Connecticut Bar Association
Elder Law Section

TESTIMONY IN OPPOSITION TO S.B. 269
AN ACT CONCERNING PROTECTION OF THE ELDERLY FROM
FINANCIAL EXPLOITATION AND REQUIRING PAPER STATEMENTS.

Scott D. Rosenberg
Secretary

Representative Doucette, Senator Miller, and Banking Committee Members:

My name is Scott Rosenberg. I write as secretary of the Elder Law Section of the Connecticut Bar Association to express our deep concerns and opposition to Section 1 of SB 269, AAC Protection of the Elderly from Financial Exploitation and Requiring Bank Statements. The Elder Law Section is a group of over 400 attorneys who devote a significant portion of their practice to assisting seniors in their families with the implications of the physical and mental decline that generally occurs in aging, particularly in the areas of long-term care planning, public benefits, and alternate decision-makers in incapacity. In the course of this practice, we often encounter situations where seniors require alternate decision-making arrangements, or have unmet care needs, due to theft or exploitation of a senior by family members, POAs, and other close parties. Our experience on the ground is consistent with national research, which reflects that most exploitation of seniors occurs at the hands of family members, and exploitation is rarely perpetrated by individuals who are not a regular presence in the victim's life.

As advocates for our clients, who face the long-term consequences of such illegal activity, and whom we help to pick up the pieces, we are particularly concerned with the exploitation of seniors. As such, we appreciate the intention of the Connecticut Bankers Association in putting forth this language. However, we cannot support it in its current form. We have no stake in this assessment other than experience with the mechanics of fraud and exploitation and a desire to protect seniors, and from that vantage point, we strongly believe the current construction risks significant adverse consequences while offering little meaningful protection to Seniors.

Section 1 of the bill contains the exploitation statute in a simple skeleton. First, banks may decline, delay or return a transaction, or suspend an account, if they suspect fraud or exploitation of an elderly person "on reasonable cause", for up to two 15-day periods. Second, no bank can face any consequences, to the accountholder, state, or anyone else, for using this right or any damage it causes, of any kind, ever. Neither of these is bad as a general concept, but they require refinement. Moreover, even in their ideal form, such provisions are risky without developing sister concepts wholly lacking in this bill: notice, remedy, and follow-up.

1. Notice

The most immediate problem with this bill is that, on bank execution of a hold or refusal, there is no requirement that they communicate to the person facing such action the scope of the bank action, the duration, the remedies, or even that there is a hold at all. If the elderly person is initiating a suspect transaction, the bank is not required to notify a joint owner or agent under a power of attorney ("POA") with account authority that there is a problem or that the account has been frozen. Likewise, if there is a hold or refusal against a POA there is no requirement even that the account owner be told.

We believe a minimum requirement would involve notification of all parties with signature authority on the affected account, who are known to the bank, other than ones believed to be perpetrating the exploitation. Best practices from consumer protection law suggest that the legislature should adopt a specific form of notice to be produced in writing to affected account holders, explaining the scope of action and remedies available.

2. Remedy

It is of significant importance in any legislation allowing the seizure of property, and potentially the complete deprivation of an individual from access to their savings, to provide some possible remedy for overreach or error in the initial assessment. S.B. 269 offers no such remedy.

While Section 1 does allow for "termination by an order of a court of competent jurisdiction," it appears to us at the Connecticut Bar Association that this does not establish a true legal remedy "on the ground." While the Superior Court has expansive jurisdiction, the existing law provides no specific cause of action that can be filed to have the court review a bank's determination, nor is there any standard available to the court in deciding whether to overturn the good faith judgment of bank staff, who have been specially trained in elder fraud detection, which they are explicitly allowed by this statute to employ. Moreover, on a practical level, our experience tells us that it is unlikely a lay person without funds, even a wholly competent one, would be hard pressed to file a Superior Court case and obtain a decision within 30 days even if the law was clear. And if an affected senior did manage to file for an expedited injunction and found a judge who felt s/he had sufficient jurisdiction to rule, we question whether the issuing bank, cloaked in absolute immunity, is likely to appear as a defendant in such an action at all. If an exploited senior is able to win by default, this, too, undercuts the protections this statute intends to create.

In our view, the ideal venue to review such decisions is the probate court. The probate court has sole original jurisdictions over conservatorships of impaired parties and are the public's preferred venue to review power of attorney relationships for misconduct. The probate court can offer speedy, affordable, and user-friendly hearings; they routinely deal with issues of senior capacity and theft and POA abuse within families, and frequently deals with investigations from the Protective Services for the Elderly (PSE) division of DSS within their existing case-load. In cases of suspected elder exploitation, the probate court not only has the latitude to offer a quick, local hearing on the merits, but would afford the possibility to extend or expand a financial hold,

or temporarily suspend a POA relationship, if good cause was shown, based on the reporting of PSE or law enforcement, and/or in concert with the filing of a conservatorship petition or other action with that same judge and court. However, the probate court is a purely statutory court, and has no authority without the establishment of a specific jurisdiction before it. While our committee has had passing discussions with the probate court administrator on this issue as a key stakeholder, the current bill and language was drafted, we believe, without any input from them.

3. Follow-Up

Our gravest concern, and one that may already be apparent from both of the prior areas, is that the bill in its present form is that even significant concern by bank employees specially trained in fraud sets into motion no particular process to address the exploitation relationship. A temporary hold may help to curb money order and lottery scams that take place by telephone, but does very little to curb they type of in-person, ongoing relationship of exploitation this law is targeted to remedy. Even in the most egregious case of a senior being pressured by an exploiter into an in-bank transaction, a refusal would not extend to other institutions or even necessarily another branch of the same institution. Seniors residing at the border could be taken across state lines to bypass protections. Even in the best-case scenario, the protective action expires after 30 days.

We are thus concerned not only for the lack of immediate notice to account-holders, but the lack of notice to state or local law enforcement, or to PSE, that can generate any follow-up inquiry to solve a likely ongoing problem. We believe any statute to address financial fraud must include a referral provision that allow the victims to receive any needed supports, and perpetrators are removed from their position of influence, if not criminally charged. As with probate administration, best practices in crafting a bank hold statute requires input from stakeholders in government who we believe were not consulted in the construction of this language.

Conclusion

The elder law community has had productive talks with the banking industry about how best to curb financial exploitation of the elderly and desire to continue doing so. As presently drafted, however, S.B. 269 offers the banking industry a very tiny spear and a very large shield in combating a type of crime that easily resists a one-off solution. We thus strongly encourage the Committee to strike Section 1 of the bill, so that we can continue to engage in discussions and incorporate the input of relevant stakeholders so that a more complete bill, containing essential protections and remedies in a meaningful way, can be considered in the full session.

If the Committee wishes to proceed notwithstanding these significant concerns, we strongly encourage you to request re-referral to the Committee on the Judiciary, so that the judicial remedies and any appropriate law enforcement requirements can be fleshed out under their cognizance.