750 Ill. Comp. Stat. 60/214(b)(13).

³¹ Cal. Wic. Code §15657.03(a)(1)-(2) (Deering 2017).

³² § 15657.03(u).

³³ Vt. Stat. Ann. tit. 33, § 6933 (2016).

elder of an out of court statement made by the elder that he or she complained of such acts to another, is admissible in any civil proceeding if:

- The Court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and
 - The elder either (A) testifies at the proceeding, or (B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.
- B. If a statement is admitted pursuant to this section, the Court shall instruct the jury that it is for the jury to determine the weight and credibility to be given to the statement and that in making its determination, it shall consider the condition of the elder, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.
- C. The proponent of the statement shall give the adverse party reasonable notice of the intention to offer the statement and the particulars of the statement.

Commentary: This provision is adapted from Illinois law, which provides for the admissibility of certain out of court statements. Specifically, the Illinois statute provides that an out of court statement made by an eligible adult may be admissible if the court conducts a hearing outside the presence of the jury and finds sufficient safeguards of reliability and the eligible adult either testifies at a proceeding or is unavailable as a witness and there is corroborative evidence.³⁴

Statute of Limitations

- A. An action for damages under this section shall be commenced within five years after the elder or elder's representative discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting financial exploitation.
- B. Tolling/Suspension of limitations during criminal proceedings.
- If a criminal prosecution is commenced arising out the same facts as a civil action under this section, the time such prosecution is pending shall not be computed as part of the period within which such a civil action may be brought. For the purposes of this subsection, the time during which a prosecution is pending shall be calculated from: the date of the issuance of a warrant, summons or capias, the return or filing of an indictment or information, or the defendant's first appearance in any court as an accused in such a prosecution, whichever date occurs first; until date of the final judgment or order in which the trial court, the date of final disposition of any direct appeal in state court, or the date on which the time for noting an appeal has expired, whichever date occurs last. Thereafter, the civil action may be brought within the remaining period of the statute or within one year, whichever is longer.

³⁴ 735 ILL. COMP. STAT. 5/8-2701.

- If a criminal prosecution is commenced and a grand jury indictment is returned or a grand jury indictment is waived after the period within which a civil action arising out of the same set of facts may be brought, a civil action may be brought within one year of the date of the final judgment or order in the trial court, the date of the final disposition of any direct appeal in state court, or the date on which the time for noting an appeal has expired, whichever date occurs last.

Commentary: There are several reasons to suspend the statute of limitations during criminal proceedings. First, many states have no statute of limitations for felony criminal cases. If there is an unlimited period of time to hold perpetrators accountable to society and the state, there should not be such a limited amount of time for the perpetrator to be held accountable to the victim. Second, victims are consumed by the criminal prosecution and are either unaware of, or unable to focus on, the available civil remedies during a criminal prosecution. Third, civil actions by victims are best handled after a criminal prosecution has concluded. Currently, eight states have extended statute of limitations for all victims based upon the criminal case or the status of the offender. For example, in New York, the statute of limitations to bring a law suit is extended to within seven years of the crime or within one year of the termination of the criminal action.³⁵

Disinheritance

- A Any person or entity found liable under this section shall not receive any property or acquire any benefit as the direct or indirect result of the financial exploitation of the elder. The Court may order any person or entity found liable under this section to forfeit all or a portion of the person's interest in any government instrument.
- B Notwithstanding any inconsistent provision of the estates, powers, and trusts law or the civil practice law and rules with respect to the timely bringing of an action, any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim, or the representative of that convicted person, within three years of the discovery of any profits from a crime.
 - "Profits from a crime" means (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, a crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

Commentary: Akin to a "slayer" statute, this provision aims to condemn elder financial exploitation by mandating disinheritance in cases of financial exploitation. It is important to require a finding of civil liability; otherwise, this

³⁵ N.Y. C.P.L.R. 213-b (Consol. 2017).

provision would have the unintended consequence of being used to force disinheritance in cases where there is insufficient proof of malfeasance. This provision aims to avoid situations where unsubstantiated civil lawsuits are being filed in an attempt to procure a larger portion of an inheritance. The language was modeled after a New York law.³⁶

Settlements

- A An agreement to settle a civil action under this section shall not include any of the following provisions, whether the agreement is made before or after filing the action, as they are contrary to public policy:
- A provision that prohibits any party to the dispute from contacting or cooperating with adult protective services; state or local law enforcement agencies; the long-term care ombudsman program; the state or local office on aging; the state attorney general; the state agency that licenses and certifies long-term care facilities and/or residential care facilities and/or hospitals; the state public health agency; the state agency or agencies that provide services to persons with physical, mental, or intellectual disabilities; a licensing or regulatory agency that has jurisdiction over the license or certification of the defendant; any other governmental entity or agency; a protection and advocacy agency; or the defendant's current or future employer if the defendant's job responsibilities include contact with elders, minors, or persons with disabilities.
 - A provision that prohibits any party to the dispute from filing a complaint with, or reporting any violation of law to, adult protective services; state or local law enforcement agencies; the long-term care ombudsman program; the state or local office on aging; the state attorney general; the state agency that licenses and certifies long-term care facilities and/or residential care facilities and/or hospitals; the state public health agency; the state agency or agencies that provide services to persons with physical, mental, or intellectual disabilities; a licensing or regulatory agency that has jurisdiction over the license or certification of the defendant; any other governmental entity or agency; a protection and advocacy agency; or the defendant's current or future employer if the defendant's job responsibilities include contact with elders, minors, or persons with disabilities.
 - A provision that requires any party to the dispute to withdraw a complaint he or she has filed with, or a violation he or she has reported to, adult protective services; state or local law enforcement agencies; the long-term care ombudsman program; the state or local office on aging; the state attorney general; the state agency that licenses and certifies long-term care facilities and/or residential care facilities and/or hospitals; the state public health agency; the state agency or agencies that provide services to persons with physical, mental, or intellectual disabilities; a licensing or regulatory agency that has jurisdiction over the license or certification of the defendant; any other governmental entity or agency; a protection and advocacy agency; or the defendant's current or future employer if the defendant's job responsibilities include contact with elders, minors, or persons with disabilities.

³⁶ N.Y. Exec. Law § 632-a (2017).

Commentary: The type of employment covered may include work requiring contact with minors and persons with disabilities, as these populations are also vulnerable to exploitation. Such populations should be protected regardless of the target of the malfeasance that lead to the civil lawsuit.

Accommodations – Speedy trial

In a civil action in which an elder is a party alleging a cause of action under this section, such party may move the court to advance the trial on the docket. The presiding judge, after consideration of the age and health of the party and/or the financial capacity of the elder may advance the trial on the docket. The motion may be filed and served with the complaint or at any time thereafter.

Commentary: Defense counsel may attempt to unnecessarily and unscrupulously delay trial in the hopes that the elder will become more incapacitated or pass away, to eliminate the potential for damning testimony. Moreover, elders who are financially exploited need the opportunity to more quickly recover their assets as they are more prone to hospitalization and other mental, emotional, and health consequences of the financial exploitation. This provision is adapted from a Florida statute.³⁷

Included in the model provision is the consideration by a presiding judge of the elder’s age, health, and current financial capacity that necessitates faster resolution of the civil action. This enables discretion in cases where a speedy trial may not be in the best interest of the victim.

Withholding priority

A judgment for a plaintiff under this section and docketed with the Court Clerk shall be a lien against the net proceeds of any settlement negotiated prior or subsequent to the filing of a lawsuit, civil judgment, civil arbitration award, inheritance or workers’ compensation award. The lien shall have priority over all other levies and garnishments against the net proceeds of any settlement negotiated prior or subsequent to the filing of a lawsuit, civil judgment, civil arbitration award, inheritance, or workers’ compensation award unless otherwise provided by the Court. The lien shall not have priority over levies to recover unpaid taxes owed or for child support. The lien shall stay the distribution of the net proceeds to the prevailing party until the civil judgment rendered in an elder financial exploitation case is satisfied.

Commentary: California law provides withholding priorities for orders regarding elder or dependent adult financial abuse, other than orders for child and spousal support and back taxes. This is an important model provision, as “many victims of elder dependent adult financial abuse know, it is not enough to receive a judgment against the perpetrator, the hard part is collecting the judgment.”³⁸ Moreover, the lien created by a judgment provides one of the highest forms of security because it gives an otherwise unsecured creditor the right to force the sale of the debtor’s interest in realty through a creditor’s bill in equity.³⁹ Providing lien priority for judgments rendered in civil

³⁷ Fla. Stat. § 415.115 (2016).

³⁸ 42 McGeorge L. Rev. 531, 532, Chapter 64: Assisting Victims of Elder Financial Abuse in Recovering Their Judgment Awards (2011), Deaver, Ekaterina.

³⁹ William & Mary Law Review Vol. 21 Issue 3, Judgment Liens and Priorities

elder financial exploitations serves a myriad of important purposes. Primarily, it improves the opportunity for an elder to recover their money more quickly. For an elder who is a victim, every year, week, and day matters in their access to proper housing, basic necessities, and medication, particularly if they have been scammed out of their hard earned money. Additionally, lien priority, like what is typically given for child support liens, sends an important message on what the jurisdiction values—protecting their most vulnerable of populations.

CONSIDERATIONS

and CONCLUSION

Legislative Considerations

Ensuring the physical and financial safety and protection of elders should be a paramount goal for state legislatures working to strengthen their responses to financial exploitation. When considering these civil provisions to enhance this response, legislatures should work within a state's criminal codes and similar statutes. There has been a flurry of recent activity. In 2013, 30 jurisdictions had legislation to address financial exploitation of the elderly and vulnerable. This progress is promising, but it has mostly focused on criminal laws and proceedings. And while strengthening that legislation is important, it is equally important to bolster civil remedies, giving victims of elder financial exploitation the opportunity for a more complete recovery.

Looking Ahead

The drafters and advisors of this report encourage legislators, policy makers, victim advocates, lawyers, judges, and other allied professionals to remain vigilant in their efforts to address elder financial exploitation. Ensuring justice requires a continued commitment to review and amend civil laws as needed, and to promote awareness of civil justice as a necessary resource to more comprehensively address elder financial exploitation.