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Business Torts Journal

Fraud Issue

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Liability for Aiding and Abetting Securities Fraud Could Expand

By Edward W. Little Jr. and Peter Antonelli

A sea change in the antifraud provisions of the federal securities laws may be coming soon—and they may be coming to a federal courthouse near you. Congress's recent round of financial legislation left intact, for the moment, the U.S. Supreme Court's line of cases prohibiting a private right of action against those who aid and abet a securities fraud. Future legislation and periodic assaults by securities plaintiffs, however, may slowly erode or remove altogether that prohibition and bring federal liability to a broad range of third parties who are not participants in the securities markets. Those who interact with publicly traded companies only as vendors or customers could be subjected to federal securities lawsuits by private plaintiffs even where those vendors or customers have no input into the financial reporting of those public companies.

Who should be concerned about these potential changes? Any person or company that does business with an issuer of public securities could potentially become a target of private plaintiffs in a federal securities action if they provide "substantial assistance" to someone who commits fraud. What constitutes "substantial assistance" remains to be seen and will likely be decided by administrative regulation and future judicial decisions. Regardless of their ultimate scope, any amendments allowing private plaintiffs the right to bring federal securities fraud claims against secondary (and remote) actors will greatly expand the dragnet of potential defendants well beyond the scope of current law.

The recent and continuing economic crisis has provided justification for a panoply of new state and federal laws and regulations that dramatically increases federal regulation over the financial services industry. Citing "[y]ears without accountability for Wall Street and big banks," Congress recently passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] Among other things, Dodd-Frank provides more federal protections for consumers and increases oversight of Wall Street by creating an independent financial consumer protection agency, attempting to avoid the need for taxpayer bailouts of financial institutions by preempting the possibility that institutions will become "too big to fail," and instituting advance warning systems to identify and address systematic risks before they become catastrophic.

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Enhanced Damages for Elderly Victims of Consumer Fraud

By Zachary D. Schorr

Jurisdictions across the United States have enacted enhanced civil damages and civil penalty provisions to deal with fraud committed against the elderly. These enhanced damages provisions differ from traditional elder abuse causes of action in that they are not limited to the narrow category of claims that traditionally constitute elder abuse—physical and financial abuse. Instead, they offer additional or enhanced damages provisions that are essentially add-ons for the elderly when they sue under non-elder abuse laws for consumer fraud and other consumer protection causes of action.

There is currently no uniform system for determining these enhanced damages across the United States, and the availability and type of enhanced civil damages and penalty provisions vary from state to state. Even the private right of action and the ability of an elderly plaintiff to retain the enhanced damages differ from state to state. However, in any case involving a claim of fraud asserted by a person over the age of 65, these enhanced penalties must not be overlooked. The ability of elderly plaintiffs to treble their punitive or compensatory damages, recover attorney fees not otherwise available, or have the court impose civil penalties on perpetrators of fraud are powerful litigation tools.

Nearly all states and the federal government have enacted laws designed to protect consumers—the retail purchasers of goods and services—from fraudulent sales practices.[1] There is good reason for these laws to exist. Indeed, approximately 12 percent of the population age 65 and over constitutes approximately 30 percent of all consumer-fraud victims. Consumer fraud is a major nonviolent crime perpetrated against older citizens.[2] This type of fraud often involves the sale of goods or services. Perpetrators of fraud often target the growing elderly population—individuals of 65 years of age or older. The elderly, unfortunately, are an easy target for unscrupulous individuals, as they are often reluctant to pursue a remedy after being taken advantage of, they are easier to reach because they are home more often, they are more isolated, they are less mobile, and they are more concerned about their health and dying.[3]

Enhanced Damages Provisions Vary from State to State

Although nearly all states have enacted statues to deal with physical and financial abuse of the elderly, fewer states have adopted enhanced damages provisions for fraud involving elderly persons. States with enhanced damages for consumer fraud include, among others, California, New York, Delaware, Arkansas, Florida, Iowa, Minnesota, and Nevada.[4] Each of these states has enacted statutory schemes wherein the perpetrators of fraud against the elderly are subject to additional civil liability beyond that for fraud committed against a non-elderly person. But the different state statutory schemes do not always mirror each other. As shown below, some states allow the elderly victims of fraud to collect and retain the enhanced damages, while in other states, the government collects the enhanced damages and uses the money to fund efforts to help prevent future fraud from being perpetrated on the elderly.[5]

California's Enhanced Penalty for Consumer Fraud

In California, Civil Code Section 3345 provides that in an action brought by senior citizens to redress forms of unfair compensation, including fraud, a trier of fact may award up to three times the amount imposed as "a fine, or a civil penalty or other penalty, or any other penalty or any other remedy the purpose of effect of which is to punish or deter."[6] To establish a claim for treble damages under Section 3345, a cause of action must be brought by a senior citizen, be asserted to redress unfair or deceptive acts or practices, and relate to a separate statutory claim providing entitlement to certain penalties, plus the defendants' wrongdoing must be directed to the protected class.[7]

Furthermore, in California, an elderly plaintiff may seek to treble his or her punitive damages on any underlying cause of action for "unfair practices" based on his or her status as a member of the protected class.[8] For example, an elderly plaintiff may sue for fraud and include a claim for punitive damages under Civil Code Section 3294, the applicable code section for punitive damages in California. That claim for Section 3294 punitive damages then acts as the gateway through which the elderly plaintiff may seek to treble the punitive damages award.[9] Despite arguments to the contrary, an elderly plaintiff's ability to treble punitive damage is not unconstitutional.[10]

Accordingly, the enhanced damages statute, Civil Code Section 3345, is a remarkably effective tool for elderly litigants in California. It can significantly enhance the value of any

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monetary claim based on unfair practices. In cases of fraud where punitive damages are available, the ability to treble the punitive damages award necessarily has a powerful chilling effect on those individuals or businesses who consider perpetrating fraud against the elderly. In addition, the standard is different from California's Financial Elder Abuse Statutes, which involves a narrower set of circumstances that qualify as physical and financial elder abuse. In contrast, enhanced damages under Section 3345 are available to an elderly plaintiff through general fraud claims as long as they involve unfair practices. Likewise, enhanced damages are available under any statutory damage provision that is based on unfair practices. This broad provision opens the door to all types of consumer protection and other fraud claims that allow the elderly to treble their punitive damages claims and statutory damages claims. Of particular significance is the fact that under this statutory scheme, all damages awarded are due and paid to the individual elderly litigant. In other words, the State of California makes no claim to any damages awarded under this statutory scheme.

Civil Penalties in New York

New York, like California, has established consumer-protection laws that make it unlawful for an individual or entity to engage in deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in New York.[11] The stated purpose of the statute is to secure an honest marketplace and eliminate deception.[12] Under this statutory scheme, a person or an entity who engages in prohibited conduct and whose conduct is perpetrated against one or more elderly persons may also be liable for an additional civil penalty not to exceed $10,000.[13] Unlike California, where the trier of fact (jury or judge) determines liability for the enhanced penalty, in New York, the court determines whether this civil penalty is applicable and the amount of the penalty by weighing several factors proscribed by statute.[14]

In New York, unlike California, the civil penalty imposed on the plaintiff is not paid to the elderly plaintiff. Instead, all monies derived from this supplemental civil penalty are paid into a special fund known as the Elderly Victim Fund.[15] Although this may have a deterrent effect, it necessarily carries less weight than the California provision, which allows a jury to treble punitive or other statutory damages. In any event, the monies collected under this New York law are used solely for the investigation and prosecution of consumer fraud against elderly persons.[16] Thus, these funds are used to prevent future fraud and as a deterrent.

Delaware's Elder Victims Enhanced Penalty Act

Delaware has enacted the Elder Victims Enhanced Penalty Act (EVEPA). EVEPA protects elderly and disabled persons who suffer actual damages from violation of certain prohibited trade practices, including consumer fraud.[17] Delaware's EVEPA is essentially a combination of the remedies provided by California and New York. EVEPA creates a private cause of action by the elderly or disabled person for enhanced penalties under Delaware's code sections that deal with prohibited trade practices (Chapter 25). The private cause of action under EVEPA allows the elderly or disabled person to bring a cause of action to recover actual damages, court costs, and attorney fees.[18] Further, the enhanced penalties statute provides that the elderly or disabled person "shall be entitled to recover 3 times the amount of the victim's compensatory damages" if a violation is established, in addition to any common-law or other damages available.[19] Thus, if a person over the age of 65 sues for violation of the Delaware consumer protection statutes, including fraud, they have a private right of action to recover actual damages, costs, and attorney fees, plus there is a *mandatory* trebling of the actual damages. All of these damages are private and are to be retained by the elderly plaintiff.

In addition to the private right of action, Delaware law also imposes a civil penalty against any person who is found to have violated its consumer protection status when that violation is committed against an elderly person.[20] The civil penalty arm of EVEPA allows a court to impose an additional civil penalty not to exceed $10,000 for each violation.[21] Like New York, the civil penalties imposed under this arm of the EVEPA are placed in a consumer-protection fund to be used for the investigation and prosecution of deceptive acts against elderly and disabled persons.[22]

Thus, the Delaware statutory scheme is clearly a combination of the California and the New York enhanced protections provided to elderly persons who are the victims of consumer fraud. However, unlike in California and New York's enhanced civil damages provisions, the trebling of actual damages is *mandatory*.

The Effect of Inconsistency

The inconsistency and lack of uniformity in enhancements and penalties for elderly victims of fraudulent conduct from state to state creates serious incentive for forum-shopping. Indeed, elderly plaintiffs suing an individual or a business doing business in several states may consider bringing their claim for fraud either where they reside or where the defendant resides, depending on the type of civil damages enhancements available to elderly plaintiffs. There are real differences between an elderly plaintiff suing in California versus New York, including who retains the enhanced damages.

Despite the obvious drawback of overlapping and inconsistent enhanced damages provisions for the elderly, which is common for nearly every type of state law, the different benefits of these protections for the elderly are clear and should be noted when dealing with consumer-fraud claims by the elderly. ■

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Endnotes

1. Law Dictionary, http://www.law.com/jsp/law/dictionary.jsp (search for "consumer protection laws," last visited Nov. 12, 2010).
2. *Consumer Frauds Targeted at Older Consumers*, 1 Elderlaw Advoc. Aging § 7.2 (2d ed.). (2009).
3. *Id.*
4. California Civil Code § 3345; N.Y. Gen. Bus. Law § 349-c; Delaware Code § 2583; Ark. Stat. Ann. 4-88-201, Fla. Stat. § 501.2077; Iowa Code § 714.16(A)(1); Minn. Stat. § 325 F.71, Nev. Rev., Stat. 598.0973.
5. *See, e.g.,* California Civil Code § 3345, Iowa Code 714.16(A)(1).
6. California Civil Code § 3345(b).
7. California Civil Code § 3345; Hood v. Hartford Life and Acc. Ins. Co., 567 F.Supp.2d 1221 (E.D. Cal. 2008).
8. *Id.* at 1229.
9. *Id.*
10. *Id.* at 1226 (citing Ross v. Pioneer Life Ins. Co., 545 F.Supp.2d 1061 (C.D.Cal.2008).
11. Ciccolo v. Chicago Research and Trading Group, Ltd., 555 N.Y.S 2d 318 (1st Dep't 1990).
12. Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002).
13. N.Y. Gen. Bus. Law. §§ 349, 350-c, 350-d.
14. N.Y. Gen. Bus. Law § 349-c(2)(b)(1), (2).
15. N.Y. Gen. Bus. Law § 349-c(3).
16. *Id.*
17. 6 Del. Code § 2583.
18. 6 Del. Code § 2583(a).
19. 6 Del. Code § 2583(b).
20. 6 Del. Code § 2581.
21. *Id.*
22. 6 Del. Code § 2581(b).

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