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Banking & Finance: Fraud Protection

September 8, 2022

2022 Summer Webinar Series

Continuing Legal Education

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Today's Presenters:

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Protecting Seniors from Financial Abuse

Presenter: Alexandria Ransom

What is Financial Elder Abuse?

- Elder Abuse generally includes the financial abuse or exploitation of a vulnerable elder
- Iowa Code § 235F.1
  - "'Vulnerable elder' means a person sixty years of age or older who is unable to protect himself or herself from elder abuse as a result of a mental or physical condition or because of a personal circumstance which results in an increased risk of harm to the person."
  - "'Financial exploitation' relative to a vulnerable elder means when a person stands in a position of trust or confidence with the vulnerable elder and knowingly and by undue influence, deception, coercion, fraud, or extortion, obtains control over or otherwise uses or diverts the benefits, property, resources, belongings, or assets of the vulnerable elder."

Three Scenarios to Consider in the Context of Financial Elder Abuse

1. Discussion and Execution of a Will or Revocable Trust
2. Actions of a Financial Agent Pursuant to a Financial Power of Attorney
3. Actions of a Trustee Pursuant to a Revocable Trust

Discussion and Execution of a Will or Revocable Trust

- Testamentary Capacity
- Capturing Client's Intentions
- Documentation of Client Meeting

Actions of a Financial Agent Pursuant to a Financial Power of Attorney

- Capacity to Execute
  - Discussion of Agent
  - Discussion of Agent's Powers
  - Discussion of Power to Revoke

- Considerations for Financial Institutions
  - Validity of Power of Attorney
  - Powers of Agent
  - Financial Institution's Power to Request Additional Documentation
    - For example, Iowa Code § 633B.119

Actions of a Trustee Pursuant to a Revocable Trust

- Considerations for Drafting Attorney
  - Discussion of Trustee
  - Discussion of Powers

- Considerations for Financial Institutions
  - Powers of Trustee
  - Certification of Trust
    - For example, Iowa Code § 633A.4604

FRAUD ALERT:

Detecting, Preventing, and Combatting Fraud in the Day-to-Day Operation of Your Financial Institutions

Presenter: Christopher K. Loftus

Protecting the Customer

- Types of Fraud Schemes:
  - Advance Fee Fraud
  - Debt Elimination Fraud
  - Nigerian Fraud
  - Cashier's Check Fraud
  - Fictitious/Unauthorized Banking
  - High Yield Investment Fraud
  - Identity Theft
  - Phishing
  - Fake Check Schemes

Bank's Liability for a Defrauded Customer

- Regulation E defines an unauthorized EFT as an EFT "from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit." -- 12 CFR 1005.2(m)
- Regulation E requires the consumer to notify the financial institution within 60 days of receiving a periodic statement on which the unauthorized EFT appears.
- Limitation of liability for customer
  - $50 if bank is notified within two (2) business days.
  - $500 if bank is notified within sixty (60) days.

Possible Expansion of Regulation E

- The CFPB is considering issuing new guidance that would require banks to make refunds to victims of scanners who defraud consumers into sending money to a third party using an online money-transfer platform.
- This initiative is being driven by an increase in consumer complaints to the CFPB about such scams.

Deposit Agreement

- “Since some types of check fraud have become more difficult to detect, we may elect in some cases to make further inquiries about certain check or other items that are presented for payment against your account. If we are unable to contact you, or take other steps, to determine with reasonable certainty that you authorized these payments, we may either pay the checks and other items or return them unpaid without any liability to you.”
- Bank of America – http://bankofamerica.com/salesservices/deposits/resources/deposit-agreements

Wire Transfer Fraud – Overview

- "Business email compromise"
  - Fraudster impersonates a senior executive or trusted business partner reaching out to member of the staff.
  - Fraudster provides new wiring instructions to pay a debt, conduct a real estate closing, or fulfill a purchase order.
  - Money is wired by the originating bank to the fraudster's account at the beneficiary bank.
- Fraudster withdraws funds before fraud is detected.
- Average fraudulent transaction is $65,000.
- Resulted in $1.8B in adjusted financial loses in 2020.

Wire Transfer Fraud – Article 4A of the UCC (Iowa Article 12)

- UCC typically preempts common law negligence claims.
- Iowa Code § 554.12207 / Article 4A § 2-207
  - If a beneficiary bank does not know that the name and number refer to different persons, it may rely upon the account number as the proper identification of the beneficiary of the order.
- *Peter E. Shapiro, P.A. v. Wells Fargo Bank* – 11th Circuit

Wire Transfer Fraud – Best Practices

- Verify information, even from trusted sources.
- Place verification calls to parties.
- Be extra vigilant if wiring instructions change.
- Educate customers to double check email addresses.
- Be suspicious of wires going to an account with a geographical location different from the party receiving the funds.
- Ensure the customer has updated policies and procedures in place.
- Ensure the customer has insurance coverage.
- Contact the FBI who can assist in clawing back the money.

Forged Payee Checks – Liability/Responsibility

- A payor bank is liable to its customer for forged payee checks.
- As between depository bank and its customer, the customer is liable for forged payee check.
- Liability is limited to loss suffered by the breach, but not more than the amount of the check plus expenses and loss of interest.

Forged Payee Checks – Defenses

- Ratification
- Statute of limitations
- Signature by authorized person.
- Endorsement by "responsible" employee.
- Payment was to a permitted co-payee.

Check Kiting – Overview

- Bank customer deposits checks drawn against uncollected funds to cover the other checks written against uncollected funds, with no real expectation of being able to cover the checks with good funds.

Check Kiting – Identifying the Kite

- Internal reports.
- Large dollar variances.
- Unusual late deposits and NSF activity.
- Deposited items drawn on like-name or allied accounts at other banks.
- Deposits and checks posting for even dollar amounts.
- Payee and maker are the same.

Check Kiting – Stopping the Kite

- Hold on the account.
- Return all items drawn against such funds by midnight deadline.
- File a SAR.
- Beware of potential liability.
- Review your deposit agreement.

PPP Loan Fraud – Overview

- The Coronavirus Aid, Relief, and Economic Security (CARES) Act established the Paycheck Protection Program (PPP).
- The PPP loan program provided $813.7B in fully guaranteed SBA loans.
- PPP loans were forgivable if used as required by the law.

PPP Loan Fraud

- As of December 2021, the PPP fraud hotline received over 54,000 complaints.
- As of August 2020, the SBA OIG identified more than 70,000 loans totaling over $4.6B in potentially fraudulent PPP loans.
- Three categories of fraudulent loans:
  - Businesses created after the 2/15/20 cutoff date;
  - Duplicate loans;
  - Loans that match DNP data sources.
- OIG continues to investigate.

PPP Loan Fraud

- Problems
  - Lack of SBA organizational structure.
  - SBA did not establish a centralized entity to lead and manage fraud risk.
- Lender liability
  - Under PPP rules, lenders were allowed to rely on borrowers' good faith certifications.
  - DOJ and Congress are investigating lenders who have issued a large number of fraudulent loans.
- Best Practices for Lenders.

Iowa Uniform Fraudulent Transfer Act (UFTA) – Iowa Code Ch. 685

- The UFTA are laws enacted by states that establish the rights of creditors against debtors where it appears the debtors fraudulently transferred property to avoid paying creditors.
- Used by creditors to void transfers of assets to third parties to the extent necessary to satisfy the creditor's claim.
- Other available remedies:
  - Attachment or other provisional remedy against the asset transferred.
  - Injunction against further disposition by the debtor or transferee of the asset or other property.
  - Appointment of a receiver.
  - Other relief as the circumstances may require.

Iowa UFTA – Present Creditors (Iowa Code § 684.5)

- Two scenarios:
  - A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at the time or became insolvent at the time of the transfer.
  - A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe the debtor was insolvent.

Iowa UFTA – Present & Future Creditors (Iowa Code § 684.4)

- A transfer made or obligation incurred by a debtor is voidable as to a creditor, if the debtor made the transfer or incurred the obligation under any of the following:
  - Actual intent to hinder, delay, or defraud any creditor.
  - Without receiving a reasonably equivalent value in exchange for the transfer or obligation if:
    - The debtor was engaged in a transaction for which the remaining assets of the debtor were unreasonably small in relation to the transaction.
    - The debtor intended, or reasonably should have believed, that the debt incurred would be beyond the debtor's ability to pay.

Bankruptcy Fraud / Dischargeability

- Fraud
  - Debtor made a misrepresentation.
  - Debtor knew the representation was false at the time it was made.
  - The representation was deliberately made with the intent to deceive the creditor.
  - The creditor justifiably relied on the representation.
  - The creditor sustained the alleged loss as a proximate result of the representation made.
- Willful and Malicious Injury
  - A “willful and malicious” injury is a “deliberate or intentional invasion of the rights of another”.
  - Conduct that is targeted at the creditor that is certain, or almost certain, to cause harm.

Bankruptcy Fraud / Denial of Discharge

- Denial of discharge is the "death penalty" in bankruptcy.
- Asset Transfer
  - Section 727(a)(2) denies a debtor's discharge if the debtor "with intent to hinder, delay, or defraud a creditor … has transferred, removed, destroyed, mutilated, or concealed property of the estate" within one year of the filing of the bankruptcy petition.
- False Oath
  - Section 727(a)(4) denies a debtor's discharge "if the debtor knowingly and fraudulently, in … the case made a false oath."
  - Must be material in that it conceals the discovery of assets and/or the existence of the disposition of property of the estate.

Criminal Referral – 28 U.S.C. § 586(a)(3)(F)

- U.S. Trustee has a duty to refer matters to U.S. Attorneys' Office for investigation and prosecution that "relate to the occurrence of any action which may constitute a crime" and to assist the U.S. Attorney in "carrying out prosecutions."
- Each district has a prosecutor and FBI agent designated to address bankruptcy-related crimes.

Types of Referrals

- Referrals from the U.S. Trustee Program resulted in 45 different categories of allegations.
- The five most common allegations in FY2020:
  - Tax fraud (63.2%)
  - False oaths or statements (19.8%)
  - Bankruptcy fraud scheme (16.6%)
  - Concealment (15.7%)
  - Identity theft (14.6%)

Numbers of Criminal Referrals FY2020

- USTP made 2,489 bankruptcy and bankruptcy-related criminal referrals.
- As of March 1, 2021:
  - 1,719 are under review by the U.S. Attorneys' Office (46.8%) or with an another investigative agency (22.2%).
  - 11 referrals (0.4%) resulted in formal charges.
  - 759 referrals (30.5%) were declined for prosecution.

U.S. v. Rosenbaum – Northern District of Iowa

- Donald and Aimee Rosenbaum (husband and wife) farmed corn and soybeans in Chickasaw County.
- In 2014, Aimee directed her son, Marshal, to apply for a crop loan for the 2015 crop year on the pretense that Marshal would be taking over the farm due to his parents' health issues.
- After Marshal obtained $165,000 in loan money and pledged the farm's 2015 crop, Aimee and Donald obtained $1.3MM in loans from a bank, claiming they were going to 201continue farming.
- 5 crop was "double-pledged" without the knowledge of the USDA or the bank.
- Aimee also applied for the bank loans on behalf of her husband using a POA.

U.S. v. Rosenbaum – Northern District of Iowa (cont'd)

- The Rosenbaums defaulted on both loans and sold the double-pledged crop with "little to no" repayment.
- After the bank filed a foreclosure action, the Rosenbaums filed five bankruptcy petitions. Two of which were filed on the eve of a scheduled sheriff's sale.
- During one telephonic bankruptcy hearing, Aimee pretended to be her husband.

U.S. v. Rosenbaum – Northern District of Iowa (cont'd)

- Members of the Rosenbaum family were charged with a total of 18 counts of federal crimes.
  - Conspiracy
  - Bank fraud
  - False statement
  - Conversion of property pledged to a Farm Credit Agency
  - Attempted wire fraud
  - False declaration
  - False statement under oath
  - Bankruptcy fraud

U.S. v. Rosenbaum – Northern District of Iowa (cont'd)

- Aimee pleaded guilty to one count of conversion of property pledged to a farm credit agency and bankruptcy fraud.
  - Sentenced to six years in prison.
  - Ordered to serve three years of supervised release following prison term.
- Donald pleaded to bankruptcy.
  - Sentenced to two years' probation.
  - Ordered to pay a $1,000 fine.
- Marshal pleaded guilty to conversion of property pledged to a farm credit agency.
  - Sentenced to three months in prison and three months of home confinement.
  - Ordered to serve three years of supervised release following his prison term.

Questions:

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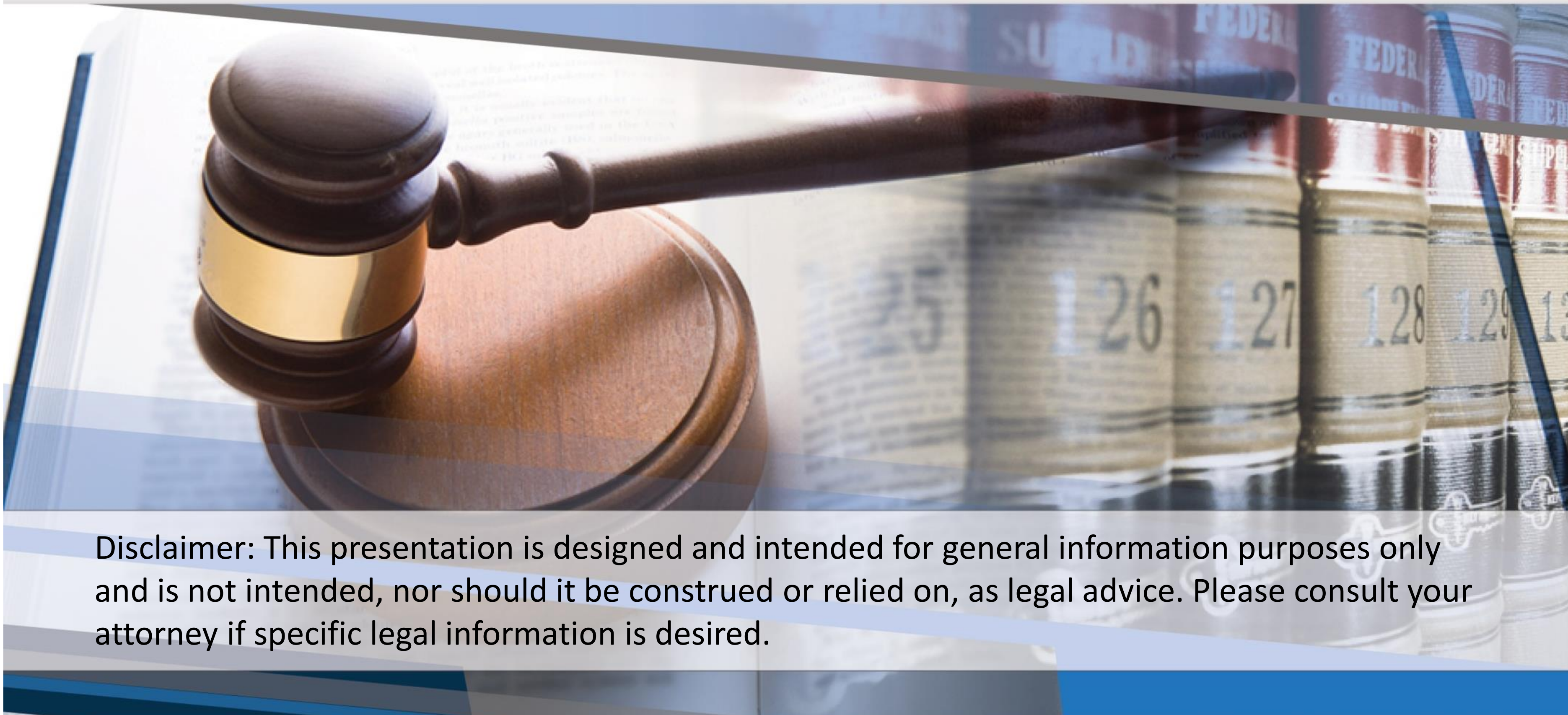

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