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Financial Abuse of the Elderly[1]

By: Christine Lazaro

As of 2010, 13% of the population is over age 65; 16% is over age 62.[2] Another 27% of the population falls into the "Baby Boomer" category, aged between 45 and 64.[3]

As Americans approach retirement, the question is raised, "are they prepared?" A study published earlier this year found, "a substantial fraction of persons die with virtually no financial assets—46.1 percent with less than $10,000—and many of these households also have no housing wealth and rely almost entirely on Social Security benefits for support. In addition, this group is disproportionately in poor health. Based on a replacement rate comparison, many of these households may be deemed to have been well-prepared for retirement, in the sense that their income in their final years was not substantially lower than their income in their late 50s or early 60s." Yet with such low asset levels, they would have little capacity to pay for unanticipated expenses for health, entertainment, travel, or other activities, let alone other financial shocks.[4]

It is important that the regulations and statutes protect the growing group of retirees. In a survey conducted in 2010, 20% of the respondents age 65 and over say they have been taken advantage of or were the victim of fraud.[5] Of four questions asked about investments, a majority or plurality of respondents age 65 and over gave the incorrect answer to two of the questions[6]: 57% think it is true that "A very high rate of return is only ok as long as the investment is guaranteed or bonded." The survey points out that this is neither true nor false. 46% think it is true that "If an investment is registered with the SEC or state securities regulators, it has been reviewed to make sure it's safe." Only 39% believed it was a false statement.[7]

Victims of fraud may be both men and women. A study conducted by MetLife in 2009 found: "Women who have not been in a position to make financial decisions may be more trusting in the advice of others, particularly if they are new at seeking financial advice. Women with cognitive problems may be easily influenced by others, especially if that influence increases in

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[1] I would like to thank Adam Heckler (St. John's University School of Law, '12) for his help editing this article.

[2] *See* Lindsay M. Howden & Julie A. Meyer, *Age and Sex Composition: 2010*, 2010 CENSUS BRIEFS (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf; *see also* Carrie A. Werner, *The Older Population: 2010*, 2010 CENSUS BRIEFS (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf.

[3] *Id*.

[4] James M. Poterba, Steven F. Venti & David A. Wise, *Were They Prepared for Retirement? Financial Status at Advanced Ages in the HRS and AHEAD Cohorts*, NBER Working Paper No. 17824, NATIONAL BUREAU OF ECONOMIC RESEARCH (Feb. 2012), *available at* http://www nber.org/papers/w17824.pdf?new_window=1.

[5] Infogroup/ORC, *Elder Investment Fraud and Financial Exploitation – A Survey Conducted for Investor Protection Trust* (2010), http://www.investorprotection.org/downloads/pdf/learn/research/EIFFE_Survey_Report.pdf .

[6] *Id*. at 42.

[7] The remaining 15% did not know.

intensity and becomes a 'hard sell.'"[8] "Men may tend to be more risk-taking in making financial investments than women, so they may be prone to being vulnerable to 'professionals' or family members who seek to invest their money by promising unrealistically high returns."[9]

This paper will review recent FINRA and SEC actions involving older customers. It will then summarize a number of criminal actions taken at the state level against investment professionals. Lastly, it will review the state statutes that cover fraud specifically against elderly investors.

<u>Regulatory Actions</u>

May 2009: FINRA barred broker William Joseph Boyle from the securities industry for wrongfully converting and using funds from customer accounts. In 2005, Boyle deceived a 64-year-old nun into giving him two separate checks totally $531,000. The nun had inherited the money from her mother; Boyle had been the mother's broker. Certain of the mutual fund holdings that were in the account were liquidated, and a check was sent to the nun in the amount of $125,000. Boyle had the nun sign the check and return it to him. He deposited the check into his personal bank account and used the funds for his own benefit. He advised the nun to invest the remaining assets in a tax exempt fund held outside of the firm. Unbeknownst to the nun, the money was invested into an account that was controlled by Boyle, and he used the funds for his own benefit. In 2006, Boyle convinced a retired couple to invest $50,000 in an outside real estate venture. Boyle had the couple write checks payable to his own business, and used the money for his own benefit without their knowledge. In 2007, Boyle deposited a $30,000 check from an 83-year-old widow into his business account, rather than the woman's brokerage account. "'FINRA is committed to identifying and expelling anyone under our jurisdiction who preys on the trust and goodwill of his customers, particularly vulnerable customers like seniors,' said Susan L. Merrill, FINRA Executive Vice President and Chief of Enforcement."[10]

October 2009: FINRA barred broker Sergio M. Del Toro from the securities industry for defrauding a 90-year-old Minnesota man of $511,000. Del Toro recommended that the customer invest in a company whose securities were not publicly quoted or traded, and for which there was no publicly available financial information. He sold the securities to the customer without the knowledge of the two firms to which he was then registered. The customer was living in a nursing home with his 87-year-old wife. FINRA found that the recommendations were unsuitable given the customer's age and financial condition, and that Del Toro had no reasonable basis for valuing the company's stock at the price the customer purchased it. "'One of FINRA's highest objectives is to protect our nation's elderly citizens from fraudulent conduct by brokers,'

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[8] MetLife Mature Market Institute, et al., *Broken Trust: Elders, Family, and Finances; A Study on Elder Financial Abuse Prevention* (2009), p. 10, http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf.

[9] *Id*. at p. 11.

[10] FINRA, *FINRA Bars Broker for Converting and Improperly Using More Than $500,000 from a Catholic Nun's Holdings, Another $80,000 from Three Elderly Customers*, FINRA NEWS RELEASE, May 5, 2009, http://www.finra.org/Newsroom/NewsReleases/2009/P118635.

said Thomas R. Gira, Executive Vice President for Market Regulation. 'Del Toro preyed on this vulnerable customer by defrauding the customer of over half a million dollars that he earned over a lifetime of hard work, at a time that the customer and his family needed it most.'"[11]

October 2009: The SEC filed a civil injunction action against Advanced Planning Securities, Inc., its former president Edward D. Puttick, Sr. [12], brokers Gregory L. Oldham[13] and Glenn R. Harris[14], among others, for orchestrating a multi-million dollar real estate investment scheme. The complaint alleges that the brokers solicited investors by inviting them to free lunch or dinner seminars at restaurants, and then coaxing them into investing in real estate funds. Many of the investors were elderly and had limited means. "'We allege that these securities professionals handed out free lunches to senior investors to win their trust and sell them risky, unregistered securities that eventually lost most of their value,' said Chairman Schapiro." "George S. Canellos, Director of the SEC's New York Regional Office, added, 'Although advertised as educational workshops, so-called free lunch seminars are very often sales presentations in disguise. These men used these supposed educational seminars to entice retirees with misrepresentations and convince them to invest in risky real estate ventures.'"[15]

December 2010: FINRA expelled APS Financial Corporation, and barred the firm's former President, George Conwill, and a former broker, Peter Aman, because of a scheme which overcharged an elderly investor by $1.2 million. Aman charged mark-ups ranging from 4.15 percent to as high as 67 percent when executing 45 transactions for customers of APS. 43 of the transactions were related to transactions for the accounts of a single elderly investor. The investor was charged over $1.2 million in undisclosed mark-ups, which included $767,000 in fraudulently excessive mark-ups. "'There is no room in the securities industry for those who prey upon elderly investors,' said Thomas Gira, Executive Vice President of FINRA's Department of Market Regulation."[16]

December 2011: FINRA fined Wells Fargo $2 million for unsuitable sales of reverse convertible securities to elderly customers and for failing to provide sales charge discounts on UIT purchases to eligible customers. FINRA found that the broker, Alfred Chi Chen, had recommended hundreds of unsuitable reverse convertible investments to 21 clients, most of whom were elderly

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[11] FINRA, *FINRA Bars Former New York Broker for Defrauding Elderly Investor of More Than $500,000*, FINRA NEWS RELEASE, October 8, 2009, http://www finra.org/Newsroom/NewsReleases/2009/P120117.

[12] Puttick consented to a one year suspension. *See In the Matter of Edward D. Puttick, Sr*., Securities Exchange Act of 1934 Release No. 66879, April 30, 2012, *available at* http://www.sec.gov/litigation/admin/2012/34-66879.pdf.

[13] Oldham consented to a bar. *See In the Matter of Gregory L. Oldham*, Securities Exchange Act of 1934 Release No. 64491, May 13, 2011, *available at* http://www.sec.gov/litigation/admin/2011/34-64942.pdf.

[14] Harris consented to a bar. *See In the Matter of Glenn R. Harris*, Securities Exchange Act of 1934 Release No. 64942, July 21, 2011 *available at* http://www.sec.gov/litigation/admin/2011/34-64942.pdf.

[15] SEC, *SEC Charges Promoter, Brokers in Real Estate Investment Scheme Targeting Seniors at Free Lunch Seminars*, SEC PRESS RELEASE, October 22, 2009, *available at* http://www.sec.gov/news/press/2009/2009-225.htm.

[16] FINRA, *FINRA Expels APS Financial, Bars Former President and Former Broker for Targeting an Elderly Investor with Fraudulently Excessive Mark-ups*, FINRA NEWS RELEASE, December 29, 2010 *available at* http://www.finra.org/Newsroom/NewsReleases/2010/P122689.

and/or had limited investment experience and low risk tolerance. Fifteen of the clients were over 80-years-old.[17] The underlying complaint against the broker discusses the details of the transactions at issue. It includes allegations of unauthorized trading in the accounts of three customers, two of whom were deceased at the time the trades were placed. Most of the customers to whom Chen recommended the reverse convertible investments were retired, living on fixed incomes, and had little or no investing experience. In some cases, Chen changed the customers' risk tolerances from "low" to "medium" so that the transactions would be approved. With the exception of one customer, all of the customers were at least 65-years-old, and many of them were in their 80s and 90s.[18]

June 2012: A FINRA hearing panel fined Brookstone Securities $1 million and ordered restitution of more than $1.6 million to customers for fraudulent sales of collateralized mortgage obligations (CMOs) to unsophisticated, elderly and retired investors. FINRA barred the firm's owner and CEO, Antony Turbeville and a broker, Christopher Kline, from the securities industry. Additionally, FINRA barred the firm's Chief Compliance Officer David Locy from acting in any supervisory or principal capacity, and suspended him in all capacities for two years while fining him $25,000. The CMOs were sold to retired investors looking for safer alternatives to equity investments. Turbeville and Kline led investors to believe that the CMOs were "government-guaranteed bonds" that would generate 10 to 15 percent returns and would preserve the investors' capital. "According to the decision, Turbeville and Kline 'preyed on their elderly customers' greatest fears,' such as losing their assets to nursing homes and becoming destitute during their retirement and old age, in order to induce them to purchase unsuitable CMOs."[19]

<u>State Criminal Actions</u>

February 2012: In California, an insurance agent, Glenn Neasham, was sentenced to three years felony probation and 90 days in jail for violating the statute on Theft and Embezzlement of an Elder for selling an annuity to an 83-year-old woman who was suffering from Alzheimer's disease.[20] Included in the announcement of the arrest: "'Insurance agents or brokers who steal from vulnerable seniors will not get away with their shameful tricks,' said Commissioner

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[17] FINRA, *FINRA Fines Wells Fargo $2 Million for Unsuitable Sales of Reverse Convertibles to Elderly Customers and Failure to Provide Breakpoints on UIT Sales*, FINRA NEWS RELEASE, December 15, 2011, *available at* http://www.finra.org/Newsroom/NewsReleases/2011/P125262.

[18] *See Department of Enforcement v. Alfred Chi Chen*, Disciplinary Proceeding No. 2008015651902, FINRA Complaint, *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@ad/documents/industry/p125266.pdf.

[19] FINRA, *FINRA Hearing Panel Fines Brookstone Securities $1 Million for Fraudulent Sales of CMOs to* Elderly, FINRA News Release, June 4, 2012, *available at* http://www.finra.org/Newsroom/NewsReleases/2012/P126718.

[20] California Department of Insurance, *Insurance Commissioner Dave Jones Announces Sentencing of Lake County Agent for Theft from a Senior*, CALIFORNIA DEPARTMENT OF INSURANCE BLOG POST, July 24, 2012, *available at* http://www.insurance.ca.gov/0400-news/01blog/blog026-12.cfm.

Poizner. 'CDI investigators will continue working to track down any unscrupulous agent who preys on California's seniors.'"[21]

April 2012: Two former insurance agents, Cynthia Gibbons and Kellie Will, pled guilty in New York to swindling approximately $400,000 from elderly clients in connection with annuity contracts. The two had plans in place to scam an additional $2 million from other seniors. Gibbons sold the seniors annuities, and then changed the beneficiaries to Will, unbeknownst to the annuitants. Gibbons pleaded guilty to one count of first degree scheme to defraud and three counts of attempted grand larceny, and Will pleaded guilty to one count of first degree scheme to defraud. "'These defendants were brought to justice and will serve hard time for defrauding vulnerable senior citizens. We will continue to aggressively investigate and build cases like this to deter the victimization of elderly New Yorkers,' said DFS Superintendent Benjamin M. Lawsky."[22]

May 2012: Insurance agent Neal Seth Smalbach was arrested in Florida for grand theft for misrepresenting details of financial products to senior citizens. The seniors invested an estimated $4.6 million in unsuitable investment products, and allegedly suffered losses of more than $2 million. "'Florida's seniors have worked hard for many years to earn their money and prepare for retirement,' CFO Atwater said. 'Criminals who choose to prey on the elderly for their own financial gain will be caught and they will be brought to justice.'"[23]

<u>State Statutes</u>

Five states recognize claims for financial abuse of the elderly. Three of the five recognize the claims under the state's Elder Protection statute.

California defines financial abuse as follows[24]:

(a) "Financial abuse" of an elder[25] or dependent adult[26] occurs when a person or entity does any of the following:

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[21] California Department of Insurance, *Insurance Commissioner Poizner Announces Lake County Insurance Agent Arrested for Allegedly Embezzling Money From a Senior*, CALIFORNIA DEPARTMENT OF INSURANCE PRESS RELEASE, December 16, 2010, *available at* http://www.insurance.ca.gov/0400-news/0100-press-releases/2010/release145-10.cfm.

[22] New York State Department of Financial Services, *DFS Superintendent Lawsky Announces Two Western New York Defendants Sentenced for Scamming Seniors*, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES PRESS RELEASE, April 27, 2012, *available at* http://www.dfs.ny.gov/about/press/pr1204271 htm.

[23] Florida Department of Financial Services, *CFO Jeff Atwater Announces Arrest of Senior Scammer for $2 Million Investment Fraud*, FLORIDA DEPARTMENT OF FINANCIAL SERVICES PRESS RELEASE, May 16, 2012, *available at* http://www.myfloridacfo.com/sitepages/newsroom/pressrelease.aspx?id=4063.

[24] Cal. Welf. & Inst. Code § 15610.30 (West 2009).

[25] The statute defines "elder" as follows: "'Elder' means any person residing in this state, 65 years of age or older." Cal. Welf. & Inst. Code § 15610.27 (West 1994).

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.
(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.

California's statute provides for additional compensation when a defendant is liable for financial abuse[27]:

(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.
(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an

[26] The statute defines "dependent adult" as follows: "(a) 'Dependent adult' means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.; (b) 'Dependent adult' includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code." Cal. Welf. & Inst. Code § 15610.23 (West 2003).

[27] Cal. Welf. & Inst. Code § 15657.5 (West 2012).

employee shall be satisfied before any punitive damages may be imposed against an employer found liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages or attorney's fees and costs.

(d) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

In Florida, financial abuse may be considered exploitation[28]:

(a) "Exploitation" means a person who:

1. Stands in a position of trust and confidence with a vulnerable adult[29] and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or
2. Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

(b) "Exploitation" may include, but is not limited to:

1. Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
2. Unauthorized taking of personal assets;
3. Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
4. Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.

The Florida statute contemplates the following recovery[30]:

> A vulnerable adult who has been abused, neglected, or exploited as specified in this chapter has a cause of action against any perpetrator and may recover actual and punitive damages for such abuse, neglect, or exploitation. The action may be brought by the vulnerable adult, or that person's guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of that person or that person's guardian, or by the personal representative of the estate of a deceased victim without regard to whether the cause of death resulted from the abuse, neglect, or exploitation. The action may be

[28] Fla. Stat. Ann. § 415.102(8) (West 2010).

[29] The statute defines "vulnerable adult" as follows: "'Vulnerable adult' means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." Fla. Stat. Ann. § 415.102(27) (West)

[30] Fla. Stat. Ann. § 415.1111 (West 2006).

> brought in any court of competent jurisdiction to enforce such action and to recover actual and punitive damages for any deprivation of or infringement on the rights of a vulnerable adult. A party who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult.

Oregon also recognizes financial abuse of a vulnerable person[31]:

> An action may be brought under ORS 124.100 for financial abuse in the following circumstances:
>
> (a) When a person wrongfully takes or appropriates money or property of a vulnerable person[32], without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the vulnerable person.

Pursuant to ORS 124.100, the following claims are available[33]:

> A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse. The court shall award the following to a plaintiff who prevails in an action under this section:
>
> (a) An amount equal to three times all economic damages, as defined in ORS 31.710, resulting from the physical or financial abuse, or $500, whichever amount is greater.
> (b) An amount equal to three times all noneconomic damages, as defined by ORS 31.710, resulting from the physical or financial abuse.
> (c) Reasonable attorney fees incurred by the plaintiff.
> (d) Reasonable fees for the services of a conservator or guardian ad litem incurred by reason of the litigation of a claim brought under this section.

Delaware provides for additional basis of liability when a violation of the Consumer Fraud Act is perpetrated against an elderly consumer[34]:

> (a) An elder person[35] or person with a disability[36] who suffers damage or injury as a result of an offense or violation described in this chapter has a cause of action to recover actual damages, court costs and reasonable attorney's fees.

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[31] Or. Rev. Stat. Ann. § 124.110(1) (West 2005).

[32] The statute defines "vulnerable person" as: "(A) An elderly person; (B) A financially incapable person; (C) An incapacitated person; or (D) A person with a disability who is susceptible to force, threat, duress, coercion, persuasion or physical or emotional injury because of the person's physical or mental impairment." Or. Rev. Stat. Ann. § 124.100(1)(e) (West). An "elderly person" is defined as: "a person 65 years of age or older." Or. Rev. Stat. Ann. § 124.100(1)(a) (West 2005) (effective through July 1, 2012).

[33] Or. Rev. Stat. Ann. § 124.100(2) (West) (effective through July 1, 2012).

[34] Del. Code Ann. Tit. 6, § 2583 (West 2011).

[35] Under the statute, "elder person" is defined as "a person who is 65 years of age or older." Del. Code Ann. Tit. 6, § 2580(a) (West 2011).

(b) If a private cause of action is brought by the victim of a violation of this subchapter, and said victim was 65 years of age or older or a person with a disability when the violation occurred, the victim shall be entitled to recover 3 times the amount of the victim's compensatory damages if a violation of this subchapter is established. Such treble damages shall be in addition to any other damages to which the victim is entitled pursuant to common law or other provisions of the Delaware Code.

The Delaware Consumer Fraud Act considers the following to be unlawful practices under the Act[37]:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

Lastly, Nevada provides for enhanced penalties when the victim is elderly under its Deceptive Trade Practices Act[38]:

> If an elderly person[39] or a person with a disability[40] suffers damage or injury as a result of a deceptive trade practice, he or she or his or her legal representative, if any, may commence a civil action against any person who engaged in the practice to recover the actual damages suffered by the elderly person or person with a disability, punitive damages, if appropriate, and reasonable attorney's fees. The collection of any restitution awarded pursuant to this section has a priority over the collection of any civil penalty imposed pursuant to NRS 598.0973.

The following acts are considered deceptive trade practices[41]:

> Advertises or offers an opportunity for investment and:
> (a) Represents that the investment is guaranteed, secured or protected in a manner which he or she knows or has reason to know is false or misleading;
> (b) Represents that the investment will earn a rate of return which he or she knows or has reason to know is false or misleading;

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[36] "Person with a disability" is defined as "a person who has a disability as defined in § 4602 of this title." Del. Code Ann. Tit. 6, § 2580(c) (West 2011). Section 4602 defines "disability" as "with respect to a person: a. A physical or mental impairment which substantially limits 1 or more of such person's major life activities; b. A record of having such an impairment; or c. Being regarded as having such an impairment, but such term does not include current, illegal use of a controlled substance as defined in § 102 of the Controlled Substances Act (21 U.S.C. 802) or Title 16 of Chapter 47, Uniform Controlled Substances Act." Del. Code Ann. Tit. 6, § 4602(10) (West 2011).

[37] Del. Code Ann. Tit. 6, § 2513(a) (West) (held unconstitutional on Jun. 7, 2001).

[38] Nev. Rev. Stat. Ann. § 598.0977 (West 1993).

[39] "Elderly person" is defined as "a person who is 60 years of age or older." Nev. Rev. Stat. Ann. § 598.0933 (West 2003).

[40] "Person with a disability" is defined as "a person who: 1. Has a physical or mental impairment that substantially limits one or more of the major life activities of the person; 2. Has a record of such an impairment; or 3. Is regarded as having such an impairment." Nev. Rev. Stat. Ann. § 598.0936 (West 2007).

[41] Nev. Rev. Stat. Ann. § 598.092 (West 2011).

(c) Makes any untrue statement of a material fact or omits to state a material fact which is necessary to make another statement, considering the circumstances under which it is made, not misleading;
(d) Fails to maintain adequate records so that an investor may determine how his or her money is invested;
(e) Fails to provide information to an investor after a reasonable request for information concerning his or her investment;
(f) Fails to comply with any law or regulation for the marketing of securities or other investments; or
(g) Represents that he or she is licensed by an agency of the State to sell or offer for sale investments or services for investments if he or she is not so licensed.

Five states provide for enhanced penalties under the Blue Sky Laws, however, the penalties are only available when actions are brought by the state securities administrators. The enhanced penalties range from $5,000 to $50,000 per violation when the victim is an elderly investor. The states are Arkansas[42], Hawaii[43], Kansas[44], Mississippi[45] and Missouri.[46]

<u>Conclusion</u>

Given the number of Americans already at retirement age, or approaching retirement age, it is necessary that the states as well as the regulators recognize the need for enhanced protections for this group of investors. Individuals should not work for their entire adult lives to then have their

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[42] Arkansas provides that the Securities Commissioner may fine any broker-dealer, agent, investment adviser, or representative the following amount: "If a victim of a violation is sixty-five (65) years of age or older: (A) Twenty thousand dollars ($20,000) for each violation; or (B) Two (2) times the amount of money received in connection with each violation." Ark. Code Ann. § 23-42-308(g)(2) (West 2011).

[43] "If a person commits a violation under this chapter and the violation is directed toward, targets, or is committed against a person who at the time of the violation is sixty-two years of age or older, the commissioner, in addition to any other administrative penalty, may impose an administrative penalty not to exceed $50,000 for each violation; provided that this section shall not apply to registered broker-dealers for violations of [section] 485A-412(d)(9)." Haw. Rev. Stat. § 485A-604.5 (West 2007).

[44] "If the administrator finds…that a person has violated this act or a rule adopted or order issued under this act, the administrator, in addition to any other power granted under this act, may enter an order against the person containing one or more of the following sanctions or remedies: (1) A civil penalty up to $25,000 for each violation. If any person is found to have violated any provision of this act, and such violation is committed against elder or disabled persons, as defined in K.S.A. 50-676, and amendments thereto, in addition to any civil penalty otherwise provided by law, the administrator may impose an additional penalty not to exceed $15,000 for each such violation. The total penalty against a person shall not exceed $1,000,000." Kan. Stat. Ann. § 17-12a604(b) (West 2004).

[45] The securities administrator may impose a civil penalty: "The amount of the civil penalty described in Section 75-71-604(d) is a maximum of Twenty-five Thousand Dollars ($25,000.00) for each violation, provided that an additional civil penalty may be imposed up to a maximum of Fifteen Thousand Dollars ($15,000.00) for violations of the chapter committed against elders or disabled persons." Miss. Code. Ann. § 75-71-613(d)(1) (West 2010).

[46] The securities commissioner may impose "an additional civil penalty not to exceed five thousand dollars for each such violation if the commissioner finds that a person subject to the order has violated any provision of this act and that such violation was committed against an elderly or disabled person. For purposes of this section, the following terms mean: (A) "Disabled person", a person with a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment, or being regarded as having such an impairment; (B) "Elderly person", a person sixty years of age or older." Mo. Ann. Stat. § 409.6-604(d)(3) (West 2009).

money squandered by an unscrupulous broker. California and Florida provide good examples of the type of statutes that should be enacted across the country. Investors should not have to consider where they live to determine what protections they have when investing.