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Strategies for Defending Banks in Elder Abuse Cases

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Losses arising from elder exploitation fraud scams are increasing, with our nation's older population withdrawing large sums of cash from their deposit accounts for fraudsters or wiring hundreds of thousands of dollars to bad actors.

Despite the efforts of law enforcement, regulators and banks to educate older customers about internet and technology fraud tactics, thwarting the crimes has been difficult, and victims and their families frequently target financial institutions to recoup the money lost, often amounting to a lifetime of savings.

The latest trend is for elder law and consumer attorneys to assert what bank lawyers label "compliance predicated" claims, maintaining that the obligation of banks to comply with the Bank Secrecy Act and related regulatory guidance on elder exploitation triggers red flags, and the banks breach a duty of care or the contract of deposit by allowing the customer to conduct a suspicious transaction.

Claims for violation of state unfair competition laws and breach of implied covenant of good faith and fair dealing are also prevalent.

Recent case law discussed below provide practice pointers.

Think Edge Act removal.

In a sticky state court situation involving an older customer? Does the case involve one or more international transactions, and is the financial institution federally chartered? Think Edge Act removal.

Federal court has always been the favored forum for elder exploitation claims, given the often-large stakes, sympathetic plaintiffs and perception that federal courts are more familiar with Uniform Commercial Code preemption arguments and the defenses that financial institutions regularly assert.

But often the bank and the customer are domiciled in the same state, and removal on grounds of diversity jurisdiction is not an option. In cases involving international financial transactions and a federally chartered financial institution, removal pursuant to the Edge Act should always be considered.

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The Edge Act allows banks and credit unions organized under federal law to remove cases to federal court that “aris[e] out of transactions involving international or foreign banking.”

While some early Edge Act removal decisions saw courts limit removal to cases involving banking laws, recent rulings embrace the literal language of the statute and permit removal in cases involving foreign banking transactions to stand.

In Lin v. JPMorgan Chase Bank NA, filed in the U.S. District Court for the Central District of California, the district judge denied the plaintiffs motion for remand after the bank removed based on Edge Act jurisdiction. The case involved an older plaintiff duped into sending seven wire transfers, one of which went to an account of a U.K. beneficiary with a Hong Kong address.

The court in 2024 rejected the plaintiffs arguments that the case involved “blatant financial elder abuse” and that the foreign transaction was not the primary issue in the case.

The court found that the bank’s processing of the wire transfer was the alleged “blatant financial elder abuse” claimed by plaintiff and that the statute’s “arising out of language encompassed the issues in the case.

The court also rejected the plaintiffs de minimis argument that only one of seven wires was an international transaction, finding that because that one wire was for $200,000, a “substantial portion of the funds that were transferred via an international bank wire” and that Congress had written the statute to tie federal court jurisdiction to an international bank transaction such as the one at issue in the case.

A June decision from the U.S. District Court for the Southern District of California, Smith v. JPMorgan Chase Bank NA, also permitted Edge Act removal to stand. Initiated against a national bank and two employees in California state court, the complaint alleged that the defendants assisted in financial elder abuse in violation of the California Welfare and Institutions Code, Section 15610.30, and violated California’s Unfair Competition Law.

The plaintiff, a victim of an online scam, invested withdrawn funds into a bitcoin ATM account and wired funds internationally to an account in Hong Kong. After the bank removed the case to federal court, the plaintiff argued that her claims did not “arise out of international banking transactions and that the purpose of the statute favored remand.

The district court rejected the arguments, finding that the plaintiffs claim derived in significant part from a wire transfer sent abroad, which the court found “sufficient for Edge Act jurisdiction.” The district court further found that “the Court must follow what Congress has required” when it enacted the Edge Act.

Courts are rejecting compliance predicated claims.

A recent trend is for elder law attorneys to assert claims maintaining that the Bank Secrecy Act and state elder exploitation statutes require financial institutions to refuse transactions that display red flags of elder exploitation.

But that is not the law. Banks are not required to prevent transactions that customers direct, nor are they required to reimburse customers who authorize wires to individuals who later turn out to be criminals.

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A 2023 published opinion from the Court of Appeals of Virginia in Navy Federal Credit Union v. Lentz reaches this precise holding.

In the case, the Court of Appeals of Virginia rejected the argument that the BSA and related regulatory guidance imposes duties owed by financial institutions to customers, finding that "[t]he duties created by the BSA are those owed by a bank only to the federal government, not to any private party, including bank customers."

The court similarly held that Virginia's elder exploitation reporting statute did not impose a duty on a credit union to refuse transactions a customer requests simply because the customer is older and the transactions may appear suspicious, stating

[w]e decline to extend a duty to mandate the reporting of elder abuse or to mandate an action by a financial institution when elder abuse is suspected where the plain language of a statute clearly says otherwise. To do so would be an abandonment of the principles of separation of powers and our deference to the legislative branch on matters of policy.

The decision from the appeals court addressing Uniform Commercial Code preemption and compliance predicated claims has been relied on by other state and federal courts addressing similar causes of action.

Embrace UCC and preemption arguments.

The UCC will almost always provide grounds for disposition in the bank's favor in elder exploitation cases involving wires and fund transfers subject to UCC Article 4A.

In case decided by the U.S. District Court for the Eastern District of Michigan last year, Owczarzak v. JP Morgan Chase Bank NA, the district court dismissed a claim asserting a negligence theory for the bank's failure to prevent or investigate 10 wire transfers made by an older customer to Hong Kong bank accounts, when the customer was the authorized sender of the wires.

The court noted Article 4A of the UCC governing funds transfers "displaces principles of common law that conflict with its terms" and "sets forth a receiving bank's duties when executing an authorized payment order."

Allegations that the bank was negligent in failing to prevent or investigate wire transfers the customer authorized and in not following the Consumer Financial Protection Bureau recommendations on elder financial exploitation fell squarely within Article 4A.

The UCC sets out the duties of the bank when executing payment orders, and common law claims predicated on assertions that the bank should have taken additional steps are displaced by Article 4A.

Courts also regularly dismiss contract claims on preemption grounds. In a case involving elder fraud filed last year in the U.S. District Court for the Southern District of New York, Markatos v. Citibank NA, a bank customer brought a breach of contract action against a bank, alleging breach of the "duty of ordinary care" agreed to in the contract between them by failing to investigate and intervene to stop seven wire transfers totaling over $1.5 million to internet fraudsters.

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The district court held that “Plaintiffs claim, at its core, is that he was induced by the fraudulent representations of a third party to authorize the transfer orders, which Defendant accepted without utilizing any heightened measures to protect Plaintiff from said fraud.”

Because this claim was “entirely dependent on Defendant’s execution of those transfers,” the district court found it was preempted.

Actual knowledge is required for liability under state elder exploitation statutes.

Courts are rejecting state unfair competition law claims predicated on allegations that a bank engaged in unlawful or unfair conduct by processing transactions for older customers.

Heightened awareness of elder exploitation has caused state legislatures to enact statutes to protect older customers and make banks liable for assisting in financial exploitation in limited circumstances.

For example, under California law, a bank providing ordinary banking services may be liable for “assisting” elder abuse if it had actual knowledge of the fraudulent conduct. But suspicion or constructive knowledge is not enough to hold a bank liable, as a recent case shows.

In Yaffe v. JPMorgan Chase Bank NA, filed last year, the U.S. District Court for Northern District of California considered whether a bank and one of its branch managers could be liable for assisting financial elder abuse under the California Welfare and Institutions Code, Section 15610.30.

The plaintiff alleged the bank should have suspected or investigated potential fraud. But the court held that without specific allegations of actual knowledge, these allegations were insufficient to impose liability. The court similarly rejected the plaintiffs claims under the California Unfair Competition Law, finding that it was unsupported by plausible allegations.

Although the leave to amend was granted, the district court found that the amended complaint still failed to sufficiently allege actual knowledge and did not cure the identified deficiencies in the Unfair Competition Law claim.

In Nauful v. Navy Federal Credit Union, the U.S. District Court for the District of South Carolina in July granted summary judgment for a credit union on claims alleging violation of the South Carolina Unfair Trade Practices Act and breach of contract.

The court found that the credit union’s conduct in allowing the customer to make frequent large cash withdrawals and wire funds did not meet the threshold for being “immoral, unethical, or oppressive.”

The court similarly rejected the plaintiffs claim for breach of the implied covenant of good faith and fair dealing, emphasizing that there was no contractual duty to prevent the transactions. Further, the implied covenant of good faith and fair dealing could not be used to create new obligations that did not exist in the contract itself.

Conclusion

Courts are increasingly recognizing that despite the sad fact patterns presented in elder exploitation cases, financial institutions do not have liability for merely assisting and executing bank transaction instructions authorized by older customers, even if the transaction is suspicious.

While banks have an obligation to report suspicious activity to the government under the BSA and related regulatory guidance, the duties created by the BSA are owed only to the federal government and not to customers.

Liability for elder exploitation requires actual knowledge of the fraud and complicity. This is the right outcome as putting banks in the position of being watchdogs on behalf of the customer rather than merely reporting suspicious conduct to the government, requiring them to police account activity, or make judgment calls about whether an older bank customer is lying when he or she tells the bank they are doing what they want to do with their money puts banks in an untenable position.

Refusing to engage in transactions for older customers may also expose financial institutions to other liability or regulatory pressure.

These are difficult cases. Financial institutions should continue to educate customers about third-party scams and comply with regulatory and statutory duties. But when actual litigation is filed, banks have plenty of defenses and tools in the arsenal to mount challenges to the claims.

Disclosure: Mary Zinsner was part of the Troutman Pepper Locke team that represented Navy Federal Credit Union in the Nauful and Lentz cases discussed in the article.

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