



South Carolina Bar

Continuing Legal Education Division

2024 SC BAR CONVENTION

Elder Law Committee

“How Consumer, Family & Elder Law
Come Together to Serve Our Vulnerable
Adult Population”

Friday, January 19

SC Supreme Court Commission on CLE Course No. 240022

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Consumer Law

David A. Maxfield

Assisting Elder Fraud Victims

Dave Maxfield, Esq.

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**Is Your Bank Account Safer
than a Folger's Can?**



**TASTES
GOOD AS
fresh-perked!**

"Madge! A dishwashing liquid... to soften hands?"

"It's all right — this is Palmolive."

"Then it's mild?"

"Oh, Palmolive®
Dishwashing Liquid is a
lot more than just mild.
Why, at home
it gives me suds that
just never stop.
And it softens hands
while you do dishes!"

Madge

Don't just do dishes...
Soften your hands!



Why the Elderly?

Disproportionate Targeting

Elderly adults are disproportionately targeted by financial scammers, accounting for over 50% of reported cases.

Cognitive Decline

Declines in memory, reasoning and judgement leave many seniors vulnerable to sophisticated scams.

Social Isolation

Isolation from family and community support systems increases reliance on strangers for help.

Lifetime Savings

Lifetime savings and assets accumulated by seniors present attractive targets for criminals.

Technological Gap

Many elderly struggle with new technologies like online banking that scammers exploit.

Fear and Shame

Victims are often too fearful or ashamed to report scams targeting them.



Top Scams and Consumer Issues Faced by Older Adults (Source, FTC)

- **Investment Scams**

Older adults reported 213% more losses in 2021 compared to 2020.

- **Business Impersonation Scams**

Reported losses increased 134% from 2020 to 2021.

- **Government Impersonation Scams**

Losses increased 109% for older adults from 2020 to 2021.

- **Tech Support Scams**

Older adults were 5 times more likely to lose money compared to younger adults.

- **Stolen / Washed Checks and Other Bank Fraud**

- **Prize/Lottery/Sweepstakes Scams**

Older adults were over 2 times more likely to report losses.

- **Financial Exploitation by persons known to senior**

- **Healthcare / Insurance / Rx Fraud**

- **Credit Card Fraud (New accounts, takeovers)**

- **Door to Door Sales**

- **Robocalls / Can You Hear Me?**



Investment Scams



**213% increase in losses from
2020 to 2021**

Older adults reported significantly more losses to investment scams in 2021 compared to 2020.



Targeting older adults

Investment scammers particularly target older adults who may have retirement savings.



Common Investment Scams

To Name Just a few....



Pyramid Schemes



Crypto / Pig Butchering



Advance Fee / 419 Scams

Echo park velit portland magna minim franzen celiac.



Ponzi Schemes



Fake Charitable Annuity / Charities

Enamel pin succulents mustache bitters consecetur polaroid cardigan church-key.



High Pressure Seminars, Free Meals, Investment Advisor Scams



Pump and Dump Schemes



Prize, Lottery, or Sweepstakes Scams





IMPERSONATION

Impersonation Scams



Romance Scammer

Romance Scammer



Government Impersonator



Tech Support Scammer

Tech Support Scammer



Bank Fraudster

Bank Fraudster



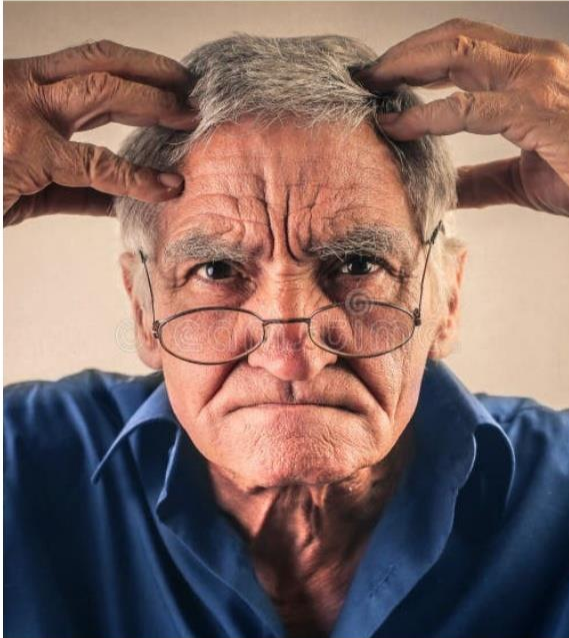
Process Server





Businesses

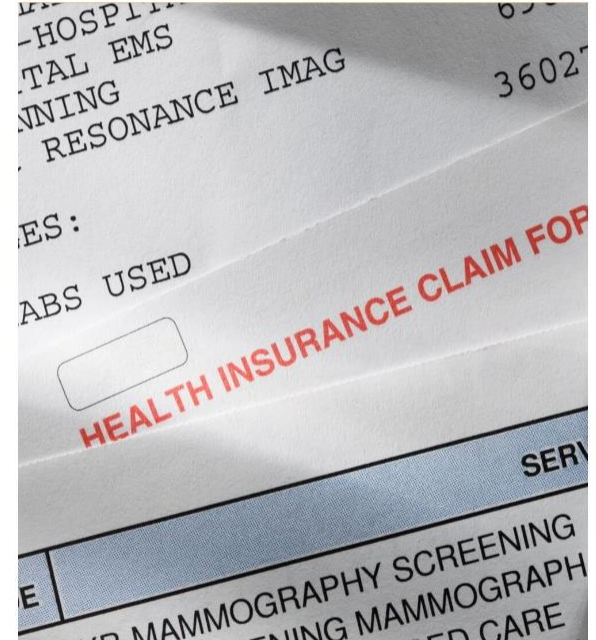
Health Care / Insurance Fraud



Fake Insurance



Fake Rx Help



More or Less Legit?



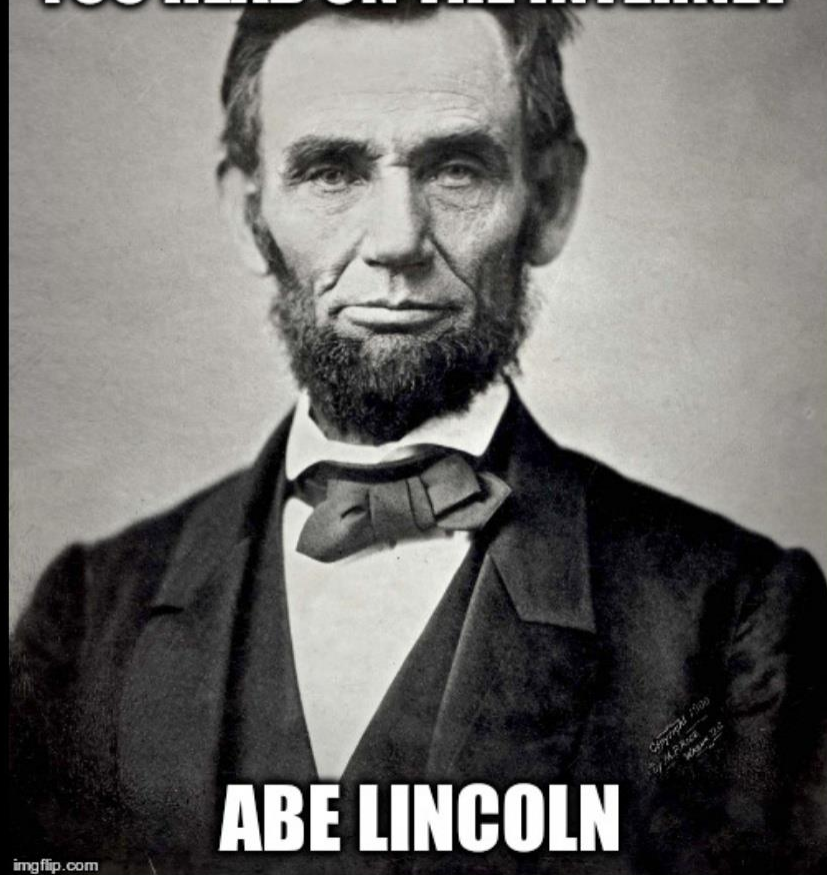


Welcome to

FLORIDA

THE SUNSHINE STATE

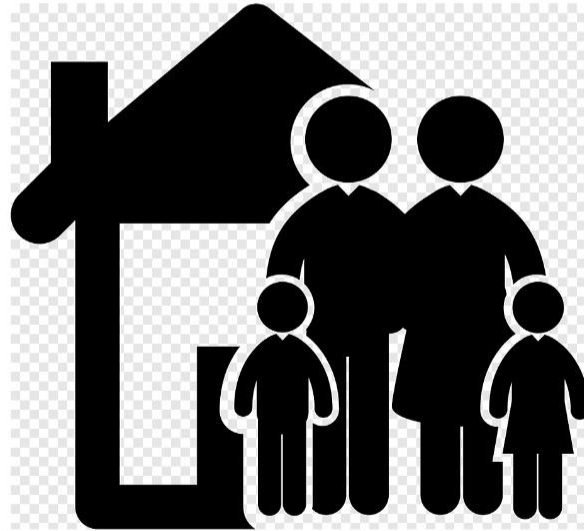
**"DON'T BELIEVE EVERYTHING
YOU READ ON THE INTERNET"**



ABE LINCOLN



Financial Abuse by Family Members or Caregivers



BANK



COMMERCE BANK
OF
BEVERLY HILLS



Milton Drysdale · 3rd

President & CEO at Commerce Bank of Beverly Hills

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PAYMENT METHODS IMPACTED BY FRAUD

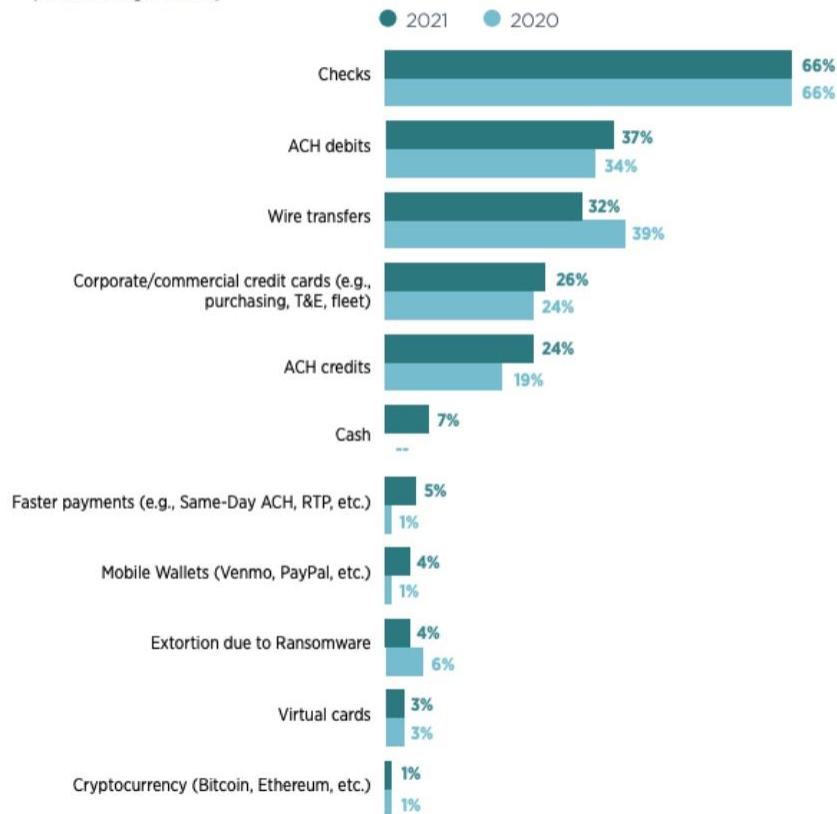
Checks and ACH Debits Most Susceptible to Payments Fraud

In 2021, checks and ACH debits were the payment methods most impacted by fraud activity (66 percent and 37 percent, respectively). Sixty-six percent of financial professionals report check fraud activity was unchanged from 2020 to 2021. Payments fraud via checks had been on the decline since 2010, with some intermittent upticks in between. Seventy percent of financial professionals reported that their organizations' check payments were subject to fraud attempts/attacks in 2018, while 74 percent reported the same for 2019. We then saw a decrease to 66 percent in 2020.

The fact that check fraud remains the most prevalent form of payments fraud is not surprising. Checks continue to be the payment method most often used by organizations. As noted in the 2019 AFP® *Electronic Payments Survey*, however, check usage declined by nine percentage points from 2016 to 2019, and so likely also contributed to the decrease in check fraud activity. The decline in check fraud can also be due to organizations using fewer checks for business-to-business (B2B) transactions as well as the increased use of electronic payments due to staff working remotely.

Even as the incidence of payments fraud overall decreases, fraudsters are shifting their focus from paper payment methods to digital methods. The share of respondents reporting fraud via ACH debits increased from 34 percent in 2020 to 37 percent in 2021. The percentage of fraud

Payment Methods Subject to Attempted/Actual Payments Fraud
(Percent of Organizations)



Vehicles of Theft

- **Electronic Transfers**

Utilize computer systems to transfer money from accounts

- **Debit Card Fraud**

Steal debit card numbers and make unauthorized charges

- **Credit Card Fraud**

Steal credit card numbers and make unauthorized charges

- **Wire Transfers**

Exploit the wire transfer system to transfer funds

- **Check Theft**

Steal checks and cash them and/or alter payment info.

- **Check Washing**

Erase check details and rewrite with new fraudulent info

- **Forgery**

Forge signatures to cash checks or authorize transactions

- **Cash Withdrawals**

Make unauthorized withdrawals from accounts (or fraudulently induced withdrawals)



In February 2023, FinCEN issued **an alert** indicating that there were 680,000 cases of possible check fraud reported last year, up from 350,000 in 2021, which itself was a 23% increase over reports in 2020.

Because FinCEN sees no indication that check fraud is going to subside anytime soon, the agency cautioned financial institutions to be vigilant and, along with the United States Postal Inspection Service (USPIS), warned that the main source of stolen checks is the U.S. mail.



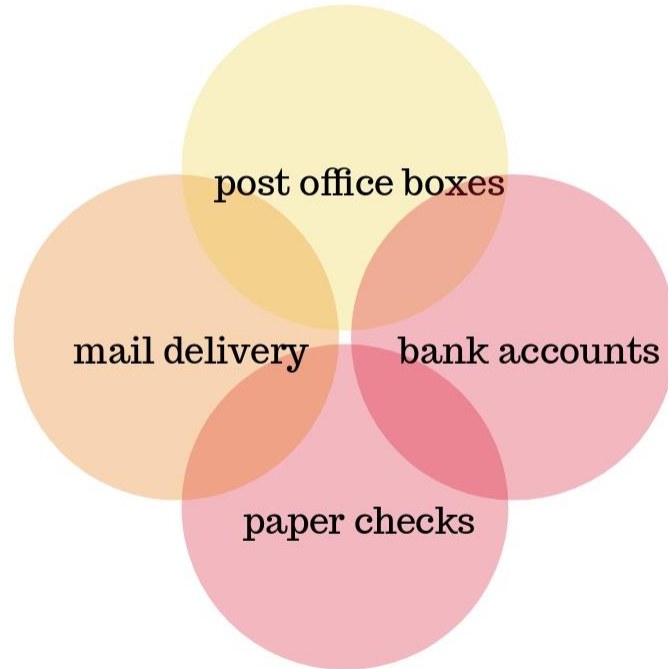


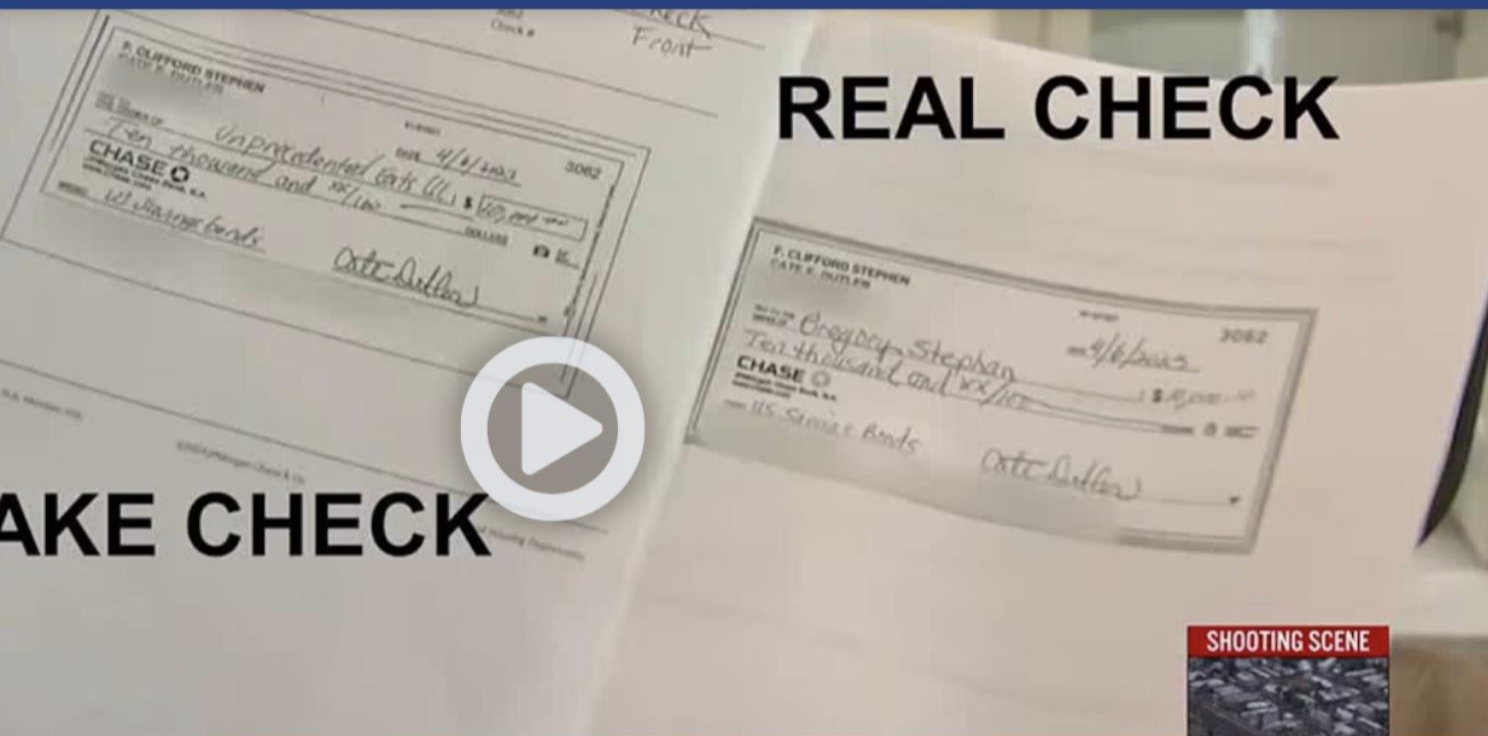
Theft

(It still works pretty good too)



Check Fraud Vectors





REAL CHECK

FAKE CHECK



ADVERTISEMENT



It's OK to burn
but have you considered

NATURAL GAS • ELECTRIC
Learn More at CleanAir.org



It's OK to burn wood today,
but have you considered the alternatives?

CLEAN AIR
**MAKE
MORE**

Consumer protection statutes - what tools do we have to help victims?



Deception, unfair or abusive practices

Consumers are protected against intentional deception, unfair practices, or any practice that harms consumers.



Reporting fraud

Consumers can report fraud to authorities who can investigate and prosecute offenders.



Consumer rights education

Educating consumers on their rights and how to protect themselves from fraud.



Private Rights of Action

SECTION 43-35-87. Financial exploitation; financial institution authority to decline transaction requests.

(A) For the purposes of this section, "financial institution" means any bank, credit union, wealth management institution, or other financial services company. This section excludes a "broker-dealer" as defined in Section 35-1-102(4) and an "investment adviser" as defined in Section 35-1-102(15).

(B) If a financial institution reasonably believes that the financial exploitation of a vulnerable adult has occurred or may occur, then the financial institution may, but is not required to, decline or place on hold any transaction involving:

- (1) the account of the vulnerable adult;
- (2) an account in which the vulnerable adult is a beneficiary, including a trust or guardianship account; or
- (3) the account of a person who is suspected of engaging in the financial exploitation of the vulnerable adult.

(C) A financial institution may also decline or place on hold any transaction pursuant to this section if an investigative entity or law enforcement agency provides information to the financial institution demonstrating that it is reasonable to believe that the financial exploitation of a vulnerable adult has occurred or may occur.

(D) A financial institution is not required to decline or place on hold a transaction pursuant to this section. Such a decision is in the financial institution's discretion, based on the information available to the financial institution.

(E)(1) Any financial institution that declines or places on hold a transaction pursuant to this section shall:

- (a) make a reasonable effort to provide notice, orally or in writing, to all parties authorized to transact business on the account from which the transfer or disbursement was declined or placed on hold; and
- (b) report the incident to the appropriate investigative entity in accordance with Section 43-35-25.

(2) Notwithstanding the provisions of this subsection, a financial institution has no duty to notify any party that is suspected of financial exploitation pursuant to this section.

(F) Any decline or hold of a disbursement or transaction as authorized by this section will expire upon the sooner of:

- (1) a determination by the financial institution that allowing the transaction will not result in the financial exploitation of a vulnerable adult;
- (2) thirty business days after the date on which the financial institution first declined or placed on hold the transaction, unless an appropriate investigative entity as set forth in Section 43-35-10(5) requests that the financial institution extend the delay, in which case the delay shall expire no more than fifty-five business days after the date on which the financial institution first declined or placed on hold the transaction; or
- (3) the order of a court of competent jurisdiction.

(G) A financial institution may provide access to or copies of records relevant to the suspected financial exploitation of a vulnerable adult to law enforcement agencies or investigative entities responsible for administering the provisions of this article. Such records may include relevant historical records and recent transactions relating to suspected financial exploitation.

(H) If the determinations and actions of a financial institution or an employee of a financial institution are made in good faith and in accordance with the provisions of this section, then the financial institution or employee shall be immune from criminal, civil, or administrative liability for declining transactions to disburse monies pursuant to this section, and for taking actions in furtherance of a determination, including making a report or providing access to or copies of relevant records to an investigative entity or law enforcement agency. Nothing in this section is intended to nor does it limit or shield in any manner a financial institution from civil liability against any claim, including reasonable attorneys' fees, costs, and litigation expenses, for participating in or materially aiding the financial exploitation of a vulnerable adult. Any such claims shall be asserted by the vulnerable adult, or on his behalf by an appropriate guardian or representative who is not involved in or otherwise suspected of participating in the financial exploitation of the vulnerable adult, by filing a civil action in circuit court.



The UCC Covers Checks for Consumers and Businesses



UCC Article 3 covers negotiable instruments

This includes rules for forged endorsements and altered checks



UCC Article 4 governs bank deposits and collections

This covers when banks can charge customer accounts, even if it creates an overdraft

UCC -- Title 36 SC Code of Laws

- **UCC § 4-401**

- (When Bank May Charge Customer's Account):
 - This section states that a bank may charge against the account of a customer an item that is properly payable from that account, even though the charge creates an overdraft.

- **UCC § 3-405**

- (Employer's Responsibility for Fraudulent Endorsement by Employee):
 - Covers situations where an employer is precluded from asserting against the bank that the signature is unauthorized if the employer entrusted an employee with responsibility with respect to the instrument.

- **UCC § 3-406**

- (Negligence Contributing to Forged Signature or Alteration of Instrument):
 - If a person, by their own negligence, substantially contributes to the alteration of an instrument or to the making of a forged signature, the person is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection. **Care includes detecting and reporting.....**



Regulation E and EFTA: Consumer Protections for Electronic Transfers



Regulation E & Electronic Fund Transfer Act

Covers electronic fund transfers like debit cards and direct deposits for CONSUMER accounts.



Protection from UNAUTHORIZED electronic transfers

Including (in general) those induced by fraud or scam, if **TIMELY DISPUTED**. (2 days, 60 days)



Key protections

Right to dispute; limits on liability, requirement of investigation, private right of action with attorney's fees and statutory penalties.

*(e.g., debit card transactions, ATM transactions, Peer-to-Peer (P2P) transactions, Cash App, Venmo, PayPal, Zelle**, direct deposits).*

Credit card fraud

Percentage of credit card fraud cases by type



Fair Credit Billing Act



Consumers have the right to dispute billing errors within 60 days of receiving a statement

This allows consumers to review statements and identify unauthorized charges or errors within a reasonable timeframe.



Consumers are liable for only the first \$50 of unauthorized charges

This limits consumer liability and protects accounts from fraudulent activity.



Consumers must receive written notice before accounts are terminated or suspended

This ensures consumers have a chance to address issues before account access is revoked.



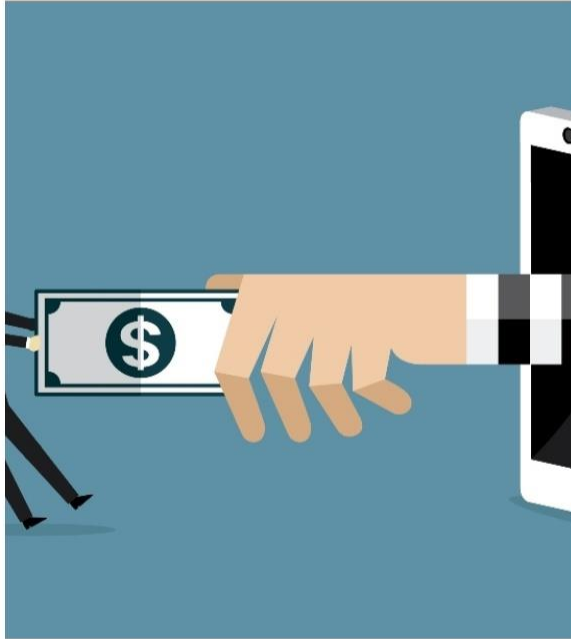
Private Right of Action

With attorney's fees.

:)



Wire Transfer Fraud





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 LIVE CUSTOMER SUPPORT
HELPDESK@BITCOINOFAMERICA.ORG
 @BITCOINOFAMERICA
 @BTCOFAMERICA



UCC Article 4A



36-4A-201 establishes security procedure agreements

Banks and customers may agree to security procedures for verifying payment orders. These may require signatures, encryption, callback procedures, etc.



36-4A-211 limits bank liability for incorrect execution

If a payment order is executed incorrectly, liability for actual loss up to the amount of the payment order. **

****Attorney's Fees? Consequential Damages? 36-4A-305**

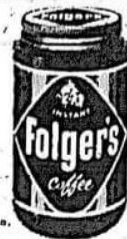




*makes you want to **WAKE UP AND LIVE!***

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the instant with the fresh-brewed flavor



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Family Law

Jonathan W. Lounsberry

Ryan F. McCarty

No Materials Available



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Vulnerable Adults: A Panel Discussion

Brenda Stalzer Marchant, LMSW, CPM

James Bouknight

Kimberly Kruse, PHD

The Honorable Jacqueline D. Belton

South Carolina Department on Aging



SC Vulnerable Adult Guardian ad Litem Program

Brenda Stalzer Marchant, LMSW, CPM

Program Director

South Carolina Omnibus Adult Protection Act (OAPA)

SC Code of Laws, § 43-35-10



ELDER LAW COMMITTEE CLE
2024 S.C. Bar Convention
January 19, 2024

WHAT IS “INCAPACITY”?

Incapacity in the Context of Guardianship and Conservatorship
Jacqueline D. Belton, Associate Probate Judge (Ret.)

- An individual is an “alleged incapacitated individual” (see S.C. Code Ann. § 62-5-101(2)) until a decision is made by the court regarding whether or not the individual meets the definition of “incapacity” stated in S.C. Code Ann. § 62-5-101(13). The language I used in my orders is substantially as follows:
- S.C. Code Ann. § 62-5-101(13) defines “incapacity” as:

“The inability to effectively receive, evaluate, and respond to information or make or communicate decisions such that a person, **even with appropriate, reasonably available support and assistance cannot** (*emphasis added*):

 - (a) meet the essential requirements for his/her physical health, safety, or self-care, necessitating the need for a guardian; or
 - (b) manage his property or financial affairs or provide for his/her support or for the support of his legal dependents, necessitating the need for a protective order.”
- Accordingly, the Court concludes that the statutory definition of “incapacity” has two components: (1) the existence of a diagnosis, impairment, disability, or other condition, the results of which impair the A.I.I.’s ability to meet the essential requirements for their physical health, safety, or self-care and/or to manage their property or financial affairs, or provide for their support or the support of any dependents, and (2) that there is no appropriate, reasonably available support and assistance to address the absence of those abilities. Both parts of the definition must be satisfied in order to make a finding of “incapacity.” That finding then serves as the basis for adjudicating someone as an “incapacitated individual.”
- Based on the Examiner Report and Affidavit submitted by Dr. _____, John Smith, has moderately advanced Alzheimer’s Dementia, and the evidence is clear and convincing that these diagnoses impair Mr. Smith such that he cannot meet the essential requirements for his physical health, safety, or self-care, or manage his property or financial affairs, or provide for his support. Mr. Smith does not have a Durable Health Care Power of Attorney to address his lack of ability to meet the essential requirements for his physical health, safety, or self-care, or a General Durable Power of Attorney for business and financial affairs to address his inability to manage his property or financial affairs. The Court has not been made aware of any other reasonably available supports and assistance (see S.C. Code Ann. § 62-5-101(23)) to assist Mr. Smith with his inability to meet the aforementioned needs.
- Therefore, the Court concludes the evidence is clear and convincing that John Smith, is incapacitated, as defined in S.C. Code Ann. § 62-5-101(13), 1976, as amended. Further, based on that incapacity the Court finds that Mr. Smith is an “incapacitated individual” as defined in S.C. Code Ann. § 62-5-101(12), the definition of which is, “An individual who, for reasons other than minority, has been adjudicated as incapacitated.”