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CONSUMER RIGHTS AND THE ELDERLY

§ 21. 1. Introduction

This chapter will briefly discuss several topics in which the elderly and those who care for them have a particular interest. In some cases, these topics will have been treated in greater detail in other chapters in this Guide. When that is the case, we will refer you to the relevant chapter. This chapter has the following sections:

- § 21. 2. Nursing Home Rights
- § 21. 3. Abuse, Neglect And Exploitation In Nursing Homes
- § 21. 4. Funeral Abuses
- § 21. 5. Telemarketing Fraud
- § 21. 6. Contests And Sweepstakes
- § 21. 7. Living Trusts
- § 21. 8. Social Security Schemes
- § 21. 9. Protect Your Savings
- § 21. 10. Hearing Aids
- § 21. 11. Reverse Mortgages
- § 21. 12. Financial Exploitation of The Elderly
- § 21. 13. Legal Services for the Elderly

Older consumers make up only 12% of the population, yet they comprise 35% of all fraud victims! And this number will only increase as our population ages. The number of persons over 65 in the United States has grown dramatically in the last 20 years and will continue to grow over the next several decades.¹ The fastest growing segment of the population is that over the age of 80. It is estimated by 2010 that there will already be twice as many Americans ages 85 and older as there were in 1990. By 2030, more than one in five Americans will be over the age of 65 and there will be more people over 65 in the country than under 18.

The elderly have a high incidence of health problems and many have one or more chronic medical conditions. They often live alone. The combination of the number of the elderly, their visibility, physical and mental problems, dependence on others, and financial assets, make them attractive targets to those who commit fraud. As the number of dependent elderly grows, so will the probability of increased fraud against the elderly.

¹ Candice Heisler, *Crime and Safety: The New Peril For Older Persons* (background paper) (1997).

Of course, it is crucial that the elderly understand their legal rights. They are their own best protectors. However, family members also play a crucial role in helping the elderly protect themselves. The U.S. Postal Inspection Service offers the following advice for the next time you visit an elderly family member:

- A. Be on the lookout for stacks of fundraising letters, such as sweepstakes mail proclaiming them “a guaranteed winner” or offering tickets for sale.
- B. Watch for an unusual number of packages on hand containing inexpensive costume jewelry, plastic cameras or wristwatches.
- C. Note if they are receiving unsolicited telephone calls from fast-talking operators offering “fantastic” opportunities to claim prizes or make surefire investments. If so, you could arrange for an unlisted phone number.
- D. Volunteer to help elderly family members balance their checkbooks, and ask about any questionable checks or sudden-large withdrawals. Offer to go over credit card statements to make sure that only authorized purchases are listed.
- E. Offer to pick up the mail to see if they are receiving unsolicited sweepstakes or lottery offers. If so, they may be on a variety of “sucker lists” being circulated by con artists. Have a trusted family friend help check the mail every day.
- F. If family members are being victimized through the mail, report the matter to the nearest postal inspector.²
- G. Enroll them on the Maine Do Not Call or Do Not Write lists. See § 28.13 in this Guide. You can sign up for the Do Not Call list over the internet by logging on to DONOTCALL.GOV or by calling 1-888-382-1222 from the number you wish to register.

§ 21. 2. Nursing Home Rights

Maine law guarantees persons living in nursing homes and boarding homes certain fundamental rights. Here is a description of these rights:³

A. Admission To A Home

At the time of admission the nursing home must:⁴

- (1) Not require residents to give up their rights to Medicaid or Medicare, and not require them to give assurance that they will not apply for such benefits;
- (2) Display in a prominent place the offer to provide written and oral information and instructions on how to apply for Medicaid or Medicare benefits and possible retroactive benefits;
- (3) Not require another person to guarantee payment as a condition of admission in order to stay in the home, except out of the resident’s own funds;
- (4) Not require residents to deposit their money with the home;
- (5) Give the residents or a responsible family member a list of resident rights and explain them in a way that can be readily understood.

All new applicants and current residents of a nursing home, regardless of payment source, will be

² See Chapter 31 in this Guide, Consumer Assistance Resources, for U.S. Postal Inspector addresses, by region.

³ This summary was initially prepared by the Maine Committee on Aging. The Committee’s duties have now been taken over by the Nursing and Boarding Home Ombudsman (1-800-499-0229).

⁴ 22 M.R.S.A. § 1826.

screened for suspected mental illness, mental retardation or related conditions. Persons with a confirmed diagnosis of mental illness, mental retardation or a related condition will be assessed according to Department of Human Services Guidelines to determine (1) the need for nursing facility services; and (2) the need for active treatment. As appropriate, active treatment or resident discharge procedures will be pursued for residents found to have mental illness, mental retardation or a related condition.

B. For People Who Live In A Nursing Home Only

Your care at the nursing home includes the following rights:

- (1) You have a right to discuss your medical problems with your doctor in a way that you understand unless your doctor feels it will be harmful for you to know.
- (2) When decisions regarding your care must be made, you have the right to be there and to have a say in the decisions.
- (3) You do not have to be part of any medical experiment or behavior modification program unless you wish to be and give your permission in writing.
- (4) You have the right to choose your own doctor, provided that doctor chooses to treat you.
- (5) You may obtain medication from a pharmacy of your choice.
- (6) You may establish a Residents Council to negotiate with the home administrators concerning your living conditions.⁵

C. Your Medical Record

No one except your doctor, the staff at the home that are involved in the planning of your care, or the state may look at your medical record without your written permission or the written permission of your legal guardian if you have one.

You have the right to look at your medical record if a staff person is with you unless your doctor has written that for specific reasons you should not see your medical record. If you are barred from seeing them, your authorized representative may be able to see the records if you give written authorization.

D. When Asked To Leave The Nursing Or Boarding Home

The nursing or boarding home *cannot* make you leave the home or move to another room within the home unless:

- (1) It is for your own health and safety or for the health and safety of others.
- (2) The bill for the room and care has not been paid.
- (3) The home *cannot* move you or make you leave solely because you have become eligible for state assistance to pay for your care, except from a private to a semi-private room.

You must be given at least 30 days notice, or enough time to find a place best suited for your needs if you are made to leave the home for one or more of the above reasons. This notice must be given to you or your legal guardian in writing telling you why you are made to leave the home.

There is an appeals process if you feel you have been asked to leave without a good reason.

If you have to go to the hospital or wish to stay overnight with relatives or friends, under certain conditions your bed may be reserved for you upon your return. Check with the social worker for information about the "bed hold" regulation.

⁵ 22 M.R.S.A. § 7923.

E. Problems, Complaints, Or Suggestions

You have the right to tell the people in charge of the nursing home about any problem, complaint or suggestion you may have, and are entitled to a prompt response to the complaint.

If your problems or complaints cannot be solved or helped within the home to your satisfaction you may phone or write to special places for help (*see* Section Q below for these places).

You cannot be punished or treated badly for making a complaint to anyone.

F. Your Own Money

You have the right to take care of your own money and sign your own checks unless you have a legal guardian, conservator, or representative payee.

You or your guardian may give the nursing home or boarding home written permission to take care of your money for you and to pay your bills (hairstylist, barber, etc.).

If the home takes care of your money for you, you must be given a written statement at least every three months to show you how your money has been spent and how much you have left.

G. Drugs/Medicine

No drugs or medicine may be given to you without written order of your doctor.

H. Restraints

If you live in a nursing home you cannot be tied into any chair or bed or held in by a tray unless your doctor says that you need to be for your own safety or in an emergency. You or your guardian may discuss with your doctor why you are being restrained.

In such an emergency your doctor must be told and it must be written in your medical record.

If you are tied into any chair or bed or held in by a tray you must be given time at least every two hours for toileting and/or exercise.

If you live in a boarding home you cannot be tied or held into any chair or bed *at any time*.

I. Punishments

You cannot be abused, scolded, or punished at any time in the nursing or boarding home.

J. Respect, Dignity And Privacy

When you enter a nursing home or boarding home you must be treated as an individual with respect, dignity, and consideration. You have the right to be addressed by the staff as you wish whether as Mr. or Mrs. Jones or George or Mary.

You must be given privacy when you are bathing, dressing, or toileting, etc. People should knock before entering your room or bathroom.

The home must provide an area where you can make telephone calls in private.

K. Doing Chores Or Jobs In The Home

You do not have to do any chores or jobs at the nursing or boarding home unless it is part of the written plan for how you will be cared for and you have agreed to the plan.

L. If You Are Married

If you are married, you have the right to visit with your husband or wife in private.

If you both live in the nursing home or boarding home, you have the right to share the same room, unless your physician recommends another arrangement.

M. Visits In And Outside Of The Home

Unless your physician indicates in your records why you cannot, you have the right to visit privately inside the nursing or boarding home with anyone of your choice. You have the right to refuse any visitor.

You may meet with and belong to any church, social club, or group of your choice.

You have the right to go out, such as to go shopping or to the movies, or visit relatives, etc.

You have the right to leave the home overnight. However, if the state helps to pay for your room and care, they must approve of your leave in order for them to pay to hold your bed while you are away.

N. Your Mail And Telephone Calls

You have the right to send mail and to receive mail addressed to you. Your mail is private and may only be read by other people with your permission. If you need help to write or mail your letters, or to make telephone calls, you may get help from the nursing home or boarding home once a week.

Mail that you send and receive must not be opened by anyone else but you. However, you have the right to ask for help in opening your mail and having it explained to you.

You have the right to make telephone calls to anybody you want to. No one can listen to your calls without your permission. If your call is a long distance call, you will be asked to pay for the cost.

O. Your Own Belongings

You may wear your own clothes and bring your own furniture and belongings to the nursing or boarding home as long as there is enough space in your room for them.

You should talk with the home about the amount and kind of belongings that you wish to have with you.

P. Smoking

You may smoke only in areas of the home set aside for smoking. If your home has a no-smoking policy, you must be told in advance, so you can look for another home.

Q. Where To Get Help

The Maine Nursing and Boarding Home Ombudsman investigates and resolves complaints made on behalf of residents of Maine's nursing, boarding and adult foster homes and recipients of home care. Any person may ask for assistance from the Ombudsman on behalf of a resident of one of these facilities. The Ombudsman receives complaints directly from residents, friends and relatives, employees and administrators, and public agencies and community groups. They include complaints about the quality of care that a resident receives in a long-term care facility, and about the problems that residents have regarding eligibility for state programs, financial status, legal problems and transfer assistance. The Ombudsman also provides training on resident rights and on federal and state regulations and identifies issues that may require legislative or regulatory changes. Here is how you can contact the Nursing and Boarding Home Ombudsman: 21 Bangor Street, P.O. Box 126, Augusta,

ME 04332-0126 (207-621-1079, 1-800-499-0229, Fax: 207-621-0509).

You may also want to contact the Maine Advocacy Services (1 Grandview Place, P.O. Box 455, Winthrop, ME 04364, 207-626-2774; 1-800-452-1948) or Legal Services for the Elderly (1-800-750-5353) (*see* § 21.13 in this Guide).

R. Maine Nursing Home Ratings

The U.S. Department of Health and Human Services has recently completed a national survey that ranks the quality of care in each State's nursing homes. This report, including its analysis of Maine nursing homes, is available to consumers at the Web site www.medicare.gov and at 1-800-MEDICARE.

§ 21.3. Abuse, Neglect And Exploitation In Nursing Homes

In Maine there are approximately 14,000 beds in licensed nursing homes, residential care facilities, adult family care homes and adult foster homes. The Maine Bureau of Elder and Adult Services provides the following information about preventing illegal treatment in licensed facilities.⁶

A. Illegal Treatment

Abuse in facilities may occur in a variety of ways. Residents may abuse one another, facility staff may abuse residents or residents may be abusive toward staff. Abuse may be an act of violation such as physical or sexual assault, or may be verbal abuse, medication errors, or failure to provide assistance resulting in injuries.⁷

B. Reporting Abuse

Maine law⁸ requires that certain persons, while acting in their professional capacity immediately report or cause a report to be made of suspected abuse, neglect, exploitation of an adult, if there is reasonable cause to suspect the adult is incapacitated. This reporting requirement covers such persons as a Dentist, Physical Therapist, Doctors, Social Workers, etc. Further, any person may make a report if that person knows or has reasonable cause to suspect abuse, neglect or exploitation of a dependent or incapacitated adult, or has reasonable cause to suspect that an adult is incapacitated. Here is how you can report such dangerous problems:

- (1) Report abuse, neglect or exploitation in *licensed nursing facilities* to the Department of Human Services, Division of Licensing and Certification at 1-800-383-2441.
- (2) Report all other adult abuse, neglect or exploitation to the Bureau of Elder and Adult Services, Adult Protective Services at 1-800-624-8404.
- (3) To make a report of abuse, neglect or exploitation of a person with *mental retardation*, call the Department of Behavioral and Developmental Services and the Substance Abuse Services Advocate at:
 - (a) Region 1 (York and Cumberland): 207-822-0270
 - (b) Region 2 (Central and Mid-Coast): 207-287-2205
 - (c) Region 3 (Northern and Eastern Aroostook): 207-941-4160

⁶ Maine Bureau of Elder and Adult Services, *Abuse, Neglect and Exploitation in Licensed Facilities: Recognizance, Prevented; Reported* (July, 1997).

⁷ *See* 22 M.R.S.A. § 3472.

⁸ *See* 22 M.R.S.A. § 3477-3479-A.

If you are not successful, and for after business hours reports, call the Chief Advocate or leave a message at 207-287-4228.

- (4) Report suspected Medicaid Fraud to the Medicaid Fraud Control Unit (State Office Building, 6th Floor, 6 State House Station Augusta, ME 04333-0006, 207-626-8520). This unit is mandated to investigate fraud perpetrated by Medicaid providers in situations where there are allegations of abuse, neglect or exploitation by a staff in a facility that receives Medicaid.
- (5) Report Nursing Home or Home-Care complaints to the Nursing and Boarding Home Ombudsman. *See* § 21.2 (Q).

C. Nursing Homes, Home Health Care Agencies And The Unfair Trade Practices Act

Nursing homes provide a consumer service. Therefore, unfair or deceptive practices by the nursing home can also be a violation of the Maine Unfair Trade Practices Act.⁹ For example, if a nursing home failed to provide sufficient nursing personnel that could be an unfair trade practice.¹⁰ Or a nursing home may also violate the Unfair Trade Practices Act by billing patients for the full price of drugs, when the home was actually charged only 85% of the price.¹¹

Similarly, home health care agencies can also commit unfair trade practices. For example, the brochure of a home-care agency may promise certain services that are never provided. *See Lingar v. Live-In Companions, Inc.* 692 A.2d 61 (N.J. Super. A.D. 1997). Here are some suggestions by the Association of Certified Fraud Examiners¹² as to how to avoid home health care fraud:

- (1) In order to select a home-care worker contact your friends, relatives, clergy, community organizations and senior advocates for referrals. Obtain credit histories and possible criminal records of any worker you are thinking of hiring. Regardless of the impression a candidate makes, do not trust the candidate's work history even if he or she is sent by a home-care agency.
- (2) Require the home-care worker to complete a detailed employment application. Require the worker to list all of his professional certifications and appropriate license numbers and then verify the information with those associations.
- (3) Even if you hire an apparently honest worker, remove all temptations before a home-care worker begins employment. All cash, jewelry, and other valuables should be off the premises in a safety deposit box. All financial records should be protected. Social Security, pension, and investment checks should be directly deposited into accounts.
- (4) Do not pay "off-the-books." Pay by check or credit card so that you have receipts. Restrict access of home-care workers to the patient area. Make random, unannounced visits to the patient's home.

⁹ *See* 5 M.R.S.A. § 207. An extensive discussion of the application of the unfair trade practice statutes to nursing home problems can be found in Horvath and Nemore, "Nursing Home Abuses and Unfair Trade Practices," 20 *Clearinghouse Review* 801 (Nov. 1986).

¹⁰ *See People v. Casa Blanca Convalescent Homes*, 206 Cal. Rptr. 164 (Ct.App. 1984).

¹¹ *See Sullivan's Wholesale Drug v. Faryl's Pharmacy, Inc.*, 573 N.E. 2d 1370 (1991); *accord Arenson v. Whitehall Convalescent and Nursing Home*, 880 F. Supp. 1202 (M.D. Ill. 1995) (nursing home allegedly used dummy drug invoices to bill patients).

¹² Association of Certified Fraud Examiners, *Home Health Care Fraud: The Emergency Epidemic* (1997).

§ 21.4. Funeral Abuses

In the past, some members of the funeral industry have been associated with consumer abuse. The distraught consumer can expect to pay as much as \$5,000 for a funeral and burial, yet does not often have the time to shop around or the emotional strength to dispute over-priced or unnecessary charges. Aware of this, some funeral providers in the past refused to give prices over the phone or tried to sell more than the individual intended to buy.

To protect the consumer, the FTC has promulgated the Funeral Industry Practices Revised Rule (§§ 453.1-453.9) which:

- A. Requires funeral homes to offer itemized price information a (“General Price List”) and disclose information over the phone;
- B. Requires funeral homes to disclose whether they make a profit on cash advance items;
- C. Prohibits funeral homes from conditioning a funeral sale upon the purchase of a casket or other items;
- D. Prohibits funeral homes from misrepresenting the need or legal requirement for embalming, a casket for cremation, or an outer burial container.

A violation of the FTC funeral rule could permit a consumer to sue for damages under the Maine Unfair Trade Practices Act.¹³

If you are in charge of funeral arrangements for someone else, remember:

- A. If the person for whom you are making funeral arrangements died in an accident and was taken to a funeral home not of your choice, you have the right to have the body moved to another funeral home.
- B. You do not have to have the body embalmed except in cases involving contagious disease.
- C. You do not have to choose the most expensive casket. Ask the funeral director if his complete line is on display. Often funeral homes do not display their least expensive models.
- D. Insist on a written contract which includes an itemized list of the cost of goods and services to be provided and terms for payment. Funeral directors are required by law to give you this statement before services are begun.¹⁴

Maine has many resources for persons confused about funeral requirements:

- A. Memorial Society of Maine
P.O. Box 3122 Auburn, Maine 04212-3122
207-786-4323
(The Memorial Society will help you arrange a simple and economical funeral)
- B. Board of Funeral Service
Department of Professional and Financial Regulation
35 State House Station
Augusta, Maine 04333-0035
207-624-8603

¹³ 5 M.R.S.A. §§ 207, 213 (private right of action).

¹⁴ See Maine Board of Funeral Services Rule 15.

- C. Maine Funeral Directors Association
506 Maine Street
Lewiston, Maine 04240
207-623-1269

Maine law prohibits funeral directors from “unprofessional conduct.”¹⁵ Included in such conduct is:

- A. Misrepresentation or fraud in obtaining a license or in the conduct of the funeral service profession;
- B. False or misleading advertising as practitioner of funeral service, funeral director, or embalmer.

Such violations could also violate the Maine Unfair Trade Practices Act.

A 1998 article in the *U.S. News & World Report*¹⁶ offered the following advice for persons faced with purchasing funeral services:

- A. **Plan ahead.** Contact FAMSA (800-765-0107; www.funerals.org/famsa) for lists of low-cost mortuaries and reputable memorial societies. Father Wasielewski (602-253-6814; www.xroads.com/funerals) will send information on fair prices. (In most cities, he says, you can find a complete funeral, with metal casket, for under \$2,200; cremation for under \$550.) A good consumer guide is *The Affordable Funeral; Going in Style, Not in Debt*, by R. E. Markin (to order, call 757-427-0220). The American Association of Retired Persons (601 E. St., NW, Washington, DC 20049) also offers a guide.
- B. **Don't prepay.** Each year, more than 1 million people, most over 55, buy pre-need plans to cover future costs of services, casket, gravesite, and monument, believing they are a hedge against inflation and a relief for survivors. But problems are common. Plans are often nonrefundable or nontransferable, meaning consumers can't switch mortuaries or change their minds. Hidden fees can mean survivors pay much more when the time comes. In the worst case, the money disappears. Consumer advocates advise earmarking a certificate of deposit or life insurance policy, or opening a designated savings account jointly with a family member who has right of survivorship so funds are not taxed. Never sign over an insurance policy to the mortuary. On November 28, 2000, funeral director Paul McFarland of Bar Harbor, Maine was sentenced to serve seven years in prison for the theft of more than \$480,000 worth of mortuary trust funds from nearly 200 consumers who had paid in advance for their own funeral. Under State law, McFarland was required to hold the money in individual trust accounts in the consumer's name at a Maine bank, to collect interest until the consumer died. Instead, McFarland spent the money. McFarland's criminal conduct went undetected for ten years, until one consumer checked with the bank to make sure her money was accounted for. When she discovered that it was missing, she filed a complaint with the Department of Professional and Financial Regulation. Shortly thereafter, McFarland lost his funeral director's license and went out of business. As part of the sentence imposed in the criminal case, McFarland was ordered to pay \$260,000 restitution to the 146 consumers who were still living.
- C. **Take your time.** Leave the body at the hospital or nursing home until you're ready. Phone funeral homes or have them fax you price lists. Make decisions out of reach of the mortuary's "grief counselor" and divulge little about your financial means. You'll save by

¹⁵ 32 M.R.S.A. § 1455-A (2).

¹⁶ Miriam Horn, Warren Cohen, "The Goliaths of the Funeral Industry Are Making Lots of Money Off Your Grief," *U.S. News & World Report*, 56-57 (March 23, 1998).

not buying a casket or urn at the home. Consumer Casket USA (800-611-8778) and Direct Casket (800-732-2753) will ship to the mortuary within 24 hours. Funeral homes cannot refuse or charge to handle caskets bought elsewhere, or demand you be present for delivery.

- D. **Buy the minimum.** Hold visitations at your house or church—this also frees you to use a lower-priced mortuary, even one far from home. Watch for hidden costs: Mortuaries often charge for use of common areas, like restrooms and parking lots. A cemetery may sell you a low-cost marker, then charge hundreds for placement and inspection.
- E. **Don't be bullied.** If a funeral director tells you the “State requires...,” insist on seeing a copy of the law.

§ 21. 5. Telemarketing Fraud

Americans lose over \$40 billion per year due to fraudulent marketing over the telephone, according to the FBI.¹⁷ One third of the fraudulent telephone “boiler rooms” closed down in a recent FBI nationwide sting operation exclusively targeted older persons. American Association of Retired Persons (AARP) estimates there are 140,000 firms engaged in telemarketing business in the United States. Up to 10% or 14,000 of them are fraudulent “boiler rooms”. Ninety-two percent of all American adults have at one time or another received a postcard or letter in the mail informing them they have won a fabulous prize. Nearly one third or 53.6 million have responded and often unwittingly self-selected themselves as potential victims for unscrupulous telemarketers to call.¹⁸ Here is AARP's “translation” of typical telemarketing fraud pitches:

- A. The pitch: “You have won a valuable prize!” The truth: you probably won a cheap prize and it will cost you plenty.
- B. The pitch: “We'll sell you our products at wholesale.” The truth: our wholesale is double everyone else's retail price.
- C. The pitch: “This is the final day of our promotion” The truth: every day is the final day of the promotion.
- D. The pitch: “We're trying to keep kids off drugs.” The truth: we're just saying that to get you to buy overpriced frisbees or sunvisors (or something else). This one goes like this:

“Our firm is engaged in a major promotion to raise money to help kids off drugs. Your name has been selected to win either a new \$35,000 luxury car, \$10,000 in cash, a brand new stereo or a \$2,000 shopping spree. To find out what you have won, all you have to do is invest in our country's future by donating \$2,000 to our "Just Say No" campaign.”

The truth is that the “One of Four” prize gimmick is just a way for scam artists to sell things for grossly inflated prices. In the above example, you would win shopping spree coupons worth about \$35 and your \$2,000 would purchase about 150 frisbees that read “Say No to Drugs”. The frisbees would actually cost about \$1 each, but the con artist would sell them for about \$13.00 to \$15.00 each and perhaps send them off to some police department which might or might not hand them out to some kids.

Here is what AARP recommends if you receive a telemarketing solicitation:

- A. If someone calls to say you have won a prize, you can just hang up the phone.

¹⁷ AARP, *Consumer Fraud: Telemarketing Fact Sheet* (1994).

¹⁸ Harris, *Telephone-Based Fraud: A Survey of the American Public* (1992).

- B. Never buy anything over the phone unless you initiated the call and are dealing with a reputable mail order firm.
- C. Never make a buying decision at the time of the sales pitch. Always give yourself at least 24 hours to think it over.
- D. Beware of filling out mail order solicitations that say you have won a prize. Most of them are looking for potential victims to call.
- E. If you have questions about whether a solicitation is legitimate, call the Office of the Attorney General, Consumer Protection, at 207-626-8849 and the National Fraud Information Center at 1-800-876-7060.

Make sure you get placed on Maine's Do Not Call list and Do Not Mail list. In a few months you will have a significant reduction in telemarketing calls and junk e-mails. *See* § 28.13 in this Guide.

Remember, never give out your social security number, credit card number or checking account number unless you initiated the contact. Identity theft is an increasingly dangerous possibility. *See* § 28.12 for what to do if your identity has been "stolen."

§ 21.6. Contests And Sweepstakes

Telemarketers use a variety of scams, from phony prize promotions to offers of "pre-paid" subscriptions, to fleece consumers. Some of the telemarketers illegally debited consumers' checking accounts without their authorization while others specifically targeted senior citizens. In some cases consumers who were told they were receiving special "promotion offers" paid hundreds of dollars in "shipping and handling" fees. The fees far exceeded the standard subscription rates for the magazines. According to the FTC, in other scams, consumers who never agreed to order magazines at all, were threatened and badgered in attempts to collect inflated bills. In at least one case, the telemarketers sent consumers bogus documents stating that the consumers had been sued to intimidate consumers into paying for subscriptions they did not want.

The Federal Deceptive Mail Prevention and Enforcement Act strictly prohibits false representations in sweepstakes promotions, such as the recipient is a "winner," unless that person has actually won a prize.

The elderly are very susceptible to unscrupulous contests and sweepstakes schemes. One convicted telemarketer said that he became a telemarketing millionaire before his twenty-eighth birthday because he understood a few things about the psyche of older people: they are lonely, they have financial insecurities that date back to the Depression, and if they get caught in a scam, they are too proud to admit it. "It is incredibly easy to con a person who remembers his or her mother having to pawn their wedding band to put food on the table... Even when an elderly victim didn't want to play anymore, it was easy to keep the game and the money going by threatening to expose them to either their spouse, their neighbors, or even to take them to court," the convicted felon said.

Therefore, the elderly can easily fall victim to contest and sweepstakes promotions that make promises that are clearly deceptive. AARP¹⁹ states that if a contest promoter asks you to do any of the following in order to collect your prize, it should be a "red flag" that this may not be a legitimate sweepstakes:

- A. **Pay money up front.** A promoter will demand possibly several hundred dollars, and often by overnight delivery, to make a "refundable" deposit, to "prepay taxes," or to cover

¹⁹ AARP, *Contests and Sweepstakes—Don't Be A Loser*, (1994).

shipping and handling. In a legitimate sweepstakes, you need not pay anything to collect your prize. If you have won merchandise, the promoter will pay for delivery; if you have won cash, the promoter will withhold taxes or report the winnings to the IRS.

- B. **Give a credit card number.** Legitimate sweepstakes do not require that you do this to establish your eligibility. You should never give a credit card, checking account or social security number over the phone to a stranger, because this can result in unauthorized charges to your account.
- C. **Act immediately.** You may be pressured into acting quickly, with little or no time to verify the caller's identity. Be particularly wary if you are called in the evening or on weekends.

§ 21. 7. Living Trusts

A living trust is a written document that lets you control the distribution of your property after your death, without the property or money placed into the trust needing to go through probate. This can reduce the length of time before your property is distributed after your death. Several groups around the country have been aggressively promoting the sale of living trusts to older Americans. They use slick promotional materials and often indicate to consumers that they must act quickly, in order to take advantage of the offer. Be very wary of buying a living trust package sold in this way. AARP provides the following advice:²⁰

- A. A living trust should be individualized to your particular needs and wishes, whereas living trust “packages” or “kits” generally are not.
- B. Companies selling these packages often charge much more than an experienced attorney would charge.
- C. Sellers of these packages often greatly exaggerate the cost and delay of probating a will and falsely claim that creditors will never be able to reach assets placed in a living trust.
- D. Trust documents often are not drafted by attorneys or are written by attorneys who are not licensed in the consumers' state; the documents may not comply with the appropriate state law.
- E. Sellers do not always tell consumers that they must transfer property into the trust in order to enjoy the benefits of the trust arrangements.
- F. Insurance agents who sell trust packages potentially can get access to the consumer's financial information and often try to sell the consumer additional products like annuities and life insurance.

Consumer Reports cautions that a living trust is no estate-planning panacea.²¹ *Consumer Reports* suggest you should be aware of the following.

- A. A living trust will not save you any money in taxes.
- B. Even with a living trust you need to watch your assets. A living trust is not complete unless the assets you want to protect are properly re-titled to show that the trust—and not you personally—is the owner. For example, any bank or investment account you own in your name must be transferred to the ownership of the trust.
- C. Some assets do not belong in your trust at all. For example, retirement accounts should not be transferred to the trust.

²⁰ AARP, *Consumer Fraud: Living Trust* (1994).

²¹ *Estate planning: Do You Need a Living Trust?*, *Consumer Reports* 54-55 (February, 1997).

- D. Do not overpay to set up a living trust. Depending on your net worth, setting up a proper trust will cost anywhere from \$600.00 to \$2,000.00 in legal fees. You may have to pay your attorney a small fee—typically \$200.00 or so—to make periodic adjustments to update your living trust as your assets, the law or family status change.

In 1992 the Maine Attorney General sued the American Association of Senior Citizens (AASC). This “organization” was contacting elderly people and attempting to persuade them they needed a revocable Living Trust in order to avoid the costs of probating a will. The AASC’s sales pitch was very deceptive. After similar court actions in other states, AASC has now gone out of business. We strongly recommend you consult with a local lawyer for help in drafting such documents.

§ 21. 8. Social Security Schemes

Many older citizens are dependent on Social Security income. Therefore, they might be less suspicious than they should be when they receive in the mail an official-looking brochure that suggests their Social Security income may be in danger and they must spend money to help “protect” their benefits. AARP suggests that the misleading statements in these mailings often fall into one of the following categories:

- A. Misrepresenting the company as a government agency;
- B. Charging a fee for services provided free by the Social Security Administration or by local older citizen advocacy organizations;
- C. Selling “required” items such as laminated Social Security cards;
- D. Conducting fundraising activities among Social Security recipients, with the added incentive of scare tactics (for example, suggesting that failure to donate will keep the bogus fundraising group from lobbying and thereby saving benefits from government budget cuts);
- E. Conducting highly suspicious “Sweepstakes” contests to entice older citizens into purchasing other services.²²

For questions concerning Social Security, consumers should contact their local Social Security office or call 1-800-772-1213.

§ 21. 9. Protect Your Savings

The financial exploitation of elders is increasingly common. Elderly persons can lose all or part of their savings due to a con artist, a fake charity, an unscrupulous contractor, or even a family member or acquaintance who behaves unethically. One important danger sign is if an elderly person suddenly is making large withdrawals from his or her bank. If you think you or someone you know may be the victim of a financial exploitation call DHS Adult Protective Services at its 24-hour number: 1-800-624-8404.

Here are some ways you can protect your savings:²³

- A. Do not be fooled by common scams. For example, never give your money to anyone who claims to need your help investigating a dishonest bank employee or who claims to have just found a large sum of cash.

²² AARP, *Bargains of the Month: Pay Double For Nothing* (1990).

²³ See Massachusetts Department of Attorney General, *It’s Your Future—Protect Your Savings* (1995).

- B. Be very careful if someone comes to your door and claims to be a utility worker or town employee. Carefully check their identification and credentials *before* you let them into your house.
- C. Pay with a check rather than cash. This will allow you to create a “paper trail” of transactions, if necessary.
- D. Do not give your ATM PIN number or other financial information to strangers or anyone else who does not need to know it.
- E. If you do not use your ATM card, cancel it.
- F. Do not give your credit card number over the phone unless *you* placed the call.
- G. If you have been told that you have just won a prize, you most likely have *not*.
- H. If you receive a charitable solicitation, contact the Maine Department of Professional and Financial Regulation and make sure that the charity is registered with the State.
- I. Include a compensation clause in any “power of attorney” agreement that you might enter into. Before assigning a power of attorney, make sure you understand the scope of the agreement and the authority you are giving to your agent. *You should also specify the compensation, if any, to be paid to your agent.* Remember, even if your agent has power of attorney, the agent cannot make gifts to himself or herself unless you specifically said so in the power of attorney agreement.
- J. Do not give away property to anyone in exchange for promises of life-long care. If you are considering such a move, discuss the arrangement with a trusted friend or advisor. Document the agreement and specify the compensation, if any, to be paid to your caregiver. Maine has a specific law to protect the elderly from financial exploitation in which the elderly transfers real estate or substantial personal property to a friend, neighbor or relative for no consideration or else in exchange for a vague promise of care and support.²⁴ Never sign anything you do not understand. Plan ahead.
- K. Protect your money. Your bank may be able to help you protect your money by arranging your accounts to control access to your funds or allow trusted friends to monitor your banking transactions.

§ 21. 10. Hearing Aids

Millions of older Americans suffer from hearing loss. Hearing aids should not be prescribed without a test by a licensed audiologist or hearing aid dealer. Maine has specific laws which provide specific consumer protections including:²⁵

- A. Persons fitting or selling hearing aids must be licensed by the State and at the time of sale must deliver a written contract that includes the complete terms of the sale, any warranty terms, and the following conspicuous notice:

Any examination or examinations or representation or representations made by a licensed hearing aid dealer and fitter in connection with the fitting and selling of such hearing aid or aids is not an examination, diagnosis or prescription by a person licensed to practice medicine in this State and therefore must not be regarded as medical opinion or advice.

²⁴ See 33 M.R.S.A. § 1021; *see also Reubsamen v. Maddocks*, 340 A.2d 31 (Me. 1975) (illegal for a person to use a confidential relationship to financially exploit an elderly person).

²⁵ 32 M.R.S.A. § 1658-C.

Failure to adhere to this required written contract is a violation of the Maine Unfair Trade Practices Act.

- B. This contract must also state that the purchaser may cancel the transaction if he consults an audiologist or a physician with specialized training in the field and receives in writing a statement that the hearing aid is not advisable and lists audiological or medical reasons why not.²⁶
- C. The Maine statute also requires revocation of the hearing aid dealer's license for the following offenses: fraud or deceit; unethical conduct; selling without proper testing; and negligence.²⁷ If a licensee's actions are so severe as to result in license revocation then the actions would also constitute a violation of the Maine Unfair Trade Practices Act.

If you believe you suffer from a hearing loss, your best course of action would be to see a physician first. Some hearing problems can be medically or surgically corrected. If not, your physician can refer you to a reputable audiologist or dealer. You may wish to have a family member or friend accompany you.

Further, both the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA) have brought numerous actions against deceptive hearing aid sale practices. Here is the National Consumer Law Center's discussion of some of these enforcement actions:²⁸

The FTC pursued case-by-case enforcement actions, and violations of the FTC act have been found where a seller misrepresented a hearing aid's benefits, performance, or efficacy. Such misrepresentations include false claims that the hearing aid is a new invention, is helpful regardless of the hearing disability, will return hearing to normal, or will prevent hearing deterioration. Another misrepresentation is stating that "hearing aids in both ears will perform better, that there is a permanent source of power, or that the aid is invisible when worn. It is also deceptive to represent government approval, indicate medical training for sales personnel, or misrepresent the guaranty.

The FTC recently signed Consent Decrees with seven hearing aid retailers with more than 30 offices in California, New York and Massachusetts, based on allegations that the sellers' Yellow Pages advertisements appear to imply that Medicare would pay the cost of hearing tests and /or aids. In fact, Medicare does not cover hearing aids and pays for hearing tests only when a physician orders them to diagnose a medical problem.

The FDA also regulates the advertising and sale of hearing aids, pursuant to its authority to regulate medical devices. The FDA has issued regulations mandating that certain information be provided to a potential hearing aid purchaser.²⁹ For example, FDA regulations provided that a hearing aid cannot be sold unless the buyer first receives a medical evaluation from a licensed physician. A purchaser over the age of 18 can, however, sign a written waiver of this requirement, but the dispenser must inform the purchaser that the waiver is not in his or her best interest and must not in any way encourage the purchaser to exercise the waiver. This waiver is used so often—85% of hearing aids sold to first time purchasers involve the use of medical waivers—that its value is questionable.

²⁶ 32 M.R.S.A. § 1658-C (4) (D). See *National Hearing Aid Centers, Inc. v. Smith*, 376 A.2d 456 (Me. 1977).

²⁷ 32 M.R.S.A. § 1658-N.

²⁸ See National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 5.11.1 (3d.Ed.)

²⁹ These regulations apply to hearing aid "dispensers," which includes anyone involved in the sale, rental, or lease of hearing aids. See 21 C.F.R. § 801.421 (1993).

§ 21.11. Reverse Mortgages

The elderly should be on the watch for a potential new fraud that seeks to take advantage of their home equity. It springs from the “Reverse Mortgage,” which is a legitimate loan vehicle that was developed to allow seniors to raise their standard of living through a loan that would draw on the equity that they have acquired in their home. Such a loan allows seniors to continue to live in their home but to have access to additional cash. Seniors can make use of a Reverse Mortgage if they are over the age of 62 and either own their home outright or have a large equity stake in their home.

One way to understand Reverse Mortgages is to realize that they are like the traditional mortgage, only in reverse. You do not make a payment to the bank each month; the lender pays you.³⁰

Steven D. Hannan, a consumer writer, believes that Reverse Mortgages will become a major source of fraud against the elderly, simply because the selling of Reverse Mortgages lends itself so well to the tricks of telemarketing.³¹ Mr. Hannan suggests that for a senior to significantly benefit from a Reverse Mortgage, he or she should be over the age of 70 and have an equity stake in his or her home in excess of 75%. Mr. Hannan believes other concerns are:

- A. Interest rates on this type of loan might be higher and are charged on a compound basis;
- B. Application fees, points, closing costs, and insurance also might be higher than other types of loans;
- C. An “estate planner” might charge the senior as much as \$6,000 to arrange a Reverse Mortgage when a fairer price might be closer to \$1,200.
- D. Interest rates are not deductible on your income tax unless you repay the loan in full;
- E. There will be less equity for and your heirs in the future.
- F. There are drawbacks to getting the mortgage as a lump sum. Not only does this arrangement give planners the chance to collect their fee immediately but it also sets the senior up for all of the other scams available to telemarketers to steal this money. These scams include a double dip by talking the senior into purchasing an annuity for an additional commission or selling fraudulent investments or scam sweepstakes.

Never enter into a Reverse Mortgage without having your own bank or lawyer review the contract and assure you that it is in your best interest.

§ 21.12. Financial Exploitation of The Elderly

The Department of Human Services, in combination with Maine banks, has initiated the Maine Reporting Project for Financial Institutions. The purpose of this Project is to quickly spot suspicious bank withdrawals by elderly persons. If a bank employee suspects an elderly person is withdrawing money because of a fraudulent scam or exploitation by a relative or friend, the bank is told to respond in two ways:

- A. If the bank suspects possible criminal fraud it can call the Attorney General Consumer Protection Division (1-800-436-2131) and ask to speak to an attorney.
- B. If the bank suspects financial exploitation, it can report the matter to Adult Protective Services (1-800-624-8404).

³⁰ See 9A M.R.S.A. § 8-103 (1) (H-1).

³¹ Steven D. Hannan, *Reverse Mortgages: The Mother Lode for Telemarketing Crooks*, NACAA News 1 (July, 1997).

§ 21.13. Legal Services For The Elderly

A wonderful, no-cost resource for seniors with legal problems is Legal Services For The Elderly. Legal Services for the Elderly helps Maine seniors age 60 and over in many civil (non-criminal) cases. LSE has offices in Augusta, Bangor, Lewiston, Portland and Presque Isle, as well as a statewide toll-free Hotline (voice, TTY and language line translation services). All of LSE's services are free and confidential. LSE can be reached as follows: 1-800-750-5353, 1-270-623-1797, TTY, 1-207-623-7770.

