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**Financial Abuse and Exploitation in Pennsylvania:
The Importance of Early Response
And Clearer Lines for Recovery**

Written Testimony

By

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Thank you for the opportunity to testify on the critical topic of protecting Pennsylvanians, including older Pennsylvanians, from financial abuse and exploitation. I know that this Committee has access to abundant statistics and reports of concern, demonstrating that elder exploitation is, unfortunately, a rising phenomenon. When bank robber Willie Sutton was asked why he robbed banks back in the 1930s, 40s, and 50s, his reported reply was “Go where the money is . . . and go there often.” If he were working today, I suspect Willie’s recommended target would be older adults, because older adults today are in charge of much of our nation’s savings.

I have been teaching and working on issues related to older adults for some 20 years. A portion of my responsibilities as a professor of law at the Dickinson School of Law have been to develop and head the Elder Law and Consumer Protection Clinic, a name we eventually shortened to the Elder Protection Clinic. For more than ten years, our Clinic represented older adults in central Pennsylvania, but we also took calls from concerned elders and attorneys searching for answers from around the state. A significant number of the matters we encountered involved financial abuse and exploitation. Dealing with the many ways in which the claims can arise led me to collaborate on a book, The Law of Financial Abuse and Exploitation, which my co-author and I subtitled “A Pennsylvania Guide for Older Adults, Families, Counsel and Courts.”¹

In speaking here today, my remarks reflect my twenty+ years of research, writing and experiences as a law professor, and track back even further, to my time as a practicing lawyer in New Mexico. I am also a member of the Pennsylvania Bar Association and have served as a past chair of the PBA Elder Law Section and as a Council Member to the Section. Since this hearing

¹ Katherine C. Pearson & Trisha E. Cowart, THE LAW OF FINANCIAL ABUSE AND EXPLOITATION (George T. Bisel Co. Inc., 2011).

is on the very general topic of financial exploitation, and not on a specific bill, there may be some issues discussed where the PBA has not yet adopted an official position. Therefore, I will be offering opinions based upon my own personal experiences, and I am not a spokesperson for either the PBA or Penn State University. However, I do know that the PBA looks forward to working with the Committee in the future on the specific bills that will result from these hearings.

Protection of older adults from exploitation requires a careful balance. On the one hand, it is important to recognize their rights to individual autonomy; on the other hand, it is important to recognize the potential for vulnerability to influence, manipulation, and outright fraud or theft. However, I also know that often the most important step is to address the potential for abuse as early as possible, before the money has disappeared completely. Prompt action can preserve not only elders' savings, but their dignity. Along this line, I believe that Pennsylvania laws and safeguards could be stronger and therefore recommend:

1. That to facilitate early *reporting*, Pennsylvania take additional measures to create an environment where banks and other financial institutions are more likely to report suspicions of financial abuse, and
2. That to facilitate early *recovery*, Pennsylvania create a private right of action under the Older Adult Protective Services Act (OAPSA), permitting the victim of exploitation (or the victim's legal representative) to allege statutory grounds against the perpetrator in order to seek recovery of money or other property, or other appropriate injunctive relief.

On the first point (enhancing reporting), one of the issues under active discussion in Pennsylvania is whether banks and financial institutions should be "mandatory" reporters of suspicions of financial abuse, as is true in certain other states.² I recognize this issue requires respect for the traditional relationship between banks and customers. Personal and commercial transactions are based upon laws that put the burden on account holders to make prompt reports of suspected errors or affirmative mishandling of accounts, and certainly the smooth flow of finance is supported by such laws.³ Thus, as I understand it, the banking industry in Pennsylvania opposes "mandatory" reporting of suspected financial abuse, even though other states have imposed such a duty. Interestingly, many elder law and estate lawyers share a similar concern about the potential impact of mandatory reporting on routine transactions. I am not speaking on "behalf" of the elder law bar, but I know from my work with attorneys in Pennsylvania that some would be worried about a change in existing law that makes it harder for financial institutions to honor appropriate, routine financial transactions and documents that direct payment, including powers of attorney. The vast bulk of financial transactions, including elders' transactions, *are* routine, including movement of what may be large sums of money or property as part of estate and tax planning transactions.

² Florida, for example, requires any bank, savings and loan, or credit union officer, trustee or employee "who knows, or who has reasonable cause to suspect, that a vulnerable adult has been or is being . . . exploited shall immediately report such knowledge or suspicion to the central abuse hotline." Fla. Stat. 415.1034(1)(8)(effective 1995).

³ See 13 Pa. C.S. § 4402 (Liability of bank to customer for wrongful dishonor) and § 4406 (Duty of customer to discover and report unauthorized signature or alteration).

However, going back to one of the very earliest cases I had as a younger lawyer in another state, New Mexico, more than 30 years ago, where my firm represented that state's largest Savings and Loan, I became aware that truly suspicious patterns are often evident to bank tellers, managers, and clerical personnel. Examples? It may be the elderly woman who suddenly starts withdrawing large sums of cash while accompanied by a "niece." It may be a hand-drawn power of attorney presented as authority to close an account by a "new friend" where the bank knows the customer has long history of frugality, or the elder now seems to be confused. It may be the senior who seems excited about winning a new sweepstakes or lottery, and is purchasing money orders to send out of the country in order to "collect" his winnings. It is important to give people who could be "first responders" the tools and incentives to report their concerns, both within their own internal lines of communication, and to public authorities charged with the power to investigate suspected abuse or criminal behavior.

My approach is rather simple. I believe that banks that have suspicions of financial abuse are already immune from liability for making reports to authorities,⁴ but we could more clearly immunize their reports from liability, in those occasional instances where they could be mistaken. I would tie a bank's assumption of an affirmative duty to report suspected financial abuse to express statutory immunity under state law for any good faith report of suspected financial abuse made to local, state or federal public authorities. My approach is the carrot, rather than the stick. I would leave it open to the common law (or other statutory law) to decide whether and when a bank that is arguably negligent in ignoring suspicions of abuse should be liable if it chooses not to make a report.⁵

On the second point (enhancing recovery), Pennsylvania's district attorneys already have a heavy criminal docket, and frankly, criminal prosecution is the last line of protection. I believe that rather than expecting prosecutors to do all of the heavy lifting, it could be useful to create a private right of action under the Older Adult Protective Services Act. An individual, or a legally recognized agent or guardian of that individual, could then bring a civil suit, alleging statutory grounds for liability, against a perpetrator, as grounds for injunctive relief and damages. This approach would use the straight-forward language of financial exploitation contained in OAPSA. Permitting such a direct suit, especially if also tied to a right for the successful party to recover attorneys' fees against the perpetrator, would permit swifter action, and thereby potentially avoid complete loss.

⁴ For example, 12 U.S.C. § 3403(c), providing an exception to confidentiality of financial records, permits disclosures to federal authorities of customer information connected to suspected criminal behavior. See also Federal Reserve Board Regulation P, which permits disclosures to "protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability." 12 C.F.C. § 216.15(a)(2)(ii). See also 35 P.S. § 10225.103(d) (Immunity under OAPSA for any "person participating in the making of a report or who provides testimony....").

⁵ Pennsylvania law already makes banks potentially liable, where, for example, a bank fails to use good faith in honoring an item. See e.g., 13 Pa.C.S. § 4406(d) and (e). See also *Bucci v. Wachovia Bank, N.A.*, 591 F. Supp. 2d 773 (E.D. Pa. 2008) (refusing to dismiss customer's claims of common law negligence and breach of contract). But see *Environmental Equipment & Service Co. v. Wachovia Bank, N.A.*, 741 F. Supp. 2d 705 (E.D. Pa. 2010)(dismissing counts alleging common law negligence, breach of contract and breach of good faith and fair dealing, as displaced by Pennsylvania's adoption of Uniform Commercial Code provisions in 13 Pa. C.S. § 4406 (d) and(e)).

It is probably rare for most private attorneys to encounter a claim for financial abuse of an elder and when they do it would often be unaffordable for them to research the civil laws governing undue capacity, undue influence, conversion, fraud, breach of fiduciary duty, contract and quasi-contract theories, or to research whether the transaction was a completed “gift.” The Older Adult Protective Services Act already has a workable theory, used by protective service units in Area Agencies on Aging (AAAs) to investigate suspected financial abuse, and to provide services. The Older Adult Protective Services Act’s straight-forward definition of exploitation is “an act or course of conduct by a caretaker or other person against an older adult or an older adult’s resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion, or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator, or monetary or personal loss to the older adult.”⁶ There are, essentially, three elements to exploitation under OAPSA: (a) a person who takes advantage of an older person’s trust; (b) diverts resources in a way that does not benefit the older person; and (c) takes such action without the older person’s (or agent’s) clear understanding or informed consent. Perhaps the time has come to provide AAAs with partners in pursuing more complete relief under OAPSA, by authorizing, in essence, private attorneys general. I believe this approach would also encourage response while the older adult is still able to benefit from recovery, rather than leaving disputes over undue influence or other wrongs to heirs or beneficiaries during probate.⁷

I am happy to expand on these two points in person or in writing in the future, if that would help the committee consider specific language for amendment or expansion of OAPSA. I am also happy to respond to questions today. Thank you again for this opportunity to support Pennsylvania’s concern for safeguarding older adults from financial abuse and exploitation.

⁶ 35 P.S. 10225.103 (Definition of “Exploitation”).

⁷ California is an example of a state that has authorized a civil action for financial abuse of an elderly or dependent person, including recovery of property, and where appropriate, reasonable attorneys’ fees or costs. See West’s Ann. Cal. Welf. & Inst. Code §§ 15647.5 through 15657.8.