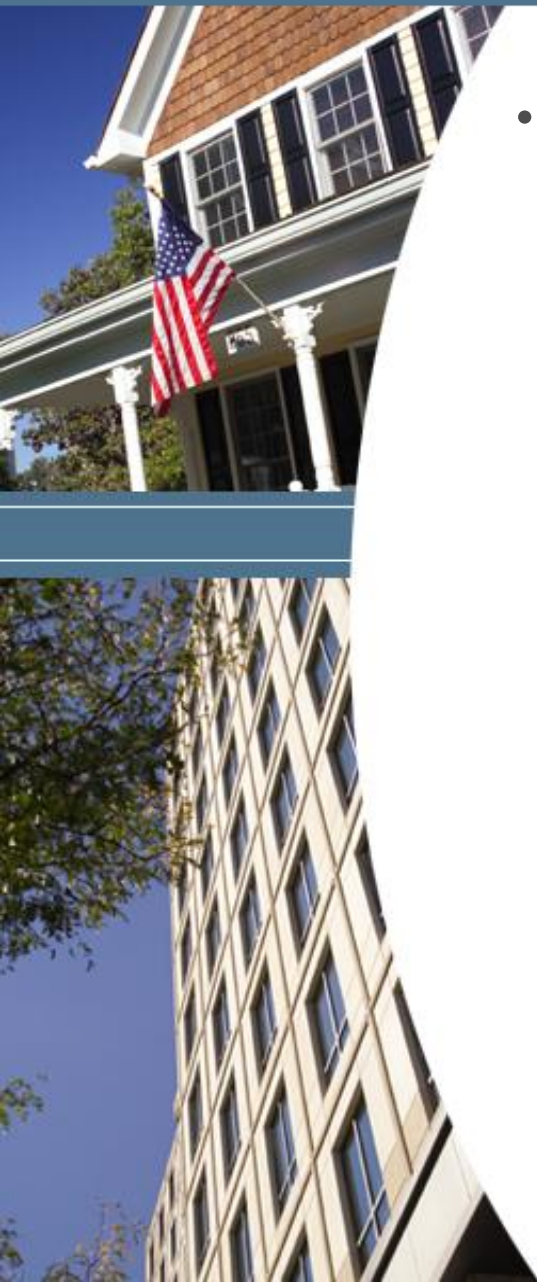


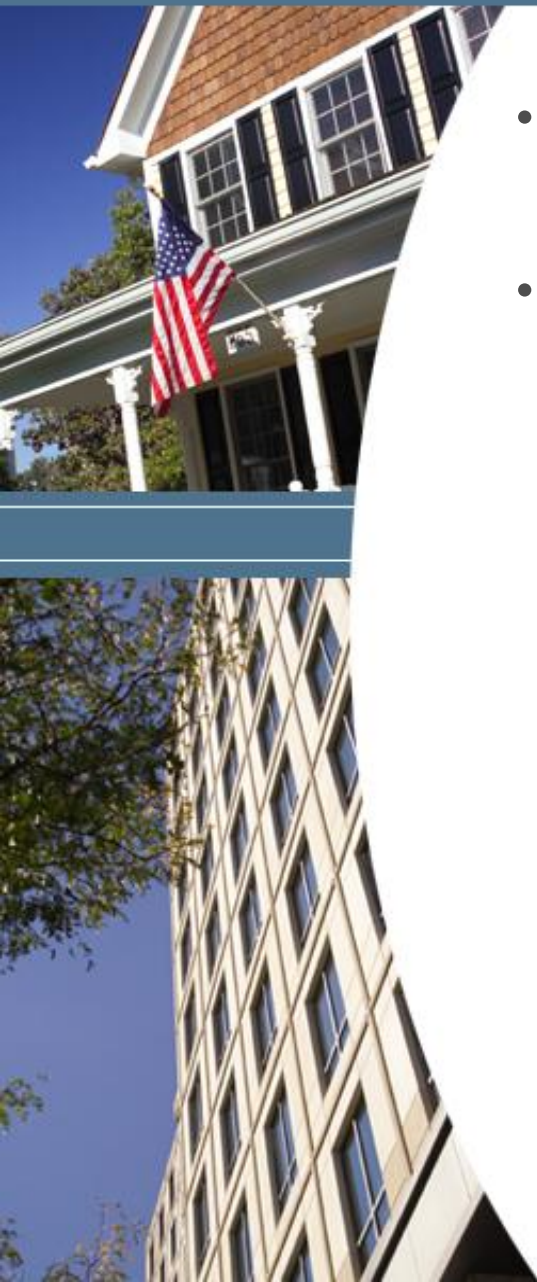


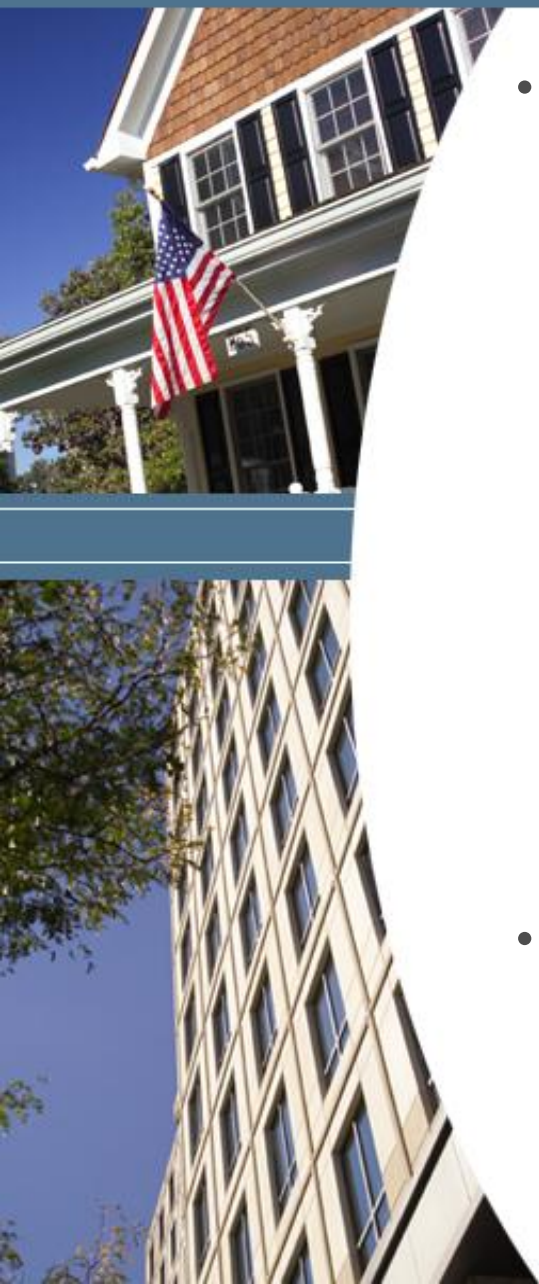
**State Elder Abuse Statutes: The Risks and What Reverse
Mortgage Lenders Need to Know**

Locke Lord Bissell & Liddell LLP

- 
- INTRODUCTION
 - » State Elder Abuse and Financial Abuse Laws – You Can Get in Trouble for What You Say or Do.
 - » State Elder Abuse Reporting Laws – You Can Also Get in Trouble for What You Don't Say or Do.
 - » Why Reverse Mortgage Transactions are Fertile Ground for Litigation (Why They Could be the Next Payment Option ARM Mortgages).

**State Elder Abuse and Financial Abuse Laws – You Can
Get in Trouble for What You Say or Do.**

- 
- **Cal. Welf. & Inst. Code § § 15600, et seq.**
(California's Elder Abuse Act)
 - Relevant excerpts of Cal. Welf. & Inst. Code § 15610.30(a)
 - "**Financial abuse**" of an elder or dependent adult occurs when a person or entity does any of the following:
 - (1) **Takes, secretes, appropriates, or retains** real or personal property of an elder or dependent adult to a **wrongful use** or with **intent to defraud**, or both.
 - (2) **Assists** in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.



- **Cal. Civ. Code § 3345:** Provides for increased fines or penalties (up to three times) when:
 - » Offending conduct was ***directed to*** one or more senior citizens or disabled persons;
 - » Defendant's conduct caused the person to suffer some type of significant financial ***loss***; and
 - » Senior citizens or disabled persons are ***substantially more vulnerable*** than other members of the public to the defendant's conduct, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.
- Some uncertainty whether this law provides a private right of action or simply provides enhanced remedies. *See Berkley v. Dowds*, 152 Cal.App.4th 518, 529 (2007).

Zimmer v. Nawabi

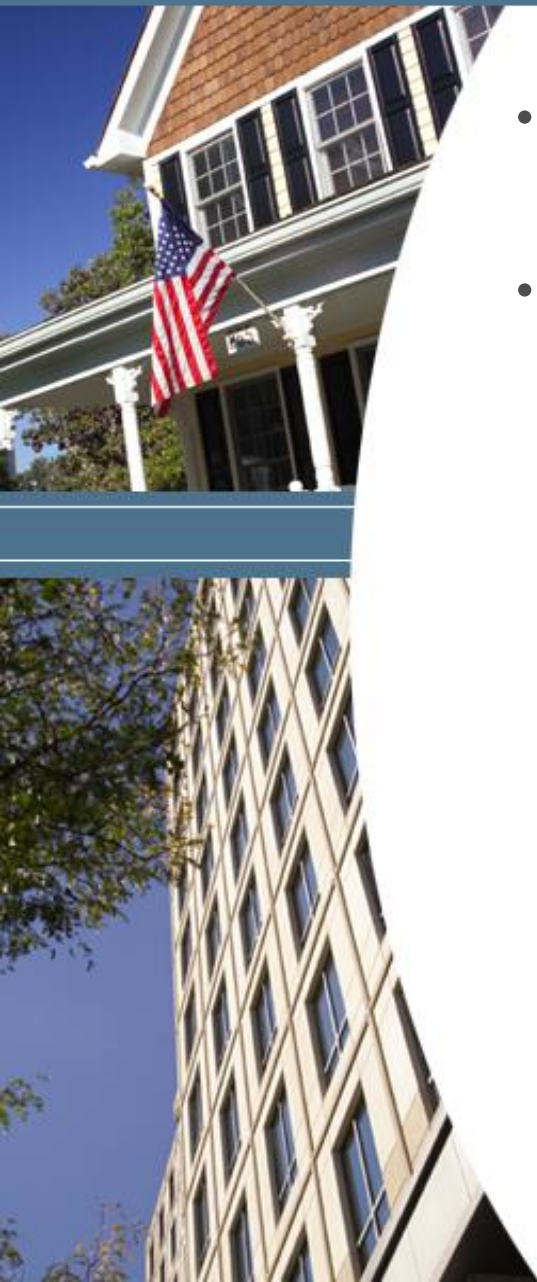
2008 U.S. Dist. LEXIS 39390 (E.D. Cal. May 13, 2008)

- Elderly borrower applied to refinance her mortgage loan. **Broker informed her that her refinance would result in a single loan** with certain monthly loan payments.
- The borrower subsequently discovered that the terms of her refinance were different from those verbally described to her by the broker.
- The court **refused to uphold oral promises** made by the broker regarding the borrower's loan.
- The court held that the **broker violated the Elder Abuse Act because it received fees** that it wrongfully obtained due to the false statements.

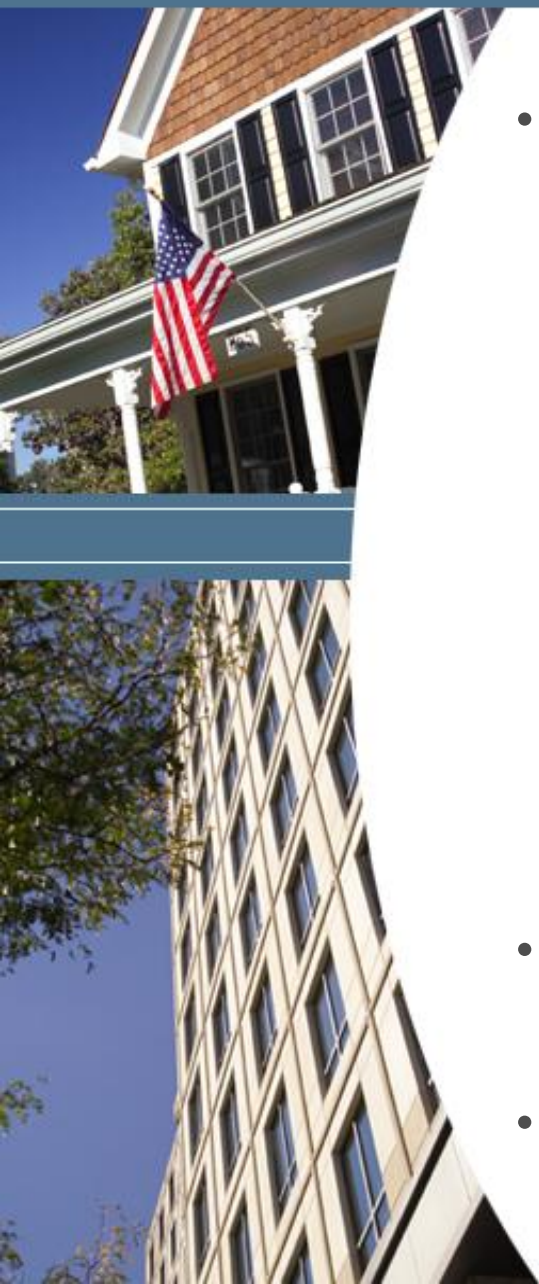
Toscano v. Ameriquest Mortg. Co.

2007 U.S. Dist. LEXIS 81884 (E.D. Cal. Oct. 23, 2007)

- Elderly borrower applied for a mortgage refinance.
- Borrower claimed that he was offered a loan with a low fixed interest rate. After executing the loan documents, he discovered that the mortgage loan was for a higher, variable interest rate.
- Borrower brought an action against the broker and Ameriquest for fraud, elder abuse and other claims.
- Ameriquest moved to dismiss the elder abuse claim, arguing that without a fiduciary relationship, no elder abuse claim can be made.
- The court denied the motion and allowed the claim to proceed, holding that ***a fiduciary relationship is not required*** to state a financial elder abuse “cause of action.”



- Fla. Stat. § § 415.101, *et seq.* Adult Protective Services
- Fla. Stat. § 415.102(7) "Exploitation" means a person who:
 - » Stands in a ***position of trust and confidence*** with a vulnerable adult 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
 - » ***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.

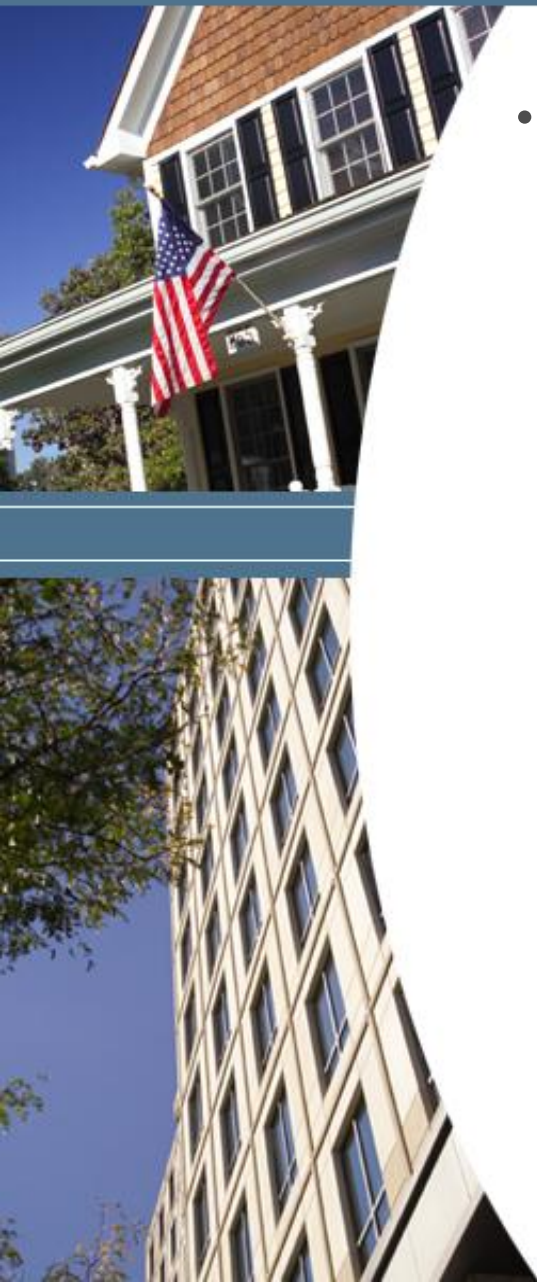


- Examples of "Exploitation":
 - » **Breaches of fiduciary relationships**, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
 - » **Unauthorized taking of personal assets**;
 - » **Misappropriation, misuse, or transfer of moneys** belonging to a vulnerable adult from a personal or joint account; or
 - » 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.
- Fla. Stat. § 415.1111: Plaintiffs may recover actual and punitive damages through a civil action.
- Fla. Stat. § 415.111: Criminal penalties may result. 9

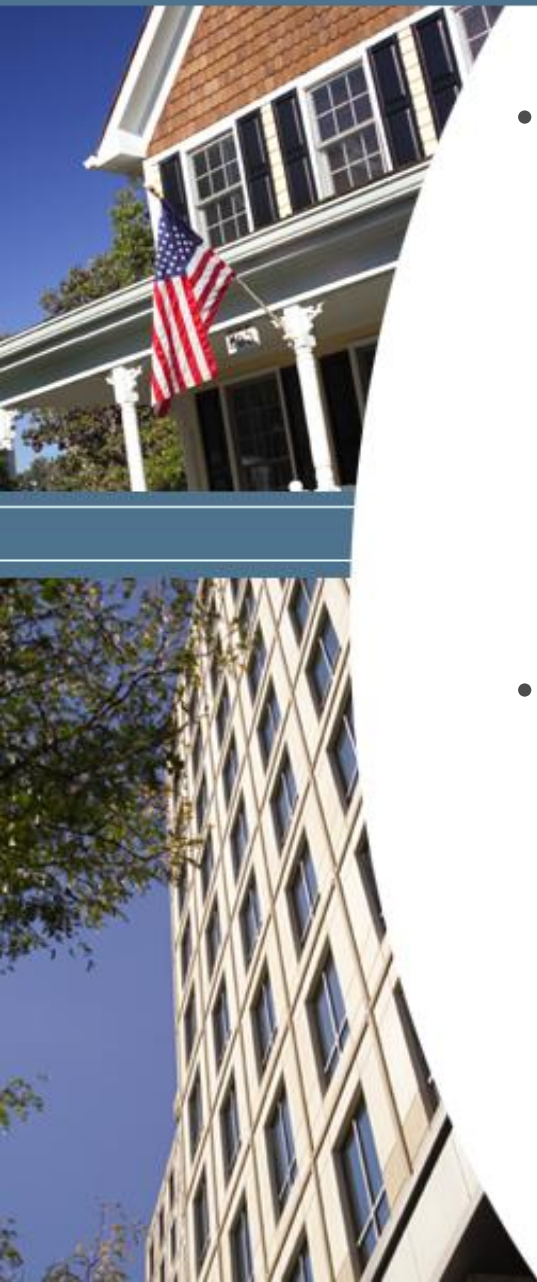
Woodruff v. TRG-Harbour House, Ltd

967 So. 2d 248 (Fla. Dist. Ct. App. 3rd Dist. 2008)

- Elderly buyer entered into a real estate purchase agreement. After a dispute arose between the buyer and seller, the buyer executed a letter terminating the agreement with the owner and forfeiting her deposit.
- The buyer brought a civil action, alleging that she executed that letter under duress and misrepresentation.
- Court held that the buyer could not maintain a claim for elder abuse because she was not a "vulnerable adult," *i.e.*, "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, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging."

- 
- N.Y. Gen. Bus. § 349-c: Imposes additional civil penalties for consumer frauds against elderly persons if:
 - » The defendant ***knows that its conduct was directed to one or more elderly persons*** or the defendant's conduct is in ***willful disregard*** of the rights of an elderly person;
 - » The defendant's conduct ***causes an elderly person or persons to suffer severe loss or encumbrance of a primary residence, principal employment or source of income, substantial loss of property*** set aside for retirement or for personal and family care and maintenance, ***substantial loss of payments*** received under a pension or retirement plan or a government benefits program; or assets essential to the health or welfare of the elderly person or if the elderly persons were ***substantially more vulnerable*** to the defendant's conduct because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability, and actually suffered physical, emotional, or economic damage resulting from the defendant's conduct.

New York Elder Abuse Statutes

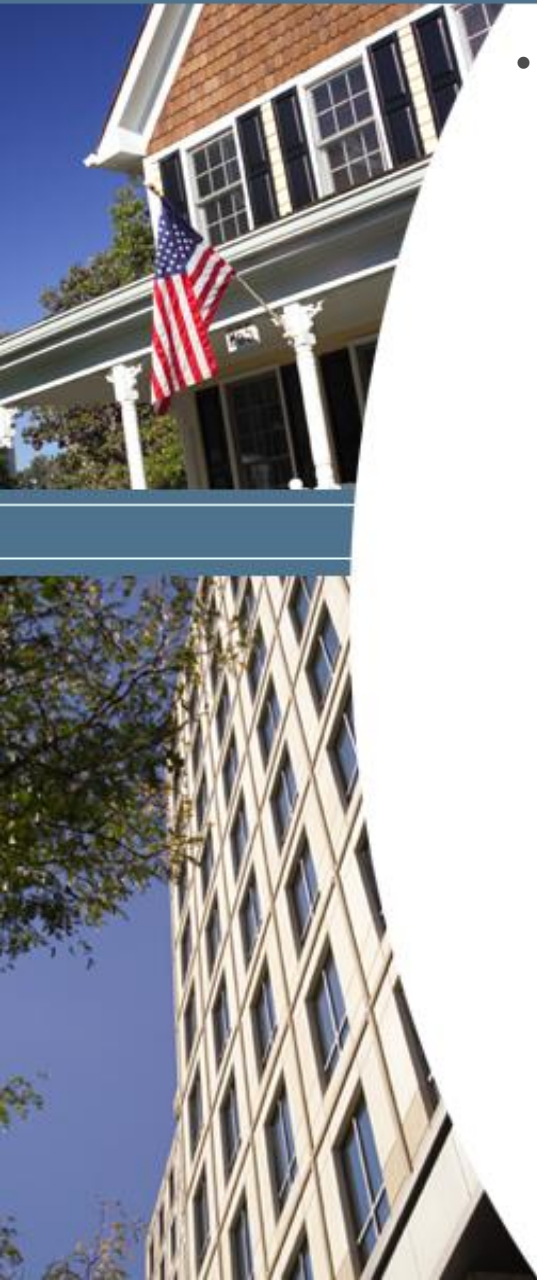


- N.Y. Soc. Serv. Law § § 473, *et seq.* provide for ***adult protective services*** “to or for individuals without regard to income who, because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from... financial exploitation or other hazardous situations...”
- N.Y. Soc. Serv. Law § 473(g): "Financial exploitation" means ***improper use of an adult's funds, property or resources*** by another individual, including but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.

State v. Justin

3 Misc. 3d 973, 995 (N.Y. Sup. Ct. 2003)

- Brokers engaged in a fraudulent scheme to sell risky investments involving coin operated payphones.
- NY Attorney General brought an action for restitution and to permanently enjoin defendants from selling securities to the public within or from the State of New York.
- The action included a claim for enhanced penalties pursuant to N.Y. Gen. Bus. § 349-c.
- Plaintiff alleged that, of the 667 investors defrauded by defendants in western New York, a large percentage was over the age of 65, the definition of an elderly person under the statute.
- On this basis, the court denied defendant's motion for summary judgment.

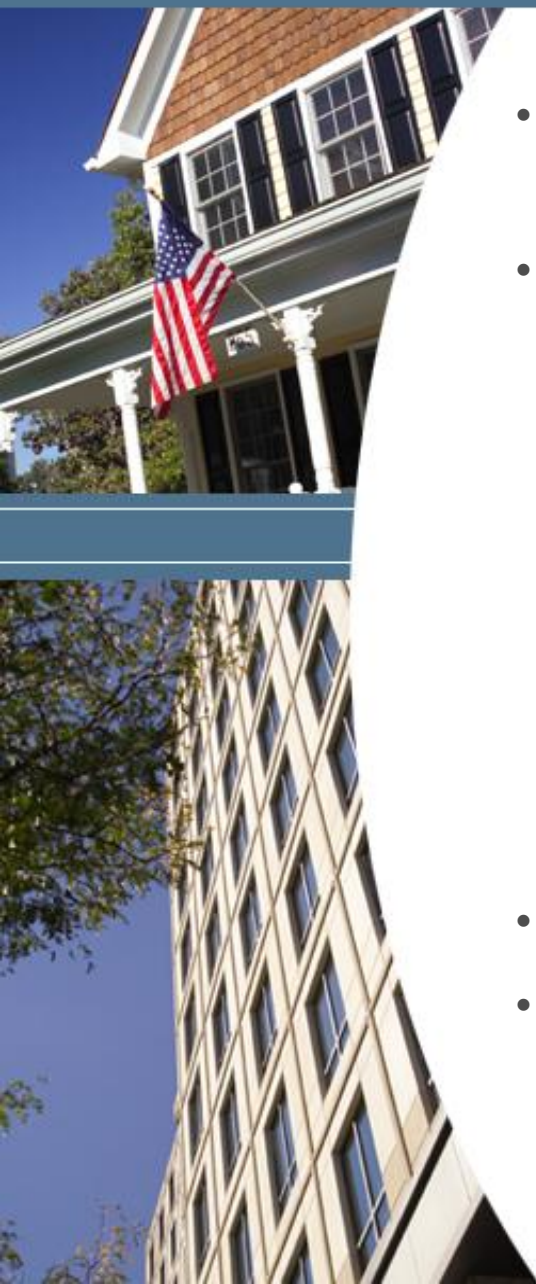


- Mass Gen. Laws ch. 19A, § 14: “**Financial Exploitation**” in the context of elderly abuse means an act or omission which causes a **substantial monetary or property loss** to an elderly person, or causes a **substantial monetary or property gain** to the other person, which gain would otherwise benefit the elderly person but for the act or omission of such other person; provided, however, that such an act or omission shall not be construed as financial exploitation if the elderly person has knowingly consented to such act or omission unless such consent is a consequence of misrepresentation, undue influence, coercion or threat of force by such other person; and, provided further, that financial exploitation shall not be construed to interfere with or prohibit a bona fide gift by an elderly person or to apply to any act or practice in the conduct of any trade or commerce declared¹⁴ unlawful by Mass. Gen. Laws ch. 93A, § 2.

Wong v. Nieboer

2006 Mass. App. Div. 67 (Mass. App. Div. 2006)

- Plaintiffs brought an action for fraud, breach of contract and elder abuse, among other claims, arising from a failed transaction to purchase a mobile home from defendants.
- Plaintiffs alleged that they were “**financially exploited**” by defendants in the course of this transaction.
- **Evidence of defendants' intentions** was required to determine whether the Elder Protection Statute, Mass. Gen. Laws ch. 19A, § § 1 - 26, was violated.
- The buyers did not prove that the contract was unconscionable under Mass. Gen. Laws ch. 106, § 2-302.
- Court held that the state elder abuse claim would have to proceed to trial and could not be resolved on summary judgment.



- **720 ILCS 5/16-1.3. Financial exploitation of an elderly person or a person with a disability.**
- A person financially exploits an elderly person or a person with a disability when he or she:
 - » stands in a position of trust or confidence with the elderly person or a person with a disability and he or she knowingly and
 - » by deception or intimidation obtains control over the property of an elderly person or a person with a disability, or
 - » illegally uses the assets or resources of an elderly person or a person with a disability.
- Financial exploitation of an elderly person is a felony.
- A person who is charged with financial exploitation may be liable for ***treble damages, reasonable attorney fees and court costs.***

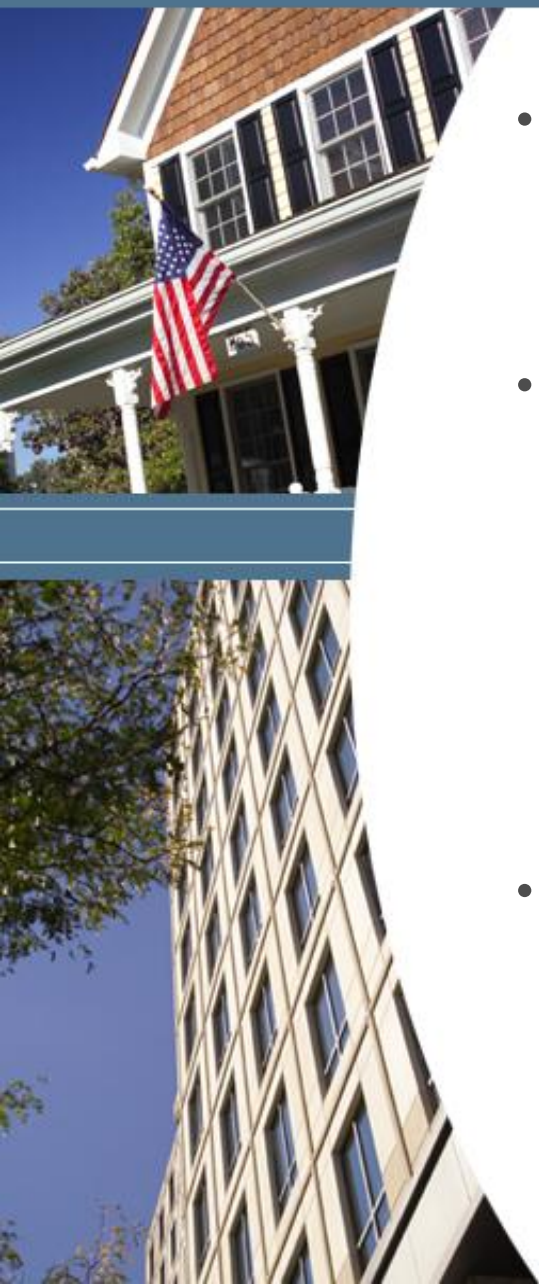
People v. Layne

286 Ill. App. 3d 981 (Ill. App. Ct. 5th Dist. 1997)

- Elderly victim met the appellant through a service that provided in-home assistance to elderly clients and eventually entrusted her with the management of money.
- At trial, she was convicted of violating the Illinois elder abuse statute.
- The court held that:
 - » The state had proven the existence of a fiduciary relationship by clear and convincing evidence; and
 - » No showing of mental impairment was necessary to prove that the victim was an "elderly person."
- Because the state had proven the existence of a fiduciary relationship by clear and convincing evidence, in addition to meeting the other elements, the appellant's conviction 17 for financial exploitation of an elderly person was upheld.

**Elder Abuse Reporting Laws - You Can Also Get in
Trouble for What You *Don't* Say or Do.**

State Elder Abuse Statutes: The Risks and What Reverse Mortgage Lenders Need to Know



- Financial abuse is a reportable form of elder abuse in all 50 States and the District of Columbia.
- Not only is the reporting of financial abuse the right thing to do – in many States, it is mandatory for “all persons,” including specifically “financial institutions,” and failure to do so can result in civil and criminal penalties.
- Some States specifically identify banks and other financial institutions as “mandatory reporters.”

- **California:** Cal. Welf. & Inst. Code § § 15630, *et seq.*

15630.1. (a) As used in this section, "***mandated reporter*** of suspected financial abuse of an elder or dependent adult" means ***all officers and employees of financial institutions....***

* * * * *

(d) (1) Any mandated reporter of suspected financial abuse of an elder or dependent adult... ***shall report the known or suspected instance of financial abuse*** by telephone immediately, or as soon as practicably possible, and by written report sent within two working days to the local adult protective services agency or the local law enforcement agency.

- Florida: FL ST § § 415.101, *et seq.*

415.1034 Mandatory reporting of abuse, neglect, or exploitation of vulnerable adults; mandatory reports of death.--

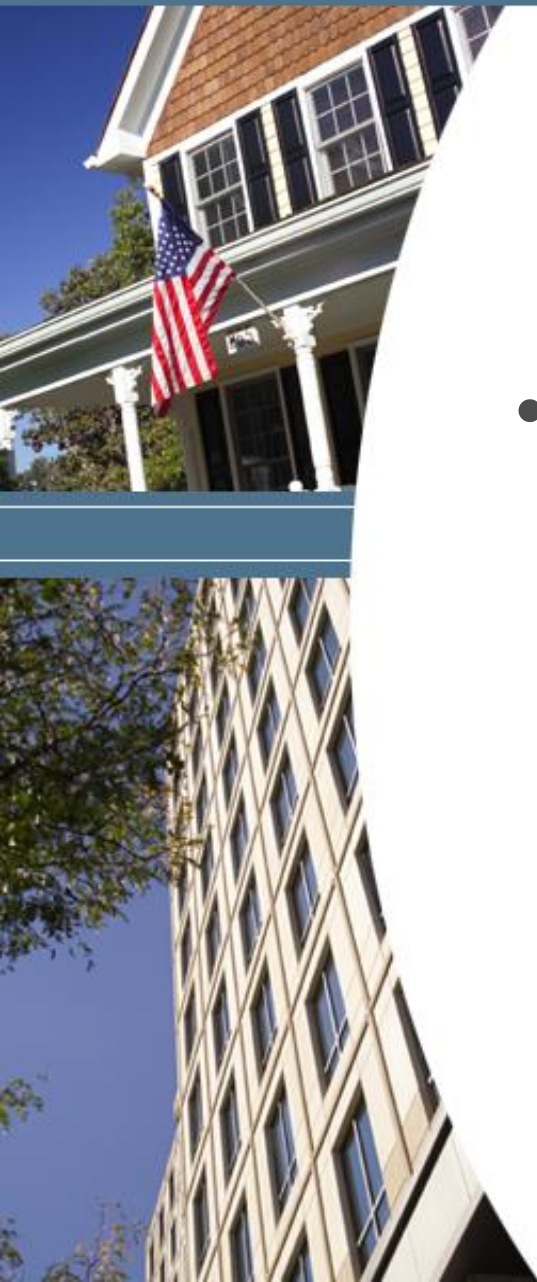
(1) MANDATORY REPORTING.--

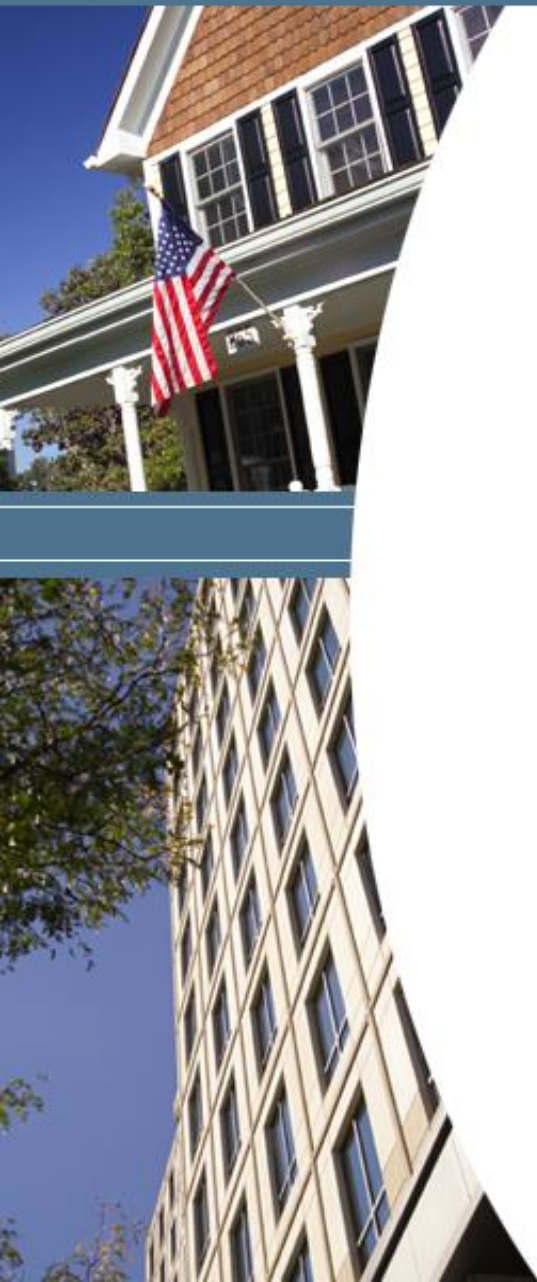
(a) Any person, including, but not limited to, any:

* * * * *

8. ***Bank, savings and loan, or credit union officer, trustee, or employee,***

who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited ***shall immediately report such knowledge or suspicion to the central abuse hotline.***

- 
- Financial institutions are also obligated to cooperate with investigations of elder abuse, *i.e.*, to provide access to documents and financial information.



[Florida] 415.1045 Photographs, videotapes, and medical examinations; abrogation of privileged communications; confidential records and documents.--

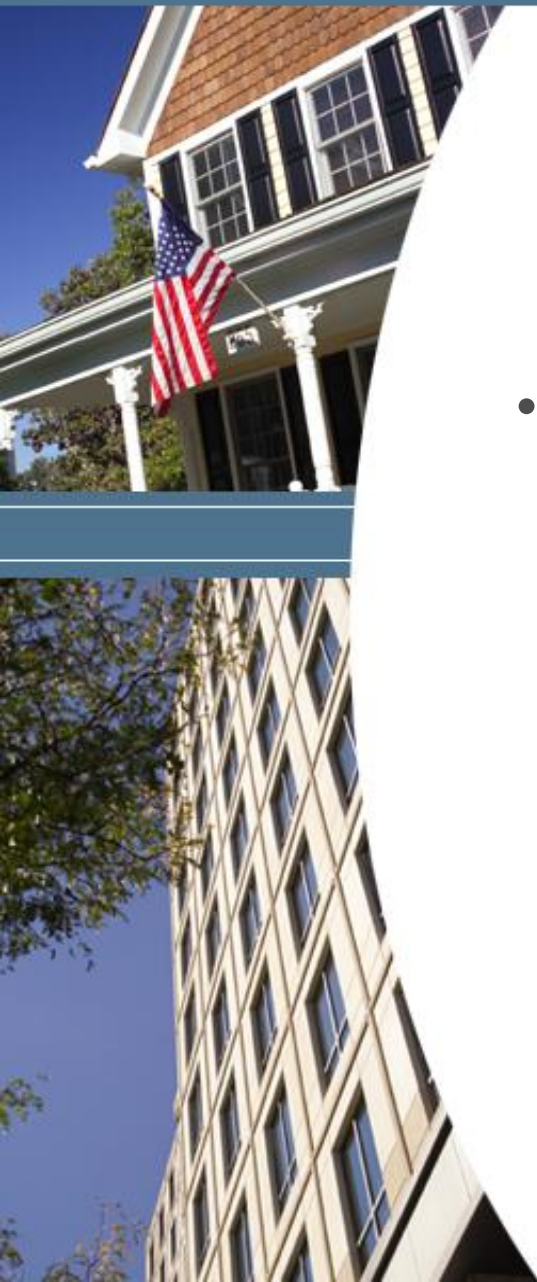
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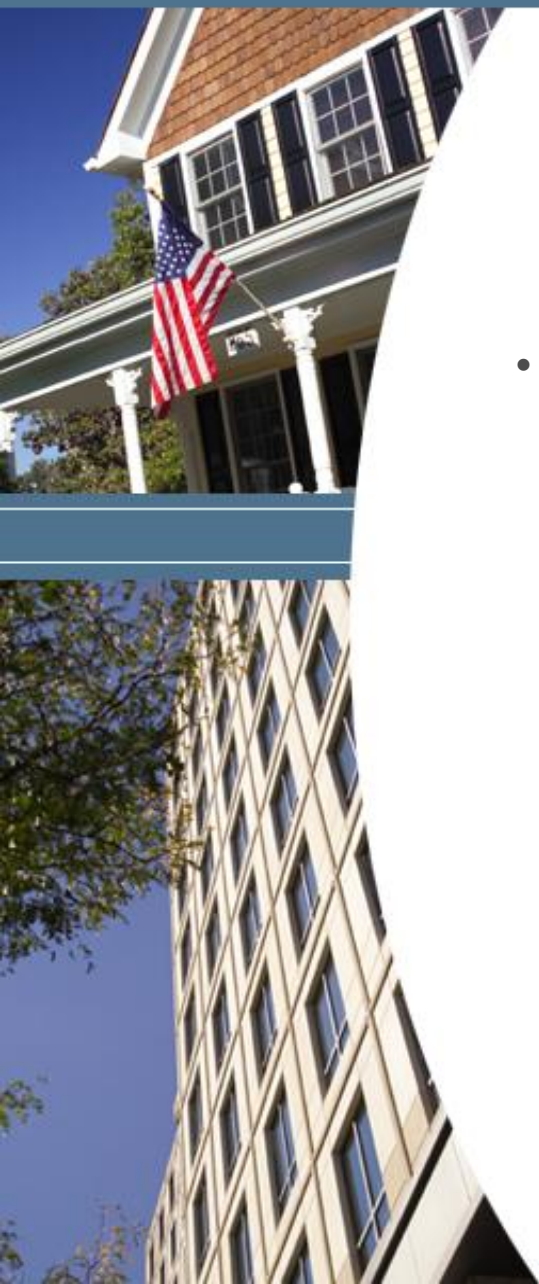
(4) MEDICAL, SOCIAL, OR FINANCIAL RECORDS OR DOCUMENTS.--

(a) The protective investigator, while investigating a report of abuse, neglect, or exploitation, ***must have access to, inspect, and copy*** all medical, social, or ***financial records or documents in the possession of any person***, caregiver, guardian, or facility which are relevant to the allegations under investigation....

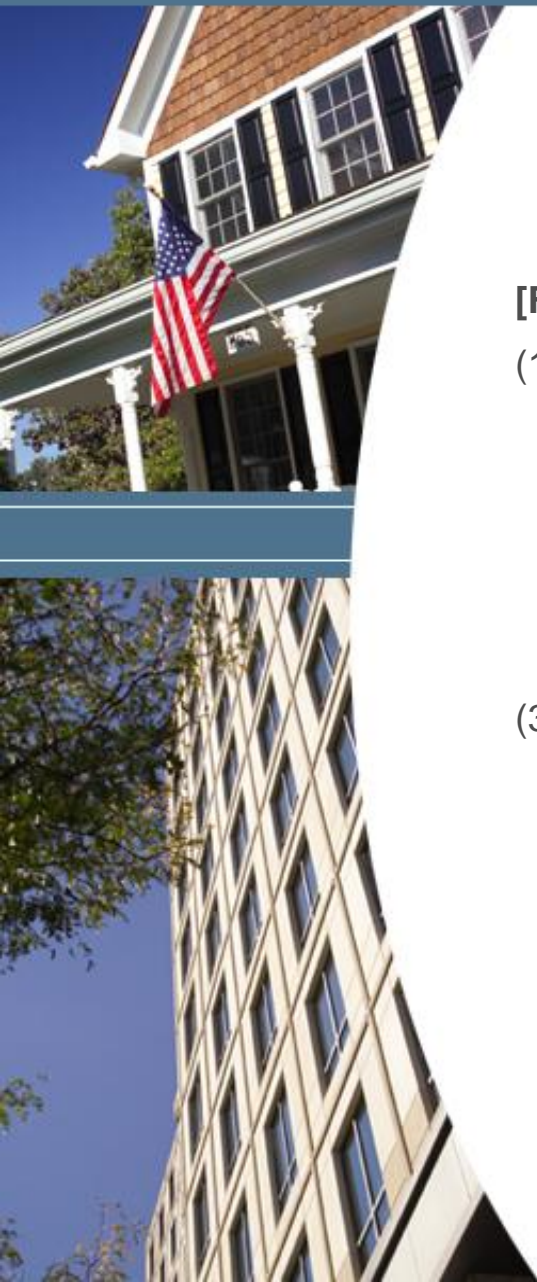
(b) The confidentiality of any medical, social, or financial record... does not constitute grounds for failure to:

1. Report as required by s. 415.1034;
2. Cooperate with the department in its activities...;
3. Give access to such records or documents; or
4. Give evidence in any judicial or administrative proceeding relating to abuse, neglect, or exploitation of a vulnerable adult.

- 
- **Failure to comply with reporting obligations or to cooperate in an investigation can result in civil and criminal penalties.**



- **[California]** 15630.1. (f) Failure to report financial abuse under this section shall be subject to a civil penalty not exceeding one thousand dollars (\$1,000) or if the failure to report is willful, a civil penalty not exceeding five thousand dollars (\$5,000), which shall be paid by the financial institution that is the employer of the mandated reporter to the party bringing the action.

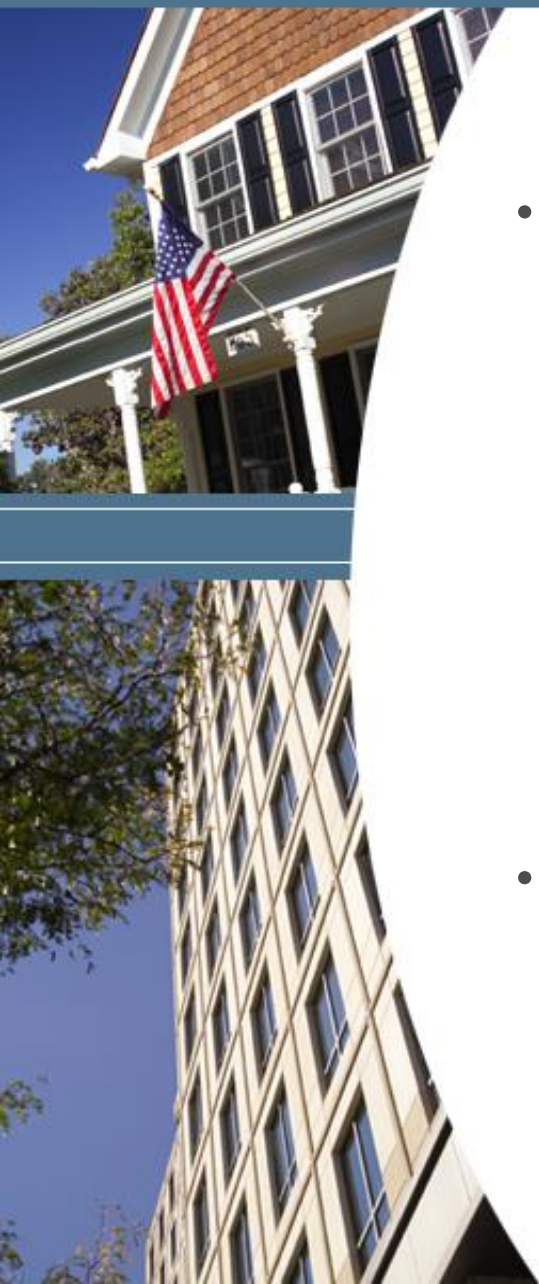


[Florida] 415.111 Criminal penalties.--

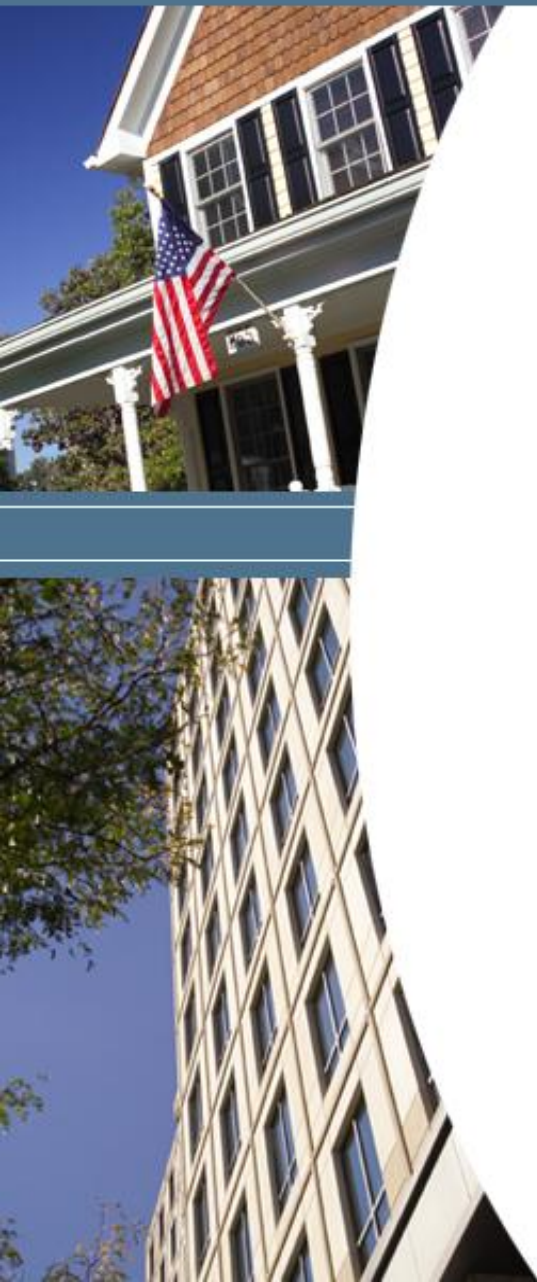
- (1) A person who ***knowingly and willfully fails to report*** a case of known or suspected abuse, neglect, or exploitation of a vulnerable adult, ***or who knowingly and willfully prevents another person from doing so***, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

* * * * *

- (3) A person who has custody of records and documents... and who refuses to grant access to such records commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.



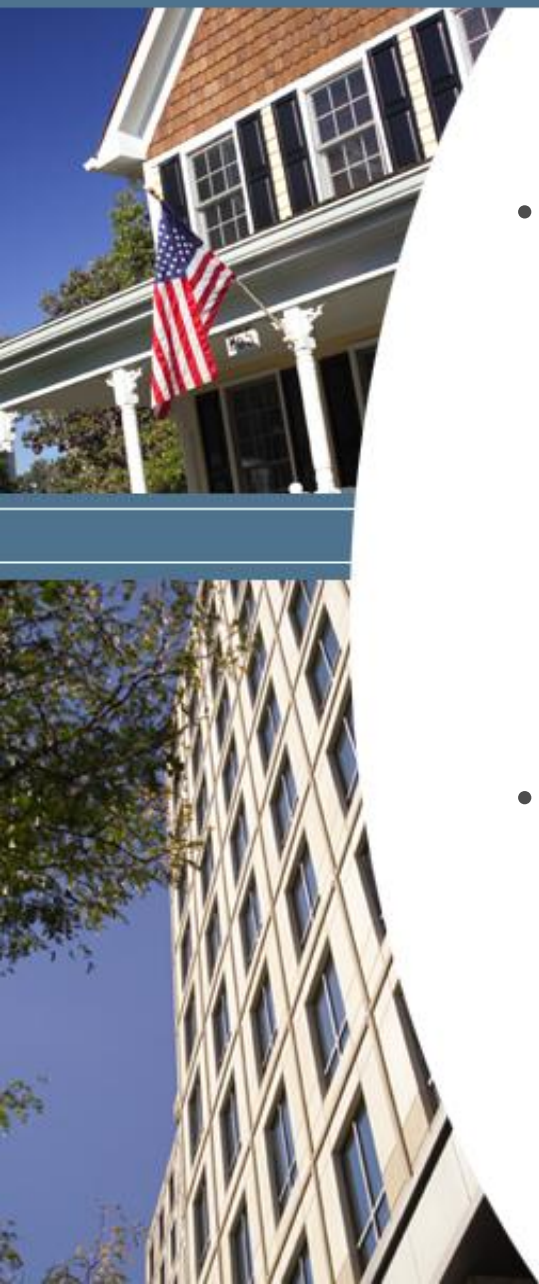
- A civil claim for damages based on a *failure* to report is unlikely to proceed in most States, e.g., Florida. See *Mora v. South Broward Hospital District*, 710 So.2d 633 (Fl. Dist. Ct. 1998) (holding that a violation of the State’s mandatory reporting statute does not give rise to a civil cause of action).
- However, there are statutory provisions on the books in some States that allow civil recovery for failure to report, e.g., Iowa and Michigan.



[Iowa] 235B.3 DEPENDENT ADULT ABUSE REPORTS. A person required by this section to report a suspected case of dependent adult abuse who *knowingly fails to do so* or who *knowingly, in violation of subsection 3, interferes with the making of such a report* or applies a requirement that results in such a failure is civilly liable for the damages proximately caused by the failure.

[Michigan] 400.11e Failure to make report; liability; disposition of fine.
Sec. 11e.

(1) A person required to make a report pursuant to section 11a who fails to do so is liable civilly for the damages proximately caused by the failure to report, and a civil fine of not more than \$500.00 for each failure to report.

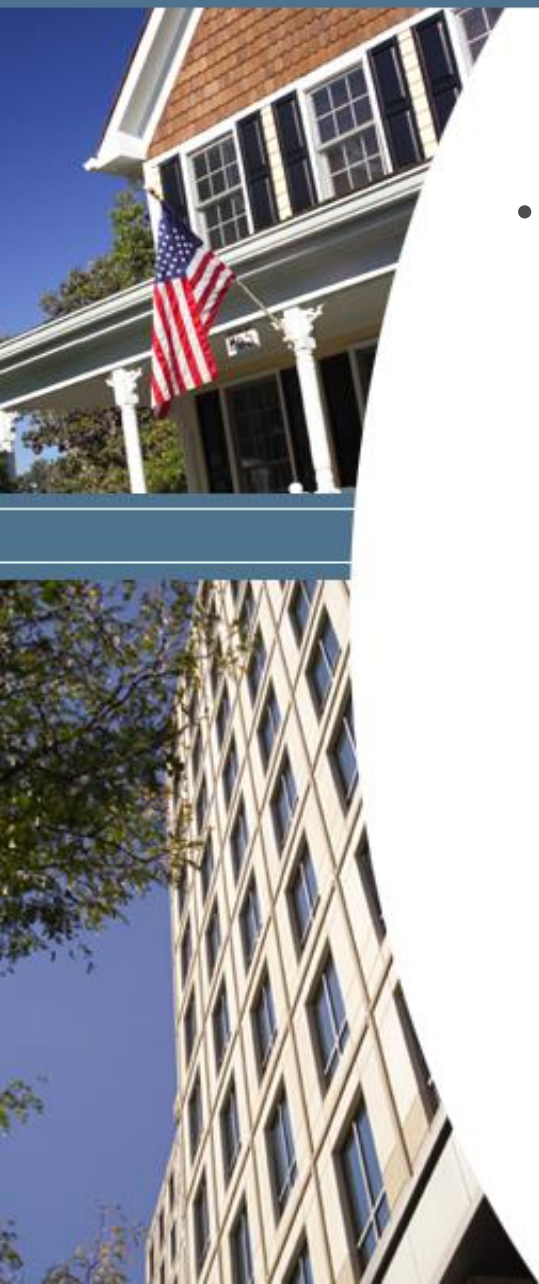


- Although it is in the nature of financial institutions to be concerned about privacy and the potential liability they can face for disclosing a borrower's private financial information, virtually all reporting statutes immunize "any person" or "anyone" who reports in good faith.
- This would include the individual who reports and the company possessing the information that is reported.

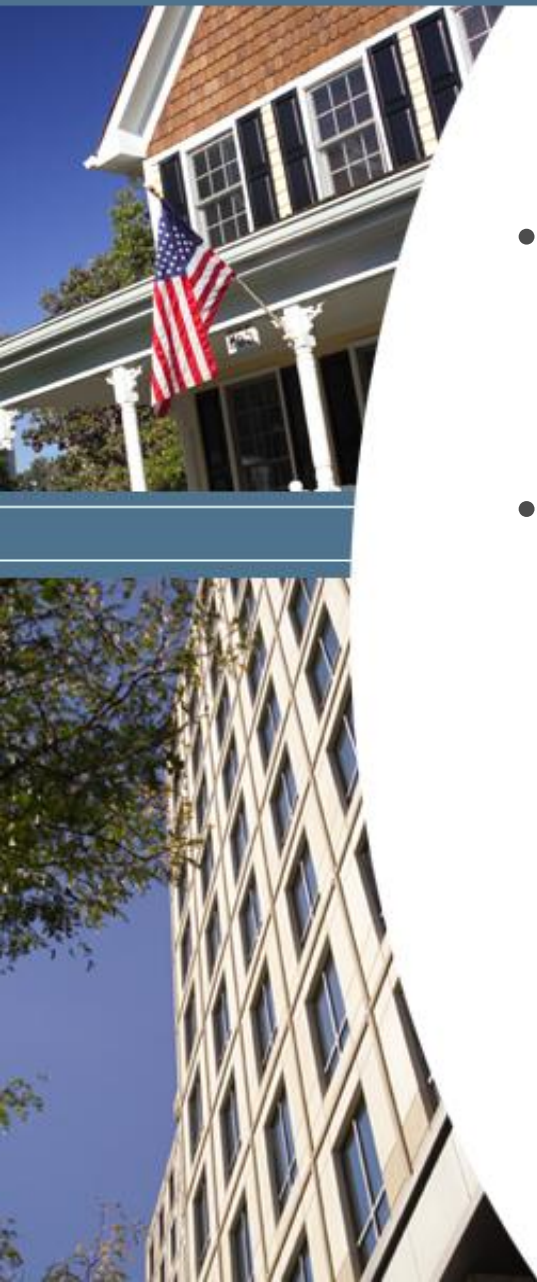
State Elder Abuse Statutes: The Risks and What Reverse Mortgage Lenders Need to Know

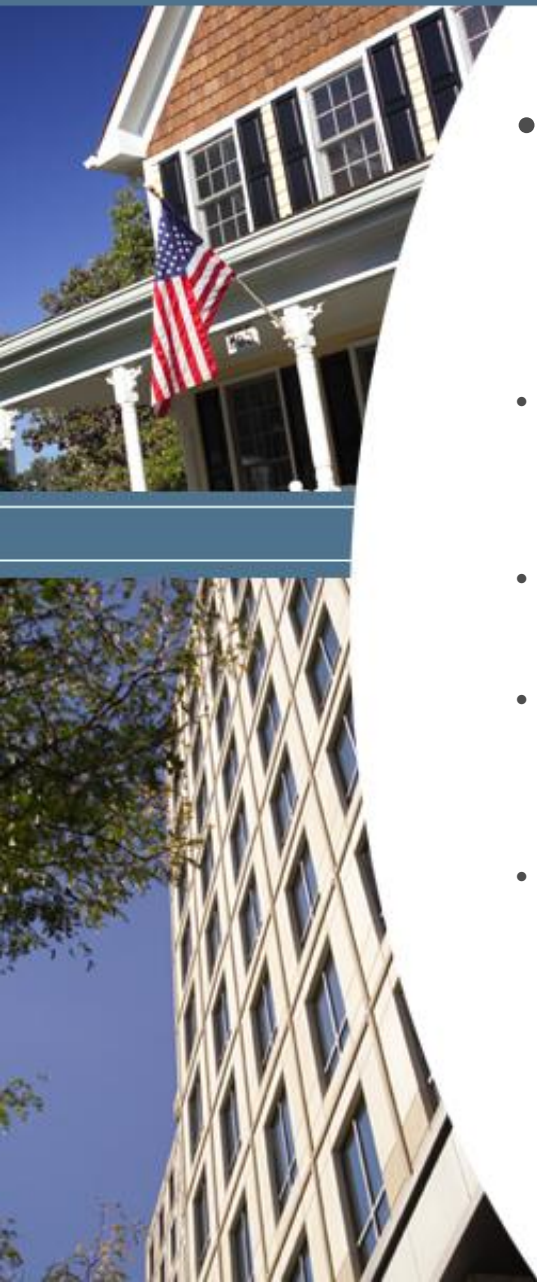
[Florida] 415.1036 Immunity.--

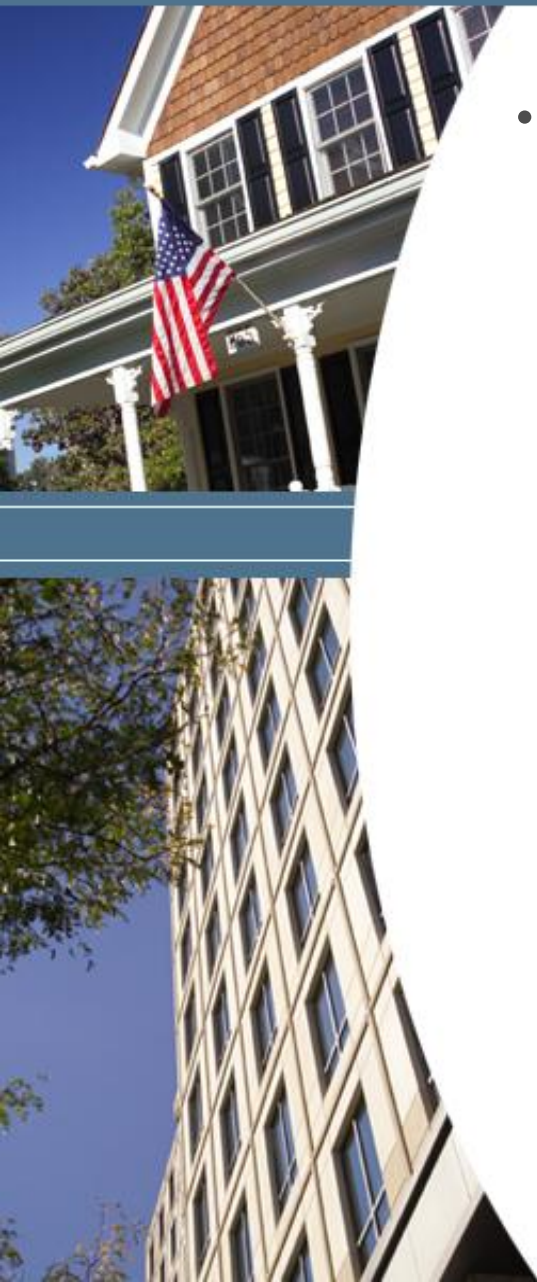
(1) ***Any person who participates in making a report*** under s. 415.1034 or participates in a judicial proceeding resulting there from ***is presumed to be acting in good faith and***, unless lack of good faith is shown by clear and convincing evidence, ***is immune from any liability, civil or criminal***, that otherwise might be incurred or imposed. This section does not grant immunity, civil or criminal, to any person who is suspected of having abused, neglected, or exploited, or committed any illegal act upon or against, a vulnerable adult. Further, a resident or employee of a facility that serves vulnerable adults may not be subjected to reprisal or discharge because of the resident's or employee's actions in reporting abuse, neglect, or exploitation pursuant to s. 415.1034.



- **While the Supremacy Clause (Article IV, Section 2 of the U.S. Constitution) may allow federal privacy laws to trump certain State statutory immunity provisions, most applicable federal laws either:**
 - (1) Do not apply to the disclosure or reporting of information to a State official or organization; or**
 - (2) contain specific exceptions which would protect disclosures made to report elder financial abuse.**

- 
- Right to Financial Privacy Act (“RFPA”), 12 U.S.C. § § 3401, *et seq.*
 - The RFPA applies only to the *federal* government and places no restrictions on State and local governments in seeking and obtaining financial records.

- 
- Financial Services Modernization Act (“Gramm-Leach-Bliley” or “GLB”), Title V, 15 U.S.C. § § 3801, *et seq.*
 - Section 502(e) of GLB contains several exemptions that would permit the disclosure of non-public personal information without prior notice to the customer.
 - Subsection (e)(3)(B) permits disclosure “to protect against or prevent actual or potential fraud, unauthorized transactions, claims...”
 - Subsection (e)(5) permits disclosure “to the extent specifically permitted or required under other provisions of law...to enforcement agencies...or for an investigation on a matter related to public safety.”
 - Subsection (e)(8) permits disclosure to comply with Federal, State, or local laws, rules and other applicable legal requirements...”

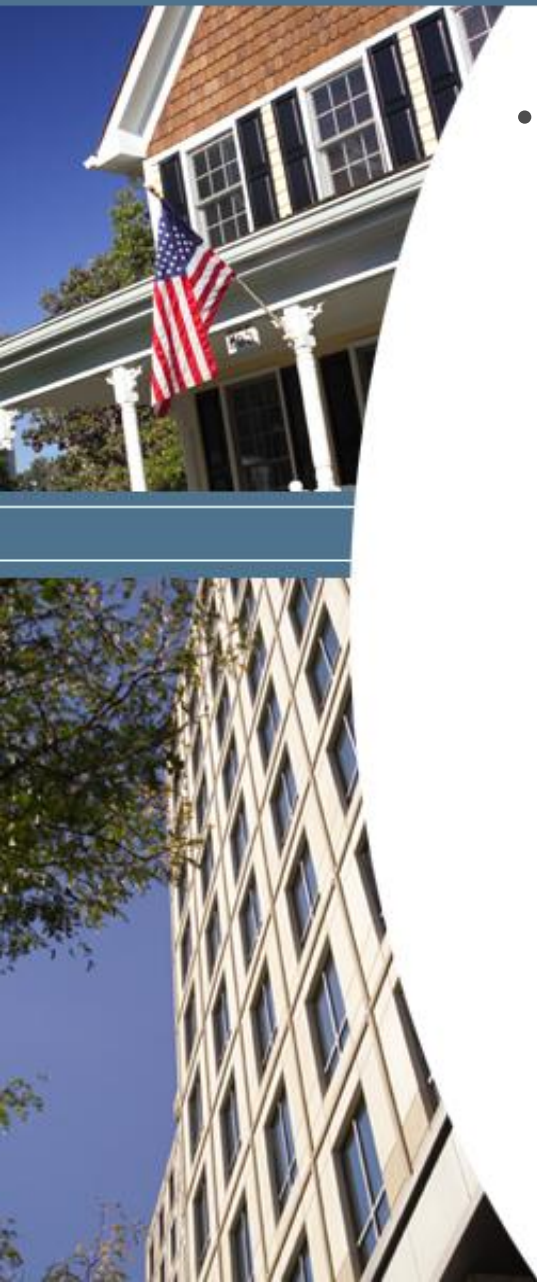
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- To Summarize:
 - (1) Be aware of your own and your company's obligations to report financial abuse – both because of the potential for liability *and* because reporting is the right thing to do;
 - (2) Be aware of your obligations to cooperate with officials investigating claims of financial abuse;
 - (3) Train your loan officers and employees who interact with borrowers or are in a position to observe on when and how to report; and
 - (4) When necessary, promptly seek advice from counsel on when and how to comply.

Reverse Mortgage Transactions are Fertile Ground for Litigation (Why Reverse Mortgages Could be the Next Payment Option ARM Mortgages).

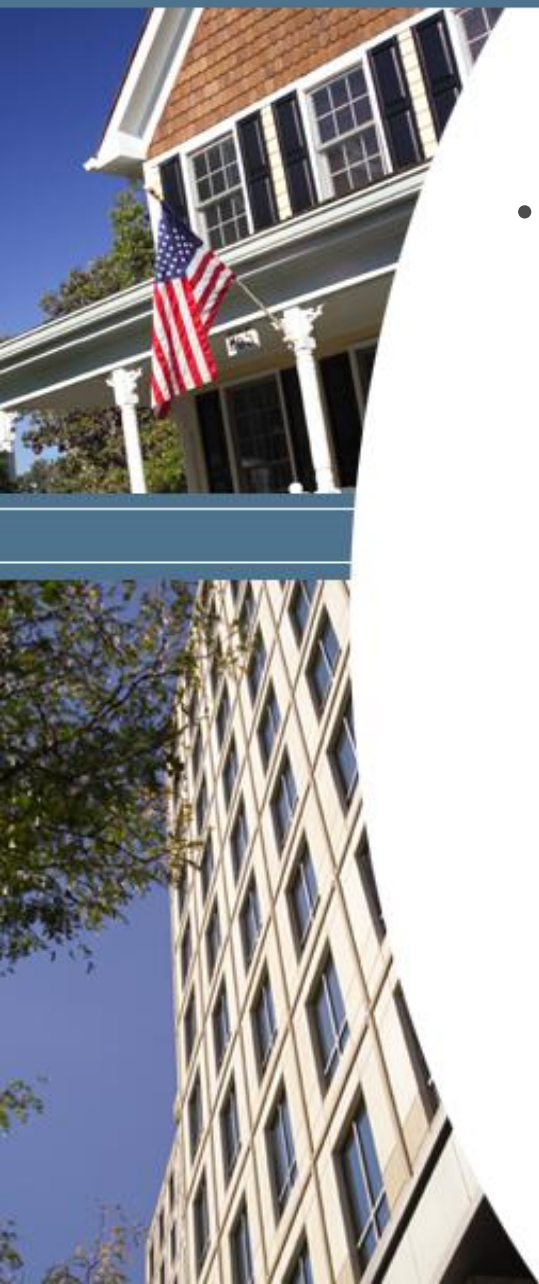
State Elder Abuse Statutes: The Risks and What Reverse Mortgage Lenders Need to Know

- Payment Option ARM Cases are an Epidemic.
- Costing the mortgage industry millions just to fight - let alone the cost of settlement or adverse judgments.

State Elder Abuse Statutes: The Risks and What Reverse Mortgage Lenders Need to Know

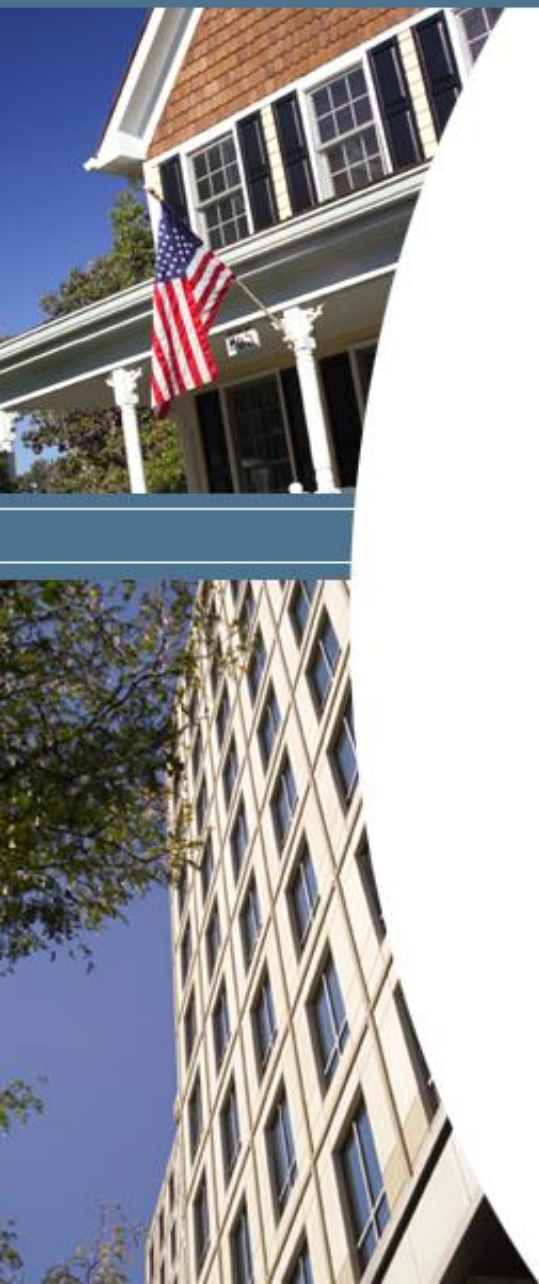
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- What do Payment Option ARMs have to do with reverse mortgages?
 - » Complicated financial product.
 - » Customer base easily taken advantage of.
 - » Customer base with jury appeal.

State Elder Abuse Statutes: The Risks and What Reverse Mortgage Lenders Need to Know



- Consumer Fraud Statutes & Elder Abuse Statutes, or a Combination.
 - » Easy to plead a violation – generally requires only an allegation of “unfair” or “deceptive” conduct – very vague.
 - » Difficult to get dismissed or resolved on a motion.

State Elder Abuse Statutes: The Risks and What Reverse Mortgage Lenders Need to Know

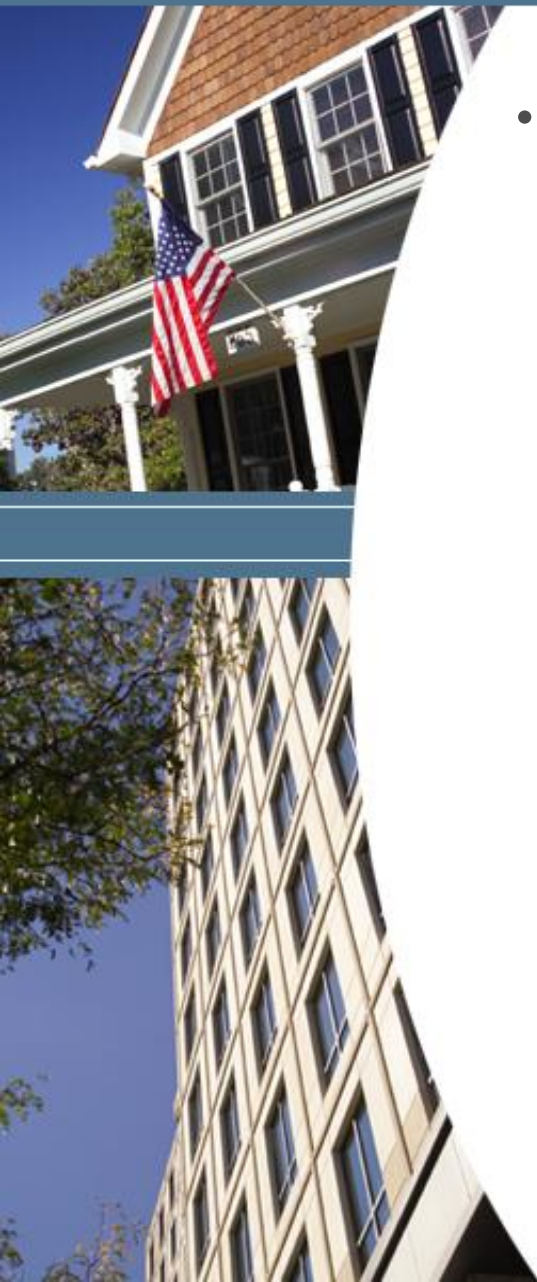


WHY NOT A CLASS ACTION?



How do you avoid being sued?

- Know what the law requires and follow it scrupulously.
- Be scrupulously honest.
- Be careful with brokers.

- 
- A few recent examples. . . .
 - » *Negrete v. Fidelity and Guaranty Life Insurance Co.*, 444 F. Supp. 2d 998 (C.D. Cal. 2006)
 - » *Munoz v. Financial Freedom Senior Funding Corp.*, 2008 WL3974308 & 2008 WL 2917176 (C.D. Cal. 2008)
 - » *Trigueros v. Transamerica Corp.*, 2006 WL 2724034 (Cal. App. 2006)
 - » *Iannuzzi v. Washington Mutual Bank*, 2008 WL 3978189 (E.D.N.Y. 2008)
 - » *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997)
 - » *Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165 (2nd Cir. 2006)



CONCLUSION

State Elder Abuse Statutes: The Risks and What Reverse Mortgage Lenders Need to Know

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