The Impact of Aging on Consumer Law

I have been fortunate to travel abroad frequently. Whenever I mention elder law, the follow-up question I get is usually, "What's that?" Obviously, elder law does not include every legal problem a person over a certain age might face. We don't segment legal services into rigid age bands—if you're in your forties, go to office A.

Elder law cannot be defined by sharp boundaries; rather, it's best described by the prototypical services provided. Some legal problems are common among the elderly: plans involving unavoidable death and possible incapacity; protective proceedings such as guardianships and conservatorships when planning is inadequate; and, for many, planning to pay for the cost of long-term care. This third problem is contingent on laws not common in most industrialized countries.

Because of historical quirks, Medicare covers most health-care needs of the elderly but does not cover the costs of extended nursing home care. Some legal issues rarely affect the elderly, such as criminal defense. This may change as a larger percentage of our population ages.[1] Note that some of the problems associated with the elderly also affect younger people with certain disabilities. This is why the Elder Law and Disability Rights Section includes both areas.

Elder law is, thus, inherently interdisciplinary, blending into other types of law. This is clearly true for probate. Elder law

By W. Josh Ard

FAST FACTS

Both federal and state agencies have special programs designed to protect older consumers.

While it is illegal to discriminate against older consumers seeking credit, it is legal to discriminate in their favor.

Even for older individuals of sound mind, good vision, and good hearing, there are special risks because they are often stereotyped as being easy marks of exploitation.

attorneys have discovered the need for greater probate expertise, and probate attorneys have noticed that many of their clients need special attention for elder concerns. What is perhaps less obvious is the overlap between elder law and consumer law.

Older people face major consumer challenges. We are told to watch out for fine print and fast talk. As we age, our oral and visual abilities decline, exacerbating the problem. Most older individuals are of sound mind, but some are in various stages of cognitive decline. Additionally, older consumers are stereotyped as being easy marks, leading to more attempts to victimize them. The statistics concerning actual victimhood are confusing. Some government data suggests fewer victims than expected, while other data indicates that elderly victims are less able or less likely to report. If an elderly victim does report, concerned family and friends may worsen the situation by believing a third party is needed to make financial decisions.

Also, as the number of defined benefit retirement programs has declined, more seniors face decisions regarding what to do with retirement accounts. Many have been duped into buying inappropriate annuities or other bad investments. Nursing home admission contracts are perhaps the epitome of an adhesion contract facing older adults at a time of maximum stress and less ability to scrutinize complex contract language carefully.[2]

There are statutes directly addressing older consumers. For example, the Equal Credit Opportunity Act, essentially a federal credit civil rights act, forbids age discrimination in credit decisions but allows decision criteria that give an advantage to consumers age 62 or over.[3] This is a type of affirmative action because older consumers actually have lower loan default rates but were historically judged more harshly than younger consumers with much higher default rates.

Several state and federal agencies also have special programs or sections for older consumers and may act to protect their rights. In Michigan, this is true for the Attorney General's Office.[4] An excellent federal example is the Consumer Financial Protection Bureau, which lists "Older Adults & Their Families" as one of the populations it serves. In a report released in May, the major complaints by people age 62 or over involved servicing problems with reverse mortgages, difficulty recovering from financial scams, confusion about deferred-interest and zero-interest credit cards, and fees for unwanted add-on products and services.[5]

The Bureau provides useful information for older adults and their families. One noteworthy series centers on managing money for someone else, with special versions for trustees, conservators, and agents under powers of attorney.[6]

The Federal Trade Commission is an agency of more general jurisdiction. In a recent report, major complaints from individuals age 60 or over involved:

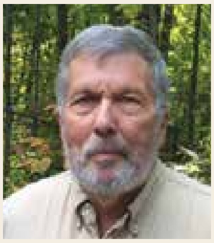
- imposter frauds
- government ("Hi, I'm from the IRS and we need to talk.")
- business ("Hi, I'm from your bank, and we need to verify some information.")
- family ("Hi, Grandma.")
- telemarketing calls
- third-party debt collectors
- prizes/sweepstakes/lotteries
- shop-at-home scams[7]

Financial regulators also have special programs for seniors. Financial institutions are strongly encouraged to pay close attention to potential signs of exploitation. Attorneys should pay attention to these as well. Red flags include a third party getting involved in financial affairs and unusual expenditures, which may occur if a person suffers a stroke and is unable to manage his or her affairs and has major medical care costs. It's best to alert banks and credit unions when this has happened.

The Securities and Exchange Commission and other bodies have devoted attention to so-called senior adviser designations.[8] A JD means something. So do various securities criteria, but consumers cannot readily distinguish these from other designations that one can obtain for $500 and a box top. Many of these designations only require training in how to market to seniors. Some states—but not Michigan—have made great strides in limiting these designations.

Governments may help, but it's better to have a private right of action. Many consumer statutes have so-called private attorney general provisions, which require the legal fees of a prevailing consumer to be paid by the defendant. This is true for most of the laws combined in the omnibus Consumer Credit Protection Act.[9] For example, persons who receive incorrect Truth in Lending statements and prevail in a suit can receive "a reasonable attorney's fee as determined by the court."[10] The purpose is to encourage those who have a problem to come forward to help others. Many of these laws also provide statutory damages if the provable harm is small or difficult to monetize. For example, a prevailing consumer plaintiff under the Fair Debt Collection Act is entitled to actual damages (often very difficult to place a dollar value on) and "such additional damages as the court may allow, but not exceeding $1,000."[11] Unfortunately, the strongest such law in Michigan, the Consumer Protection Act, has been virtually eviscerated by courts and the legislature.[12] The courts have interpreted this act so as not to apply to any business that is regulated. Not surprisingly, most defendants successfully claim that they are regulated by somebody. Another threat is the increasing use of mandatory arbitration clauses, which preclude the right to judicial relief. Many attorneys know little consumer law and, therefore, have little idea whether private rights exist. The best advice is to refer clients who may have issues to a consumer attorney for analysis.

Additionally, death and disability cannot be ignored in this discussion. Persons with significant debt issues have greater protections if they have a conservator.[13] There are also some debts that are forgiven at death, such as federally insured student loans.[14] Only the decedent is forgiven; if there is a cosigner, he or she is still responsible. Most debts persist to afflict the estate. What many people may not realize is that the federal Fair Debt Collection Practices Act applies to collection efforts against what was consumer debt after the debtor's death.[15] Violations appear to be rife, and if a family is hassled, a referral to a consumer law attorney is in order. As previously noted, statutory damages, even if no actual harm can be proven, are $1,000 under the Fair Debt Collection Practices Act. ■



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ENDNOTES

1. See, for example, Liljegren et al, *Criminal behavior in frontotemporal dementia and Alzheimer disease*, JAMA Neurol, 72(3):295–300 (2015 March). The authors noted that some types of dementia lead to behaviors considered criminal. Palm Beach County, Florida had a program that assessed elderly defendants never charged with crimes before to see if dementia was at issue. I have not been able to find if the program is still in effect; it was a project of a particular probate judge a decade ago.
2. Under President Obama there was a controversial federal proposal to ban compulsory arbitration in nursing home contracts, as summarized in Lee and Ng, *What You Need to Know About CFPB's Proposal to Ban Mandatory Arbitration Clauses in Financial Contracts* (June 17, 2016) <https://consumerfinancialserviceslaw.us/what-you-need-to-know-about-cfpbs-proposal-to-ban-mandatory-arbitration-clauses-in-financial-contracts/>. The nature of these proposals is now moot, because on November 22, 2017, all comments on the Arbitration Agreements Rule were removed from the Code of Federal Regulations and all efforts to limit arbitration were stopped. Also, some older adults are shocked when their Social Security payments are garnished for federally insured student loans for fraudulent schools. All websites cited in this article were accessed November 29, 2017.
3. 15 USC 1691(b)(4).
4. Mich Dept of Attorney General, *Seniors/Health Care Fraud* <http://www.michigan.gov/ag/0,4534,7-359-82915_82919_82267---,00.html>.
5. Consumer Financial Protection Bureau, *Monthly Complaint Report: May 2017*, Vol 23 <https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201705_cfpb_Monthly_Complaint_Report.pdf>.
6. Consumer Financial Protection Bureau, *Practitioner Resources: Managing someone else's money* <https://www.consumerfinance.gov/consumer-tools/managing-someone-elses-money/>.
7. Federal Trade Commission, *Prepared Statement of the Federal Trade Commission Before the Senate Judiciary Committee on Protecting Older Americans from Financial Exploitation* (June 29, 2016) <https://www.ftc.gov/system/files/documents/public_statements/967033/160629olderamericanstest.pdf>.
8. See, e.g., US Securities and Exchange Commission, *"Senior" Specialists and Advisors: What You Should Know About Professional Designations* (February 27, 2009) <https://www.sec.gov/reportspubs/investor-publications/investorpubssenior-profdeshtm.html> and Consumer Financial Protection Bureau, *Senior Designations for Financial Advisors: Reducing Consumer Confusion and Risks* (April 18, 2013) <http://files.consumerfinance.gov/f/201304_CFPB_OlderAmericans_Report.pdf>.
9. 15 USC 1692–1693r.
10. 15 USC 1640(a)(3).
11. 15 USC 1692k(a).
12. See, for example, Andrews, *The MCPA: So Long, It's Been Good to Know Ya*, 89 Mich B J 38 (September 2010) <https://www.michbar.org/file/barjournal/article/documents/pdf4article1735.pdf>.
13. Ard, *Use of a Conservator to Protect Troubled Consumers*, ELDRS Update, Vol V, Issue 4 (Winter 2016) <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/3acb3cb7-39ba-43dc-be87-c817fb53cc80/UploadedImages/pdfs/newsletter/winter2016.pdf>.
14. Office of the US Dept of Education, Federal Student Aid, *Discharge Due to Death* <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/death>.
15. Federal Trade Commission, *Consumer Information: Debts and Deceased Relatives* <https://www.consumer.ftc.gov/articles/0081-debts-and-deceased-relatives>.