

***The Consumer Finance Podcast: Litigating Elder Financial Exploitation Cases: Defending Banks in a Tough Spot***

**Host: Chris Willis**

**Guests: Mary Zinsner and Dave Gettings**

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**Chris Willis:**

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And I'm really glad you've joined us for today's episode, which is going to be about a very interesting topic, and that is litigation considerations in cases of elder financial exploitation. It's going to be a great episode. But before we jump into that, let me remind you to visit and subscribe to our blogs, [TroutmanPepperFinancialServices.com](https://TroutmanPepperFinancialServices.com), where we cover the breadth of the entire financial services industry, and [ConsumerFinancialServicesLawMonitor.com](https://ConsumerFinancialServicesLawMonitor.com), where we focus on all the developments in the consumer financial services world. And don't forget about our other podcasts. We have lots of them. We have the [FCRA Focus](#), all about credit reporting. We have [Unauthorized Access](#), which is our privacy and data security podcast. We have [The Crypto Exchange](#), all about crypto, and our newest podcast [Payments Pros](#), which is all about the payments industries. And all of those, of course, are available on all popular podcast platforms.

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Now, as I said, today we're going to be talking about litigating elder financial exploitation cases, and I'm fortunate to be joined by two of my colleagues, Mary Zinsner and Dave Gettings. You may recognize Dave as the host of our *FCRA Focus* podcast. Mary, Dave, welcome to the podcast today.

**Mary Zinsner:**

Thanks, Chris.

**Dave Gettings:**

Thanks, Chris. You are putting me to shame in your intro. I just realized I've been playing checkers over at *FCRA Focus* while you've been playing chess with respect to this intro, so I need to up my game for next time.

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**Chris Willis:**

Thanks a lot, Dave. I really appreciate both of you being on the podcast today because this is a really important and very interesting topic because we have an aging population in the United States, and so that makes elder abuse and financial exploitation of elderly people an increasing problem in American society. And although there's a lot of law enforcement directed against criminals who victimize elderly Americans, these financial schemes are ongoing and they're becoming more creative and evasive of the controls and monitoring that financial institutions may have in place. And so financial institutions have both regulatory obligations to report suspicious activity to the government, and they will frequently be the subject of litigation in the aftermath of an elder fraud scam.

So, Mary, you've spent your career litigating cases relating to deposit accounts for financial institutions. What are you seeing in your practice relating to elder financial exploitation?

**Mary Zinsner:**

Five years ago, we did not have many cases which I would characterize as involving elder fraud, but today we handle between five to 10 cases a year for our financial institution clients in arbitration as well as in state and federal courts. Our bank clients have elderly customers who fall prey to romance scams. They're tricked into believing they need to make loan payments or persuaded to make short-term loans to someone who tricks them by wire transfer. And that someone is usually a fraudster. Once the money's wired out, there's virtually no means of recovering it from the fraudsters. So, they turn to the banks hoping to recoup the money. Sadly, there's usually no basis for recovery, and the cases are often high dollar cases involving the loss of retirement savings.

**Chris Willis:**

Yeah, that sounds really tragic. And Dave, let me jump over to you. You handle these cases as well. What issues are implicated in these wire fraud cases that Mary mentioned involving elderly customers?

**Dave Gettings:**

I think, Chris, before discussing the legal issues that are implicated, the main issue that you've got to consider going in is just frankly sympathy. Because the way these claims are pled and the individuals that are the alleged victims of the frauds, they're sympathetic people. Nobody wants to realize that someone's grandparents, someone's husband, someone's spouse has fallen victim to fraud when the fraud actually did occur. So, the first item we always consider is how do you litigate this case successfully for your bank client while also making sure you're not coming across unsympathetic, you're not coming across cold, because that will ultimately impact litigation strategy.

From a legal perspective, most of the elder fraud cases we see involve wire transfers. We do have some that involve credit cards or deposit accounts and deposit transactions, but most of them involve wire transfers. And the starting point in any case involving a wire fraud scheme is always the UCC and the state code that adopts the UCC. Article 4A of the UCC provides the framework for evaluating liability of the parties to the financial transaction. And given the large

amount of funds that flow through the fund transfer system, the UCC's drafters made the explicit decision to use precise and detailed rules to assign responsibility, define norms, allocate risks, and establish specific limits on liability rather than to rely on broadly stated, ambiguous, flexible principles.

And that's really good. It's good for defense lawyers to have an easily understood, clear, concise system of rules that the UCC applies. And one of the overriding principles of the UCC is the language stating that common law claims that conflict with the UCC are preempted. Typically, state common law claims are displaced by the UCC. Unless a party can allege misconduct by the bank that occurred outside of the four corners of the wire transfer transaction, there's usually preemption. And if the misconduct occurred before or after the wire transfer process, a common law negligence claim may be theoretical, but these type of factual circumstances are very rare and other common law defenses such as causation and standing can bar those claims.

So, what that really means is, generally speaking, claims that arise for pre-acceptance conduct and conducts related to the acceptance are preempted by the UCC. And plaintiffs' counsel know this, so we typically see plaintiffs' counsel making claims of negligence or making claims alleging loose claims of fraud or things like that to try to get around this UCC preemption. But the UCC preemption's really strong, and it's really important for litigators to understand the scope of the UCC preemption. Now, it's also important to understand that the UCC does not have special rules for elderly customers. The UCC treats all these customers similarly, whether they're old, young, college educated, a lot of education, a little education, language barriers.

The UCC generally presumes that the customer has the legal capacity to manage his or her banking transactions. This presumption, coupled with the premise that under the UCC and contract of deposit, a bank can face liability for rejecting a customer's wire transfer instructions usually compels banks to process wire transfers as instructed by the elderly customer.

**Chris Willis:**

It sounds like the UCC preemption is, as you said, Dave, a friend to the defendant in these cases because it has these bright line clear rules that presume capacity and intelligent decision-making by the deposit account holder. But you also noted that the plaintiffs' lawyers always want to get around this preemption defense.

So Mary, what else are you seeing to try to get around UCC preemption in these types of wire cases?

**Mary Zinsner:**

Well, as Dave said, we assert the preemption defense in virtually every case involving a wire transfer with a lot of success. And because lawyers bringing these cases are aware of the UCC preemption, now they're getting more creative. When we first started seeing these cases, the complaint or arbitration demand would typically allege negligence or breach of contract. The plaintiff would claim that the bank was negligent in not detecting that an elderly customer was being scammed or breached the deposit agreement and courts have been pretty uniform in either finding preemption or in declining to find a common law duty of care to protect elderly customers from financial scams even when fraud is suspected.

So creative lawyers for the victims of elder exploitation are starting to allege new theories. For example, they alleged that the Federal Bank Secrecy Act and associated anti-money laundering regulations and FinCEN guidance impose a duty on banks to detect and report elder fraud. And then they take it one step further and assert that because of these regulatory obligations, the banks have a duty to intervene and protect the elderly customer. We're also seeing assertions that by not being proactive and preventing the exploitation of the elderly, banks are engaging in unfair trade practices. We are still usually able to get these claims dismissed because the statutes are being misapplied and misinterpreted.

**Chris Willis:**

Speaking about misapplied or misinterpreted, I'm no expert on Bank Secrecy Act or FinCEN's AML guidance, but I thought there was no private right of action under that and that it was enforced exclusively through regulatory enforcement by FinCEN. Dave, am I off on that?

**Dave Gettings:**

No, Chris, it's like you've read our briefs. No, you're exactly right. The BSA should not be asserted by private litigants, but plaintiffs are always looking for an angle to create a duty where no duty exists, especially given some of the strength of the law under the UCC. The Bank Secrecy Act is a federal anti-money laundering enforcement statute. It's not a consumer protection statute and was not enacted to protect consumers' rights. Now, under the BSA, it states that the Act's purpose is to prevent the laundering of money and the financing of terrorism through the establishment by financial institutions of reasonably designated risk-based programs. Another frequently cited provision of the BSA states that the Act's purpose is to establish appropriate frameworks for information sharing among financial institutions and to identify, stop, and apprehend money launderers and those who finance terrorists.

The statutes and case law make clear that the BSA and the anti-money laundering regulations were enacted to protect the soundness of the banking system, the banking system, by requiring banks to submit to the government certain reports or records of suspicious behavior. A bank owes duties under the BSA to the government, not to the account holder. And we make this point all the time. We argue that the BSA does not create a private right of action and does not establish a standard of care that consumers can use against the financial institution in lodging a claim. And we've been generally successful in getting these BSA arguments dismissed in most cases. The really, I would say complicated aspect of BSA if it gets into discovery is the fact that, as you mentioned earlier, Chris, you can't really talk about BSA. So, we often have plaintiffs that in discovery ask us for SARS and whether information was included in SARS, for example, and that's something we can't talk about, and it ends up becoming very sticky in discovery, so we try not to get there.

**Chris Willis:**

Yeah, because I always have been told by bank clients that everything about the AML measures that they take under the Bank Secrecy Act needs to remain secret and they can get in really big trouble with FinCEN for revealing SARS or all kinds of other things because the idea is you don't want to tip criminals and money launderers and terrorists off to how you discovered their bad behavior and put FinCEN onto them. Does that become part of the argument to you, Mary?

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**Mary Zinsner:**

Yes, Chris, that's exactly the argument we raise. The explicit provisions of the Bank Secrecy Act require that banks keep investigations and suspicious activity reports secret. So, banks are expressly barred from revealing even the existence of an investigation to a customer. Specifically, the BSA states that neither the financial institution nor any other reporting person may notify any person involved in the transaction that the transaction has been reported or otherwise reveal any information that would reveal the transaction has been reported. Yet plaintiffs make the untenable assertion that a statute expressly prohibiting banks from revealing or discussing the fact that an investigation is underway somehow requires it to report unusual transactions to the customer and prevent the fraud. But multiple courts have held that the BSA does not impose such a duty and cannot be used in the way the plaintiffs are arguing.

**Chris Willis:**

Got it. Well, that's a very interesting attempt by the plaintiff's lawyers though. I guess we have to give them credit for creativity at a minimum. But Dave, as we think about elder financial exploitation litigation matters that you and Mary handle, do you have any final words of advice to our financial institution clients about preventing or dealing with these kinds of cases?

**Dave Gettings:**

Yeah, we typically advise our clients not to do business with elderly customers. I'm kidding, Chris, I appreciate you smiling even though the listeners can't see that. No. The best precautions we usually advise are clients to take them on the front end. So, our clients are becoming more and more engaged and proactive about reporting elder fraud issues to the government and to adult protective services. And we encourage this, it can be beneficial to the elderly customers if they are truly being taken advantage of in a fraud. And banks have to be proactive because the regulators are requiring it. Regardless of the size of the bank, there needs to be regular training and education about elder fraud, how to potentially perceive it and how to potentially counter it if you see it come up. But it's important to remember that the banks are not in the business of law enforcement, despite the fact that a plaintiff's counsel often tries to put this duty on banks, the duty of law enforcement, that is.

The obligation of the financial institution is to report this business transaction to the government. The bank does not generally have a duty to confront the customer or family members, although it often has discretion to do so, including discretion under the deposit agreements. What we really advise banks to do is think about all these issues on the front end. How do you train your staff? How do you train your staff to perceive elder abuse potentially and respond to it? What do your policies and procedures say in terms of what your staff should do in response? What does your deposit agreement say in terms of obligations you do and do not have to the customer?

And we've really seen a lot of clients exploring these issues in depth in the last few years and revising their policies, revising their training, revising their procedures because of the increase in litigation on this front. So, there's no one size fits all approach, but we do advise our clients to take a fresh look at all of their practices because this is a growing area of litigation and only going to increase in growth in the next number of years.

**Chris Willis:**

That's really great advice, Dave. Thanks for sharing that. On a more personal level, Mary, what about advice to bank customers? We don't represent bank customers because we always represent the banks, but the listeners of this podcast probably frequently have aging parents and may be concerned about what they can do to protect them from these kinds of scams. So, what would you say about that?

**Mary Zinsner:**

The burden of preventing financial exploitation of the elderly really falls on the family. There is a lot that can be done by family members to protect the elderly. As parents age, consider powers of attorney or a joint account so that a trusted family member can monitor account transactions and be vigilant about protecting family members from sophisticated scams. If a family member lacks capacity, then go to court and obtain the appointment of a guardian or conservator to take control of the customer's bank accounts. This is not a simple process, but it could protect against the loss of life savings.

**Chris Willis:**

Thanks a lot for that, Mary, and thanks to both you and Dave for being on the podcast today. This is an incredible problem in our society and one that unfortunately inevitably results in litigation involving our bank clients. So, thanks for sharing your experience and wisdom on both the litigation and the prevention side with our listeners today. And of course, thanks to you listeners for tuning into today's episode. Don't forget to visit and subscribe to our blogs, [TroutmanPepperFinancialServices.com](http://TroutmanPepperFinancialServices.com) and [ConsumerFinancialServicesLawMonitor.com](http://ConsumerFinancialServicesLawMonitor.com). And while you're at it, why don't you head on over to [Troutman.com](http://Troutman.com) and add yourself to our Consumer Financial Services email list. That way you'll get copies of the alerts that we send out and invitations to our industry-only webinars. And of course, don't forget to download and check out our mobile app. Just look for Troutman Pepper in your app store, whether it's Apple or Android, and download it and take a look because it has a lot of really cool capabilities that we're proud to show you. And of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.

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