

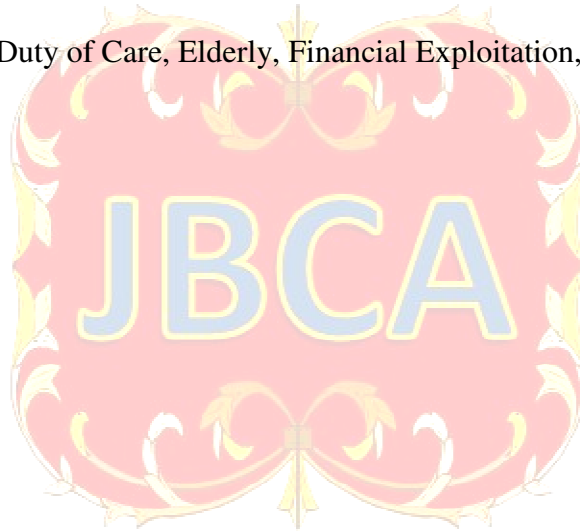
## **Financial exploitation of the elderly and disabled: can banks be held liable? A business law case study**

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### **ABSTRACT**

This case study requires students to examine the legal obligations of financial institutions when dealing with current or potential elderly and/or disabled customers. It allows students to delve into the role financial institutions play in deterring and preventing financial abuse or exploitation of two of the most vulnerable segments of society. In addition, students are required to address basic legal concepts of joint ownership, rights of survivorship, Americans with Disabilities Act, duty of care and negligence.

Keywords: Disabled, Duty of Care, Elderly, Financial Exploitation, Joint Account, Negligence



## INTRODUCTION

Today it is suggested that over 12% of the population over the age of 65 are the victims of financial abuse or exploitation. In many of those cases, the perpetrator is a family member or close family acquaintance.

The problem is compounded by the fact that, for a variety of reasons, in the vast majority of cases, the exploitation or victimization is never reported to the authorities. There are many reasons for this. Many times, the elderly or disabled victim fears that they cannot report the exploitation because they are reliant upon the exploiter as a caregiver. Other times, the victims fear that by reporting the theft and exploitation, their family will take away their independence and freedom by establishing a guardianship or placing them in a nursing home. Sometimes, the victim is just too embarrassed to admit to their family and friends that they were naïve enough to become victims. Finally, because of the nature of the disability or infirmity, the victim may be unable to discover that they were the victim of financial fraud and exploitation.

Since financial exploitation often involves the victim's bank accounts and deposits, this case study, focuses on a financial institution that is faced with a factual scenario in which a caregiver is given or somehow obtains unfettered control over an elderly and disabled customer's accounts.

## THE CASE

An elderly woman, who was a brittle diabetic, wheelchair-bound, and totally blind, settled a medical malpractice lawsuit that resulted in a payment to her of over \$680,000. At the time of the settlement, the elderly, blind woman hired an attorney to prepare a Trust and a Last Will and Testament. The woman intended to put the money from the lawsuit into the trust and to use the trust to take care of her during the remainder of her life, and then to take care of her only son. The attorney properly prepared all of the documents.

At that same time, the woman was living with and being cared for by her sister. As a result, the settlement check was sent to the sister/caregiver's address. When the check arrived, rather than placing the check in the trust account that had been established by the woman's attorney, the sister/caregiver took the elderly, blind, wheelchair-bound woman to a local branch of a national bank whether neither the sister nor the woman had ever banked before.

Upon entering the National Bank branch office, the sister/caregiver rolled the elderly, blind woman up to a bank officer's desk and instructed the bank officer that she and the elderly woman wanted to open a joint bank account using the elderly woman's \$680,000 check, reiterating that the account should be made in the sister/caregiver's and the elderly woman's names. The bank officer asked the elderly woman, in her sister/caregiver's presence, if that is what she wanted to do. She said yes. The bank officer asked no other questions of the elderly woman. She was not questioned about her specific understanding of the transaction, nor were any documents or agreements read to her. No explanation of the effect of placing her money in a joint account with her sister

was given to the elderly woman and nothing was done to ascertain whether the sister/caregiver was exerting undue influence or otherwise wrongfully exploiting her. In addition, no one at the bank spoke with or questioned the elderly, blind, wheelchair-bound woman outside the presence of her sister/caregiver.

Within one-and-half months after opening the account with the \$680,000 deposit, the sister/caregiver spent most of the money in the account on personal items and gifts for herself and friends. The elderly woman passed away shortly thereafter, and the sister/caregiver spent the rest of the money, leaving the elderly woman's trust and estate penniless and the woman's son with nothing.

### **THE TEACHING NOTE**

This case is based on actual facts and is appropriate for use in an undergraduate legal environment of business, business law, or commercial law course. It deals with what duties, if any, a bank or financial institution owes its elderly or disabled customers; what the legal ramifications are of putting your money in joint bank accounts; whether the bank or financial institution breached its duty of care to its customer, and what a bank or financial institution can do to better protect its elderly or disabled customers.

### **CASE QUESTIONS**

1. Who legally owns the joint bank account opened by the elderly, blind, wheelchair-bound woman and her sister/caregiver while they are both alive?
2. What should legally happen to the money remaining in the joint bank account when the elderly woman dies?
3. Did the bank owe a legal duty of care to the elderly woman to ensure that she was not being exploited or unduly influenced by her sister/caregiver?
4. Did the bank owe any legal duty of care to the elderly woman under the Americans with Disabilities Act?
5. What actions could the bank have taken to protect the elderly woman from acts of exploitation or undue influence by her sister?

## SUGGESTED SOLUTIONS TO CASE QUESTIONS

**1. Who legally owns the joint bank account opened by the elderly, blind, wheelchair-bound woman and her sister/caregiver while they are both alive?**

Both the elderly woman and her sister/caregiver have joint ownership which means that each owns the money in the account in totality with no restrictions on their access to or use of the funds.

**2. What should legally happen to the money remaining in the joint bank account when the elderly woman dies?**

When one joint owner of an account dies, the funds in the account automatically belong to the surviving owner. This is due to the fact that owners of a joint account have rights of survivorship under the law.

**3. Did the bank owe a legal duty of care to the elderly woman to ensure that she was not being exploited or unduly influenced by her sister/caregiver?**

Generally banks have a duty to exercise ordinary care to protect their customers from wrongful acts of third parties. However, a bank's liability is limited under the Uniform Commercial Code if the customer fails to discover the unauthorized transactions in their bank accounts and report it to the bank within the time prescribed by the UCC or state law. UCC §40406 In addition, historically, many states have held that banks do not have a duty of care to inquire into the competency of customers who had not be declared incompetent by a court of law. In fact, some courts have even suggested that if a bank fails to honor and elderly customer's instructions because of concerns that the customer might be incompetent, the bank could face liability based on the premise that they are not allowing the customer to transact business. However, recently the vast majority of states have passed statutes mandating any "bank, savings and loan, or credit union officer, trustee, or employee, who knows or has a reasonable cause to suspect that an aged person or disabled adult is an abused, neglected or exploited person shall immediately report such knowledge or suspicion to the central abuse registry..." (Florida Statute §415.1034) Under statutes like this, it is now the obligation of banks and other financial institutions to develop compliance programs so that their officers, trustees and employees know when they should make a report. Under these statutes financial institutions must give clear instructions to officers and frontline employees so that they will know what should be reported and how to report it. *Republic National Bank of Miami v. Johnson*, 622 So.2d 1015 (Fla. 3d DCA 1992) Failure to develop a compliance program or to follow a properly implemented compliance program may give rise to legal liability on the bank's behalf. *Mora v. South Broward Hospital District*, 710 So. 2d 633 (Fla. 4<sup>th</sup> DCA 1998) Obviously, the case law in this area is still developing, so the outcome of this question, based on the facts stated and the applicable jurisdiction may vary.

**4. Did the bank owe any legal duty of care to the elderly woman under the Americans with Disabilities Act?**

The ADA defines a place of public accommodation as a “facility, operated by a private entity, whose operations affect commerce and fall within at least one of [a number of categories]” Contained within those categories are banks. §36.104(6) Public accommodations, under the ADA, are required to provide “auxiliary aids and services” for people with disabilities, such as readers, in order to ensure effective communication with those individuals. §36.303(b)(c) Based on this, it can be argued that the bank in this case owed a legal duty under the ADA to provide someone to read the banking documents to the elderly woman. Since nothing in the facts indicates that a reader was provided, the bank could be found to be in violation of ADA requirements. However, since the elderly woman is dead, there would be no avenue for recourse since the ADA only provides for injunctive relief. §36.501

**5. What actions could the bank have taken to protect the elderly woman from acts of exploitation or undue influence by her sister?**

The Arizona Elder Abuse Coalition has created a list of suggestions for financial institutions can help detect and prevent financial exploitation of the elderly. In it’s article “Financial Exploitation of the Elderly”, the Coalition has suggested that financial institutions can help prevent exploitation by: 1) educating and training employees about financial exploitation so that they will recognize it when it occurs and report it to the proper authorities; 2) appointing a supervisory employee to whom other employees must report suspicious financial transactions; 3) developing procedures and guidelines for reporting possible financial exploitation to the proper authorities; 4) training employees on how to properly interview elderly and disabled customers; 5) educating employees on how to recognize signs of financial exploitation and fraud.

**References**

Americans with Disabilities Act §36.104(6), “Definitions”

Americans with Disabilities Act §36.303(b)(c), “Auxiliary Aids and Services

American with Disabilities Act §36.501, “Private Suits”

Arizona Elder Abuse Coalition. *Financial Exploitation of the Elderly: How Financial Institutions Can Help*

<http://www.azag.gov/seniors/FinancialExploitationoftheElderly.pdf>

Uniform Commercial Code §4-406, “Customer’s Duty to Discover and Report Unauthorized Signature or Alteration”