

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2092

SPONSOR: Judiciary Committee, Senators Villalobos and Smith

SUBJECT: Financial Protection for Elderly

DATE: March 23, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>HC</u>	_____
3.	_____	_____	<u>ACJ</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides for the creation of the Financial Protection for the Elderly Act.

This bill provides protection to elderly persons over 60 years of age against financial exploitation of money, funds, assets or property, through entitling elderly persons, or certain other persons acting on their behalf, to a cause of action for financial exploitation and to recover certain civil damages, including punitive damages capped at \$1 million.

This bill requires the court to consider specific circumstances when determining an act is unconscionable, and therefore constituting financial exploitation, including:

- The defendant took advantage of an elderly person's inability to protect his or her interests because of mental or physical infirmity, ignorance or illiteracy;
- The elderly person was unable to materially benefit from the transaction;
- The defendant knew or should have known that there was no reasonable probability that the elderly person could pay a financial obligation;
- The defendant induced the elderly person into the transaction to the person's detriment;
- The acts shocks the conscience or offends public policy; or
- The defendant seeks a waiver of the rights and remedies under this bill.

The Attorney General is authorized to investigate and file civil actions in cases of financial exploitation against an elderly person. Funding for the Elder Victims Trust Fund includes one-half of all punitive damages awarded, and moneys received by the Attorney General for attorney's fees and costs of investigation or litigation under this authority.¹

¹ See SB 2090

This bill creates sections 410.701, 410.702, 410.703, 410.704, and 410.705, of the Florida Statutes. This bill is linked to SB 2090, which creates the Elder Victims Trust Fund.

II. Present Situation:

Financial Exploitation

According to experts in elder law, the financial exploitation of elderly citizens is a significant and growing problem. Perpetrators are most often persons in whom elderly citizens place trust and confidence, such as a family member, a long-term business associate or an employed caretaker, to manage their funds, assets and property. A four year national study determined that more than 550,000 cases of elder abuse, neglect and self-neglect were reported in 1996, and estimated that many more go unreported.²

The study ranked in order of frequency the types of elder mistreatment:

- Neglect;
- Emotional/Psychological Abuse;
- Physical Abuse;
- Financial/Material Exploitation; and,
- Abandonment.

Statutory Authority

Various statutes provide protection to elderly persons against abuse, neglect and exploitation:

Chapter 825 specifically governs abuse, neglect and exploitation of elderly persons and disabled adults. Section 825.103, F.S., defines exploitation as:

- (a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's...funds, assets, or property with the intent to temporarily or permanently deprive the elderly person...of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:
 1. Stands in a position of trust and confidence with the elderly person or disabled adult; or;
 2. Has a business relationship with the elderly person or disabled adult; or
- (b) Obtaining or using...an elderly person's...funds, assets, or property with the intent to...deprive the elderly person...of the use, benefit, or possession of the funds, assets, or property...by a person who knows or reasonably should know that the elderly person...lacks the capacity to consent.

² National Center on Elder Abuse. September 1998. *National Elder Abuse Incidence Study: Final Report*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families and Administration on Aging.

Chapter 825 provides for the charge of a first degree felony for exploitation of an elderly person where the funds, assets, or property are valued at \$100,000 or more, for a second degree felony where funds are valued at between \$20,000 and less than \$100,000, and for a third degree felony where funds are valued at less than \$20,000.³ Ignorance of a person's age is not a defense.⁴

Chapter 772 is the Civil Remedies for Criminal Practices Act. This Act creates a civil cause of action for violations of certain enumerated crimes, such as for usurious practices, violations of the secure transactions act, unlawful telemarketing activities, illegal insurance transactions, and credit card crimes.⁵ Although punitive damages are not authorized under this section, a person who proves injury by clear and convincing evidence may recover up to three times actual damages caused.⁶

While Florida's Anti-Fencing Act classifies an elderly person as one who is 65 years of age or older, the offense of exploitation committed against an elderly person refers to someone who is 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.⁷

Chapter 415 relates to Adult Protective Services. Section 415.1111, F.S. authorizes the creation of a civil cause of action and the recovery of actual and punitive damages for abuse, neglect or exploitation against vulnerable adults. A vulnerable adult is defined as someone who is 18 years old or older, and whose ability to perform normal activities is impaired because of a mental, emotional, long-term physical or developmental disability or dysfunctioning, brain damage or the infirmities of aging.⁸

III. Effect of Proposed Changes:

This bill creates the Financial Protection for the Elderly Act. Legislative intent is provided that these provisions are to be construed liberally to provide for the protection of elderly persons, and to ensure recourse from financial exploitation.

An elderly person over 60 years of age is provided protection under this act, without regard to infirmity. Financial exploitation occurs when one obtains or uses, or endeavors to use, an elderly person's money, funds, assets or property through deception, intimidation, unfair or unconscionable acts, including aiding or abetting these acts. This bill requires the court to consider specific circumstances when determining whether an act is unconscionable, including:

- The defendant took advantage of an elderly person's inability to protect his or her interests because of mental or physical infirmity, ignorance or illiteracy;

³ s. 825.103(2), F.S.

⁴ s. 825.104, F.S.

⁵ s. 772.102, F.S.

⁶ s. 772.104, F.S.

⁷ See chapter 812, F.S. and s. 825.101(5), F.S.

⁸ In 2000, the terms "elderly persons and disabled adult" were uniformly replaced with the term "vulnerable adult" in chapter 415, F.S. See s. 415.102(26), F.S.

- The elderly person was unable to materially benefit from the transaction;
- The defendant knew or should have known that there was no reasonable probability that the elderly person could pay a financial obligation;
- The defendant induced the elderly person into the transaction to the person's detriment;
- The acts shocks the conscience or offends public policy; or
- The defendant seeks a waiver of the rights and remedies under this bill.

This bill creates a cause of action for an elderly person to obtain a declaratory judgment, or to enjoin a violator of the provisions of this bill. If the elderly person suffers injury or loss, punitive damages may be sought, capped at \$1 million, or in an amount that is less than treble damages. Punitive damages are to be equally divided in a specified manner as between the claimant and the Fund. Prevailing plaintiffs may recover reasonable attorney's fees and costs.

A guardian, family member, person or organization acting on behalf of the elderly person with certain consent, or the personal representative, executor or trustee is granted standing to sue if an elderly person is deceased. An elderly person is authorized to move the court to advance the trial on the docket.

Under this bill, the Attorney General is authorized to investigate, administer oaths and subpoena witnesses, and to bring a civil action in circuit court to obtain a declaratory judgment or enjoin a violator, or for actual damages or restitution on behalf of an elderly person. Costs and fees will be awarded in prevailing cases, to be deposited in the Elder Victims Trust Fund.

This bill requires the Department of Elder Affairs to create statewide initiatives to educate the public, including the elderly, law enforcement, judiciary, and social service professionals of deceptive and unfair acts against the elderly.

This bill clarifies that these rights and remedies supplement those already in existence, except that punitive damages are recoverable only under this legislation or alternatively under chapter 772.

Lack of knowledge of an elderly person's age is not a defense. Any waiver by an elderly person of these rights is unenforceable and void. This bill provides protection to an elderly person without requiring that he or she is infirm or otherwise lacks capacity.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill should provide an additional avenue to elderly persons for recovery of damages in financial exploitation actions.

C. Government Sector Impact:

The new civil causes of action proposed under this bill should result in additional revenue generating to the state, due to an increase in filing fees. Under chapter 2003-402, L.O.F., filing fee revenue is directed to the General Revenue Fund, the Clerk of Courts Operations Conference, the Court Education Trust Fund and the Clerks of Court Trust Fund, effective July 1, 2004. The bill also directs half of punitive damage awards, as well as litigation costs and attorney's fee awards received by the Attorney General into the Elder Victims Trust Fund.

Given the state's large elderly population, this bill potentially has a notable fiscal impact on judicial workload, particularly as relates to expedited circuit proceedings. This bill may increase due process costs for the state. Under chapter 2003-402, L.O.F., certain due process services that are being transferred from the counties to the state include costs for conflict counsel, court reporting, interpreting, auxiliary aids or services, and expert witness fees.

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is uncertain who will have priority standing to sue in the event of an elderly person's death.

VIII. Amendments:

None.