



## **CBAI LEGAL: Safe Harbors for Financial Exploitation Reporting**

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Both Illinois' Probate Act of 1975 ("Probate Act") and Illinois' Adult Protective Services Act ("Elder Act") contemplate, but do not mandate, the reporting by financial institutions of suspected cases of financial exploitation to the proper authorities. Many bankers have asked two related questions regarding such reporting. First, does disclosure of customer records to such proper authorities without a subpoena or court order risk a violation by the bank of State law and/or federal Gramm-Leach Bliley (G-L-B) regulations protecting the privacy of bank records? Second, does the disclosing bank have any assurance that it is exempt from liability exposure if its disclosure of financial records in these circumstances is challenged or second-guessed by a person who did not approve of the disclosure (perhaps, for example, a family member)?

Under both the Probate Act and the Elder Act, the answers are: No, disclosure to proper authorities without a subpoena or court order is not a violation of bank privacy restrictions; and yes, there is assurance that the disclosing bank has safe harbor insulation from criminal and civil liability and thus need not fear reprisal from any person who disputes the legality of the disclosure.

Section 2-6 of the Probate Act requires forfeiture of a right to any financial interest in the estate of a decedent for any person whose intentional act caused the death. Section 2-6.2 provides the same forfeiture penalty for any person who, prior to the death, was convicted of the crime of financial exploitation or abuse of the decedent or was found civilly liable for such conduct. The forfeiture of rights under both Section 2-6 and 2-6.2 would apply to payable on death ("POD") accounts if the abuser/exploiter was the P.O.D. beneficiary on the account.

The Elder Act governs reporting of suspected abuse and financial exploitation of elderly persons and disabled persons. As I mentioned above, banks are not mandated reporters under the Elder Act, but they do benefit from safe harbor immunity in Section 4 of that Act if the bank voluntarily makes a report of suspected financial exploitation. The relevant language in Section 4 states: "A person making a report under this Act in the belief that it is in the victim's best interest shall be immune from criminal or civil liability...notwithstanding any requirements concerning the confidentiality of information...which might otherwise be applicable." "Elderly person" is defined as a person at least 60 years old, so CBAI will soon have an elderly General Counsel. Of course, reporting based on reasonable suspicion must be made in good faith (i.e., no grudge-reporting).

With respect to disclosure in the absence of a subpoena, Section 2-6 of the Probate Act specifies that a financial institution "shall fully cooperate with law enforcement authorities and judicial officers" in any investigation of the death. Furthermore, both the Illinois Banking Act and the G-L-B regulations

authorize these disclosures among exceptions to the customer privacy obligations. Section 48.1 of the Illinois Banking Act explicitly allows subpoena-less disclosure to the Illinois Department on Aging or its designated local agencies when “there is a suspicion by the bank that a customer who is an elderly person or person with a disability has been or may become” a financial exploitation victim.

In addition to Section 48.1 of the Illinois Banking Act, the G-L-B regulations, which apply to both state-chartered banks and national banks, authorize disclosure without a subpoena. One of the enumerated exceptions to the privacy obligation of a bank is for compliance “with a properly authorized civil, criminal or regulatory investigation....”

Two sections of the Probate Act address the release of funds from a decedent’s account. As mentioned above, Section 2-6 bars a person who has intentionally committed an act that caused the death of the decedent from benefiting by the receiving, through inheritance or otherwise, any assets or estate of the decedent. Section 2-6 states that a holder of the decedent’s assets (e.g., a financial institution) is not liable for the release of the decedent’s property prior to a determination of the wrongdoer’s culpability in the death.

In addition, Section 2-6.2 of the Probate Act (addressing situations where the wrongdoer did not **cause** the death but has been convicted of financial exploitation, abuse or neglect of an elderly or disabled person prior to her/his death) imposes similar forfeiture of any right to any inheritance or benefit from the estate of the decedent. Section 2-6.2 also provides safe harbor immunity for a bank that releases property (including funds on deposit or any item in a safe deposit box) to the person whose abuse or financial exploitation caused forfeiture of her/his inheritance or other rights to the property unless the bank released the property “after having received actual written notice” of the wrongdoer’s criminal conviction or judgment of civil liability.

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