

# community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

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## Financial Exploitation of Your Customer

Monica Morrell lived in Oregon until early 2014, when she sold the family farm and received about \$500,000. She was elderly and beginning to suffer from dementia, so she moved to her daughter Caroline Conrad's home in Fargo shortly after selling the farm. A joint account was set up at a local credit union when Monica moved to Fargo, and Caroline's name was listed on the account so it would be easier for her to help her mother manage her finances. Mother and daughter lived together until Monica moved out in December 2014 because the two did not get along. Thereafter, Caroline had her mother "trespassed" from her home, meaning her mother would have faced arrest if she came on to the premises.

About \$115,000 was taken out of the account in June 2014 and put into Caroline's personal checking account; Caroline also made a number of transfers from the joint account to her personal account on the day Monica moved out. The transfers from the joint account to Caroline's account were exposed when one of Monica's other children tried to move her to an assisted living facility and discovered she had roughly \$12,000 left in her account and could not afford to live there. In 2014, Caroline was charged in Cass County District Court with exploitation of a vulnerable adult and theft, with prosecutors alleging that she stole over \$450,000 for her own personal use from her mother's account. In her defense, Caroline claimed that her elderly mother "gifted" her the money as soon as she added her name to the account. Ultimately, after a trip to the North Dakota Supreme Court to hash out various legal doctrines, Caroline pleaded guilty and was sentenced to 60 days in jail, which she served at home on electronic monitoring. She was also ordered to pay \$504,300 to her mother in restitution.

This sad story made news across the state, but unfortunately it's not the only time this has happened. Financial exploitation of an "eligible" adult is an increasing problem; banks and bankers are on the front line and can do much to help reveal it. "Financial exploitation" is a crime. It is the wrongful or unauthorized taking, withholding, or use of money, assets, or property of a vulnerable adult (defined in N.D.C.C. § 50-25.2-01) or a person aged 65 or older, for one's own benefit or the benefit of a third party. Nearly 1 in 3 North Dakotans aged 65 and older live alone, putting them at increased risk for social isolation and the resulting depression, neglect or physical abuse, and financial exploitation. The person doing the exploitation is often someone you wouldn't suspect, such as a close friend or a child, as in Monica's case. However, exploitation may be committed by *anyone* in a close relationship with the eligible adult: those new "best friends," thieving caregivers, family members with access to accounts and assets,

or those family members without access but who are deeply trusted. Signs of financial exploitation may include someone cashing checks without permission, sudden changes in bank accounts or banking practices, someone coming in with the account owner who then withdraws a lot of money, adding extra names on a bank signature card, unusual ATM card withdrawals, unpaid bills despite having enough money, and relatives suddenly claiming rights to a person's affairs and property.

Required or mandated reporting of abuse of the elderly or vulnerable in North Dakota includes financial abuse as well as physical abuse. Mandated reporters include clergy (if the knowledge isn't acquired while acting as a spiritual advisor), counselors, chiropractors, dental hygienists or dentists, doctors and nurses, optometrists, pharmacists, social workers, and other professionals. Banks are *not* mandated reporters; however, it's not a violation of the duty of customer confidentiality if a bank employee reports suspected exploitation of an eligible adult to North Dakota Vulnerable Adult Protective Services or to law enforcement. *See* N.D.C.C. § 6-08.1-03(7).

Additionally, under N.D.C.C. § 6-08.5-03(3), an officer, director, or employee of a bank is immune from all criminal, civil, and administrative liability for reporting, based on a good faith belief, that financial exploitation occurred, was attempted, or is being attempted. Under N.D.C.C. § 6-08.5-04, a bank may contact certain individuals, such as the conservator or guardian of an eligible person, with its good faith belief of suspected financial exploitation without obtaining customer consent. Again, the law makes clear that banks are not mandatory reporters.

If you have a good faith belief to suspect financial exploitation, other tools available under the Financial Exploitation Prevention laws of chapter 6-08.5 allow banks to refuse a financial transaction or hold a financial transaction on an account belonging to the eligible adult, on which the eligible adult is a beneficiary (including a trust, guardianship, or conservatorship account), or belonging to a person suspected of perpetrating financial exploitation. N.D.C.C. § 6-08.5-02(1).

A bank may also refuse a financial transaction or hold a financial transaction if the department of health and human services or a law enforcement agency provides information to the bank demonstrating it is reasonable to believe financial exploitation occurred, was attempted, or is being attempted. However, receipt of this information does not *require* a bank to refuse a financial transaction or hold a financial transaction. Except as ordered by a court, a bank may determine whether to refuse a financial transaction

or hold a financial transaction based on the information available to the bank. N.D.C.C. § 6-08.5-02(2) & (3).

If a bank *does* refuse a financial transaction or holds a financial transaction based on a good faith belief to suspect financial exploitation, it must make a reasonable effort to notify one or more parties authorized to transact business on the account (except with regard to an account administered by a bank or trust company in a fiduciary capacity), *and* report the incident to the department of health and human services if the incident involves financial exploitation of a vulnerable adult. Obviously, a bank is not required to notify a party authorized to conduct business on the account if that person is the suspected wrongdoer. N.D.C.C. § 6-08.5-02(4) & (5).

A bank or its employees, officers, or directors are immune from all criminal, civil, and administrative liability for refusing or not refusing a financial transaction, or for holding or not holding a financial transaction under N.D.C.C. § 6-08.5-02. Finally a bank may refuse to accept an acknowledged power of attorney if it has a good faith belief to suspect the principal is or may be the victim or target of financial exploitation by the agent or individual acting for or with the agent. The bank or its employees, officers, or directors are immune from all criminal, civil, and administrative liability for refusing to accept a power of attorney or for accepting a power of attorney under this section.

In sum, you aren't obligated to sit by and watch nice old Mr. Smith's nice daughter or Mrs. Jones' sketchy caregiver steal their life savings if you have a good faith belief that they're being financially exploited. You are not required to report, but you may report your suspicion that financial exploitation is occurring or is being planned without fear of confidentiality restrictions. After making the report, do not get unnecessarily involved – let social services and law enforcement sort it out. Remember that the victims usually love their exploitative family member and they do not necessarily want to see that person criminally prosecuted. If your bank is unsure how to report something or whether to report something or whether to refuse or hold a financial transaction, seek competent legal counsel for guidance.