

## Texas Passes A New Law To Punish Elder Financial Abuse

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The Texas Legislature recently enacted a new law that criminalizes the financial abuse of the elderly. This is in response to the increasing financial attacks on the elderly. Effective September 1, 2021, the Texas Legislature added a penal statute entitled “Financial Abuse of Elderly Individual.” Tex. Pen. Code §32.55. It provides:

"(a) In this section: (1) “Elderly individual” has the meaning assigned by Section 22.04. (2) “Financial abuse” means the wrongful taking, appropriation, obtaining, retention, or use of, or assisting in the wrongful taking, appropriation, obtaining, retention, or use of, money or other property of another person by any means, including by exerting undue influence. The term includes financial exploitation. (3) “Financial exploitation” means the wrongful taking, appropriation, obtaining, retention, or use of money or other property of another person by a person who has a relationship of confidence or trust with the other person. Financial exploitation may involve coercion, manipulation, threats, intimidation, misrepresentation, or the exerting of undue influence. The term includes: (A) the breach of a fiduciary relationship, including the misuse of a durable power of attorney or the abuse of guardianship powers, that results in the unauthorized appropriation, sale, or transfer of another person’s property; (B) the unauthorized taking of personal assets; (C) the misappropriation, misuse, or unauthorized transfer of another person’s money from a personal or a joint account; and (D) the knowing or intentional failure to effectively use another person’s income and assets for the necessities required for the person’s support and maintenance.

(b) For purposes of Subsection (a)(3), a person has a relationship of confidence or trust with another person if the person: (1) is a parent, spouse, adult child, or other relative by blood or marriage of the other person; (2) is a joint tenant or tenant in common with the other person; (3) has a legal or fiduciary relationship with the other person; (4) is a financial planner or investment professional who provides services to the other person; or (5) is a paid or unpaid caregiver of the other person.

(c) A person commits an offense if the person knowingly engages in the financial abuse of an elderly individual.

(d) An offense under this section is: (1) a Class B misdemeanor if the value of the property taken, appropriated, obtained, retained, or used is less than \$100; (2) a Class A misdemeanor if the value of the property taken, appropriated, obtained, retained, or used is \$100 or more

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but less than \$750; (3) a state jail felony if the value of the property taken, appropriated, obtained, retained, or used is \$750 or more but less than \$2,500; (4) a felony of the third degree if the value of the property taken, appropriated, obtained, retained, or used is \$2,500 or more but less than \$30,000; (5) a felony of the second degree if the value of the property taken, appropriated, obtained, retained, or used is \$30,000 or more but less than \$150,000; and (6) a felony of the first degree if the value of the property taken, appropriated, obtained, retained, or used is \$150,000 or more.

(e) A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either section or both sections."

Tex. Pen. Code §32.55. The Bill analysis provides that:

"Reports indicate that older Americans collectively lose nearly \$37 billion each year to financial scams and abuse. Concerns have been raised regarding the vulnerability of elderly Texans to these scams, as Texas has one of the largest and fastest growing populations of senior citizens in the country. The number and complexity of reports involving financial abuse of vulnerable and older adults has grown significantly over the past decade. Due to the complexities of elder financial exploitation, many of the victims are left without restitution or any other means of legal protection. The toll that these crimes places on elderly victims frequently results in financial ruin, loss of dignity, diminished health, and other negative effects. C.S.H.B. 1156 seeks to address this issue by creating an offense for the financial abuse of an elderly individual.

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C.S.H.B. 1156 amends the Penal Code to create the offense of financial abuse of an elderly individual for a person who knowingly engages in the wrongful taking, appropriation, obtaining, retention, or use of money or other property of an elderly person or for a person who knowingly assists in such conduct, by any means, including by exerting undue influence and by financial exploitation. The bill establishes penalties for the offense ranging from a Class B misdemeanor to a first degree felony depending on the value of the property taken, appropriated, obtained, retained, or used. If the conduct constituting the offense also constitutes another Penal Code offense, the actor may be prosecuted for either offense or both offenses. The bill defines "financial exploitation," among other terms."

Acts 2021, 87th Leg., ch. 456 (H.B. 1156), § 1, Bill Analysis.

This provision is in addition to Financial exploitation of the elderly is a criminal offense in Texas that has been in the statutes since 2011. Tex. Pen. Code Ann. § 32.53. "A person commits an offense if the person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual." Id. at § 32.53(b). "Exploitation" means the illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain. Id. at § 32.53(a)(2). A "child" means a

person 14 years of age or younger, and an “elderly individual” means a person 65 years of age or older. *Id.* at § 22.04(c). A “disabled individual” means a person: (A) with one or more of the following: (i) autism spectrum disorder, as defined by Section 1355.001, Insurance Code; (ii) developmental disability, as defined by Section 112.042, Human Resources Code; (iii) intellectual disability, as defined by Section 591.003, Health and Safety Code; (iv) severe emotional disturbance, as defined by Section 261.001, Family Code; or (v) traumatic brain injury, as defined by Section 92.001, Health and Safety Code; or (B) who otherwise by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person’s self from harm or to provide food, shelter, or medical care for the person’s self. *Id.* This offense is a felony of the third degree. *Id.* at § 32.53(c).

Moreover, there is an older statute, which is misapplication of fiduciary property or property of a financial institution is a charge that has been in existence in Texas for over forty years. *Tex. Pen. Code Ann.* § 32.45. A person commits the offense of misapplication of fiduciary property by intentionally, knowingly, or recklessly misapplying property he holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property. *Id.* at § 32.45(b). “Substantial risk of loss” means a real possibility of loss; the possibility need not rise to the level of a substantial certainty, but the risk of loss does have to be at least more likely than not. *Coleman v. State*, 131 S.W.3d 303 (Tex. App.—Corpus Christi 2004, pet. ref’d). The statute defines “Fiduciary” to include: “(A) a trustee, guardian, administrator, executor, conservator, and receiver; (B) an attorney in fact or agent appointed under a durable power of attorney as provided by Chapter XII, Texas Probate Code; (C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 162.001, Tax Code; and (D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.” *Id.* at § 32.45(a)(1).

The Texas Human Resources Code has a general provision that requires the reporting of the exploitation of elderly or disabled individuals. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Section 48.051 states: “a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department.” *Tex. Hum. Res. Code* § 48.051. In the Texas Human Resources Code, the term “exploitation” means “the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person’s social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person.” *Id.* at § 48.002. Importantly, the Texas Human Resources Code provides a criminal penalty for not reporting the exploitation: “[a] person commits an offense if the person has cause to believe that an elderly person or person with a disability has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter.” *Id.* at § 48.052. Generally, this offense is a Class A misdemeanor. *Id.*

These criminal statutes do not create civil causes of action. “The Texas Penal Code does not create private causes of action,” and as a result, criminal code “allegations fail to state a viable claim for relief.” *Spurlock v. Johnson*, 94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.); see also *Macias v. Tex. Dep’t of Crim. Justice Parole Div.*, No. 03-07-00033-CV, 2007 Tex. App. LEXIS 6798 (Tex. App.—Austin August 21, 2007, no et.). Other states have adopted express civil causes of action for the exploitation of the elderly or other vulnerable persons. See, e.g., *Ariz. Rev. Stat.* § 46-456, et. seq.; *CA Welf. & Inst. Code* § 15610-1561-.65; *Fla. Ann. Stat.* § 415.102(8)(a)(1) and (2); (8)(b). In

Texas, there are no such statutory or common law claims for exploitation of vulnerable persons. However, there is a common law claim for breach of fiduciary duty, and the same conduct that may justify a criminal charge may also support a valid breach of fiduciary duty claim. Compare *Natho v. State*, No. 03-11-00498-CR, 2014 Tex. App. LEXIS 1427 (Tex. App.—Austin Feb. 6 2014, pet. ref'd) (criminal charge affirmed) with *Natho v. Shelton*, No. 03-11-00661-CV, 2014 Tex. App. LEXIS 5842 (Tex. App.—Austin May 30, 2014, no pet.) (affirming civil judgment in part based on same acts of fiduciary breach). Moreover, there are civil claims for conversion, fraud, breach of contract, money had and received, undue influence, mental incompetence, constructive trust, etc. that may provide the appropriate relief.

Even if a party cannot assert a civil claim under a criminal statute, a criminal court has discretion to award a victim restitution as against the criminal defendant. *Jones v. State*, 2012 Tex. App. LEXIS 10549 (Tex. App.—Corpus Christi Dec. 20 2012, pet. ref'd). “Restitution was intended to ‘adequately compensate the victim of the offense’ in the course of punishing the criminal offender.” *Cabla v. State*, 6 S.W.3d 543, 545 (Tex. Crim. App. 1999) (quoting Tex. Code Crim. Proc. Ann. art. 42.12 § 9(a)). A sentencing court may order a defendant to make restitution to any victim of the offense. Tex. Code Crim. Proc. Ann. art. 42.037(a). “[T]he amount of a restitution order is limited to only the losses or expenses that the victim or victims proved they suffered as a result of the offense for which the defendant was convicted.” *Cabla*, 6 S.W.3d at 546. “An abuse of discretion by the trial court in setting the amount of restitution will implicate due-process considerations.” *Campbell v. State*, 5 S.W.3d 693, 696 (Tex. Crim. App. 1999). Due process places four limitations on the restitution a trial court may order. First, “[t]he amount of restitution must be just, and it must have a factual basis within the loss of the victim.” *Id.* Second, “[a] trial court may not order restitution for an offense for which the defendant is not criminally responsible.” *Id.* at 697. Third, “a trial court may not order restitution to any but the victim or victims of the offense with which the offender is charged.” *Id.* Fourth, a trial court may not, “without the agreement of the defendant, order restitution to other victims unless their losses have been adjudicated.” *Id.* The standard of proof for determining restitution is a preponderance of evidence. Tex. Code Crim. Proc. Ann. art. 42.037(k). The burden of proving the amount of loss sustained by the victim is on the prosecution. *Id.* The restitution ordered must be “just” and must be supported by sufficient factual evidence in the record.

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