

TWENTY-FIRST CENTURY ADVERTISING AND THE PLIGHT OF THE ELDERLY CONSUMER

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I. INTRODUCTION

The twenty-first century inundates consumers with an increasing barrage of advertising.¹ Advertising's effects only increase as Americans continue to consume media at a high rate.² There is a general concern about advertisements directed at younger audiences.³

1. *Total US Ad Spending to See Largest Increase Since 2004*, EMARKETER.COM (July 2, 2014) <http://www.emarketer.com/Article/Total-US-Ad-Spending-See-Largest-Increase-Since-2004/1010982> (total spending on ads in the United States for 2015 was projected to be \$189.38 billion and it is estimated that companies will spend \$200 billion for 2016)

2. Jan Zverina, *U.S. Media Consumption to Rise to 15.5 Hours a Day-Per Person-by 2015*, UC SAN DIEGO NEWS CTR. (Oct. 23, 2015, 9:45 PM), http://ucsdnews.ucsd.edu/pressrelease/u.s._media_consumption_to_rise_to_15.5_hours_a_day_per_person_by_2015.

3. See BRIAN L. WILCOX ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 2 (2004); see also Victor Strasburger, *Children and TV advertising: Nowhere to Run, Nowhere to Hide*, 22 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 185 (2001) (analyzing the negative impact of commercials on children). See generally Jin Kim, *The Institutionalization of YouTube: From User-Generated Content to*

However, more advertisements may be lurking for those less young at heart. The majority of the wealth in the United States is held by those over the age of fifty-five,⁴ and companies have not overlooked this. The effect of advertising on the elderly is more effective and perhaps more dangerous than the general population may understand.

This comment analyzes the effect that advertisements have on the elderly as a whole.⁵ First, it describes how the United States is experiencing dramatic growth in the elderly population, and how that population has experienced growth in the extent of its wealth. Then, the comment describes the remarkable effect that the older demographic has had on advertising content and tactics. Second, it addresses problems associated with an elderly population such as financial elder abuse and elder susceptibility. More specifically, this comment explores the role of regulatory agencies and the appropriate response to the growing rise of elder abuse in the United States. The rise in elder susceptibility and elder abuse calls for stricter regulation on advertisements at the state and federal level.

II. THE ELDERLY BY THE NUMBERS

The elderly population of the United States is rapidly growing as the baby boomers⁶ enter their golden years and medical advancement continues to extend life expectancy.⁷ Recent census numbers show people who are sixty-five years old or older number over 44.7 million.⁸ They are a growing 14.1% segment of the United States population, statistically representing about one in every seven

Professionally Generated Content, 34 MEDIA CULTURE & SOC'Y 53, 56 (2012) ("Because of YouTube's popularity, industries have shown a deep interest in monetizing it. Since being purchased by Google, YouTube has adopted a new e-commerce model; it puts banner ads in videos or in YouTube pages and shares the revenue with the copyright holders of the videos.").

4. RICHARD FRY, ET AL., PEW RESEARCH CTR., THE RISING AGE GAP IN ECONOMIC WELL-BEING 10 (2011).

5. For the purpose of this article "elderly person" means any person six-five or older.

6. In this article, I define "baby boomers" as those people who were born between 1945 and 1964.

7. See John P. Bunker, *The Role of Medical Care in Contributing to Health Improvements Within Societies*, 30 INT'L J. EPIDEMIOLOGY 1260 (2001); see also NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2014: WITH SPECIAL FEATURES ON ADULTS AGED 55-64 (2014).

8. Population Division, Annual Estimates of the Resident Population for Selected Age Groups by Sex for the United States, States, Counties, and Puerto Rico Commonwealth and Municipalities: April 1, 2010 to July 1, 2013, CENSUS.GOV (June 2013), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

Americans compared with 13% in 2010 and 9.8% in 1970.⁹ By 2050, the surviving baby boomers will be over the age of eighty-five, but that will not slow down the growing numbers.

The eighty-five-years-or-older population is projected to triple from 6 million in 2013 to 14.6 million in 2040.¹⁰ Current estimates predict that by 2050 there will be close to 112 million elderly people in the United States, more than twice that in 2013.¹¹ Although people who are sixty-five or older represented 14.1% of the population in the year 2013, the United States Census Bureau projects the segment to grow to 21.7% of the population by 2040.¹² The rapid growth of the elderly demographic will continue to change the way businesses use advertising techniques and how legislatures determine public policy in response to these changes. These dynamics already demonstrate the need for businesses to focus their advertising attention on this market.

One of the main reasons for an expanding elderly population is the advancement in life expectancy. People reaching age sixty-five have an average increase in life expectancy by an additional 19.3 years (20.5 years for females and 17.9 years for males)¹³ compared to 1970, in which the life expectancy was an additional 10 years.¹⁴ As the population of United States ages, there is also growing trend among the elderly to stay independent. About twenty-eight percent (12.5 million) of noninstitutionalized older people live alone (8.8 million women and 3.8 million men).¹⁵

Relative to other developed countries in the world, the United States is projected to have one of the largest elderly populations

9. *Id.*; see JENNIFER ORTMAN ET AL., ECON. & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 3 (2014) ("The population is also expected to become much older. By 2030, more than 20 percent of U.S. residents are projected to be aged 65 and over, compared with 13 percent in 2010 and 9.8 percent in 1970.").

10. *Projections of the Population by Sex and Selected Age Groups for the United States: 2015 to 2060*, tables 1, 5, CENSUS.GOV (2014).

11. POPULATION ESTIMATES AND PROJECTIONS, U.S. CENSUS BUREAU, PROJECTIONS OF THE POPULATION BY AGE AND SEX FOR THE UNITED STATES: 2010 TO 2050 (NP2008-T12) (2008).

12. *Id.*

13. KENNETH KOCHANER ET AL., NAT'L CTR. FOR HEALTH STATISTICS, MORTALITY IN THE U.S., 2013 NCHS DATA BRIEF, NO. 178, 1 (2014).

14. See *QuickStats: Life Expectancy at Birth, by Year—United States, 1970–2003*, CENTERS FOR DISEASE CONTROL & PREVENTION (Apr. 15, 2005), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5414a6.htm>.

15. Admin. on Aging, *Living Arrangements*, U.S. DEP'T HEALTH & HUMAN SERVS. (Oct. 23, 2015), http://www.aoa.acl.gov/Aging_Statistics/Profile/2014/6.aspx.

falling short of only highly populated countries like China and India.¹⁶ Other countries, like Japan, have reached high volumes of elderly citizens and are experiencing the challenges of a growing elderly population.¹⁷ Businesses see past the social challenges and view this demographic change as an opportunity. They have already turned their gaze to the elderly, given the amount of wealth owned by this age group.

A. *Wealth Percentages*

Households headed by individual people sixty-five or older reported median income in 2013 of \$51,485.¹⁸ While the median net worth in the United States was \$71,635 in 2009, the average household headed by adults ages sixty-five and older had a net worth of \$170,494.¹⁹ This amount was forty-seven times as much net wealth as the typical household headed by someone in the younger age group.²⁰ Additionally, in 2009, households with adults aged sixty-five and older possess forty-two percent higher median net worth (assets less debt) than households headed by their similarly aged counterparts in 1984.²¹ The elderly have become wealthier. From 2000 to 2011 the total share of wealth held in retirement accounts in the United States increased from eighteen to thirty percent.²² Whether that is because of retirement accounts, pension plans, real estate investments, or the fact the elderly may have more time to shop, businesses

16. JENNIFER ORTMAN ET AL., *supra* note 9, at 20.

17. See generally Mariko Oi, *Who Will Look After Japan's Elderly*, BBC NEWS (Mar. 15, 2015), <http://www.bbc.com/news/world-asia-31901943> (177,600 people in Japan aged between 15 and 29 are caring for elderly family members and more than a quarter of Japan's population is over age sixty-five).

18. Administration on Aging, *Income*, U.S. DEP'T HEALTH & HUMAN SERVS. (Oct. 23, 2015), http://www.aoa.acl.gov/Aging_Statistics/Profile/2014/9.aspx.

19. PAUL TAYLOR, ET AL., PEW RESEARCH CTR., *THE OLD PROSPER RELATIVE TO THE YOUNG: THE RISING AGE GAP IN ECONOMIC WELL-BEING 10* (2011) (estimating that the wealth of American households in 1984, 2005 and 2009 and income of U.S. households in 1967 to 2010.). *Contra* Beat the Press, *Time to Bury Pew Report on Wealth by Age Group*, CTR. ECON. & POL'Y RES. (Oct. 24, 2015, 1:00 PM), <http://www.cepr.net/blogs/beat-the-press/time-to-bury-pew-report-on-wealth-by-age-group> (criticizing the media's understanding of net worth and the errors that occur when comparing age groups).

20. TAYLOR, ET AL., *supra* note 19, at 1.

21. *Id.*

22. Alfred Gottschalck et al., *Household Wealth in the U.S.: 2000 to 2011*, U.S. CENSUS BUREAU 2 (2011), <https://www.census.gov/people/wealth/files/Wealth%20Highlights%202011.pdf> ("interest-earning assets" includes assets such as interest checking, savings, and money market accounts, and "retirement accounts" includes 401(k) and thrift accounts, Keogh accounts, and IRAs).

understand this data and the opportunities therein.

There are countervailing economic forces of note. In 2011, the total healthcare expenses for the elderly were \$414.3 billion, with the average annual expense per person around \$9,863.²³ Also nine out of ten individuals age sixty-five and older receive social-security benefits, which represents about 39% of the income of the elderly.²⁴ In 1962 social-security benefits represented about 31% of income for the elderly.²⁵ For retired workers, this is an average monthly benefit of \$1,335.²⁶ While marketing efforts reach out to this wealthy group, realistically, purchasing power may be limited as healthcare costs increase with age. However, businesses still have the opportunity to access the elderly market by selling essential medical products to the elderly.

B. Target Audience for Advertising

The average consumer only has to watch a few prime-time television shows to realize there still is a focus on the younger demographic, but the trend may be shifting. In the 1990s, researchers began to analyze the appearance of older adults in the media. At that time, the amount of advertisements with older actors or commercials aimed at the elderly was low compared to the growing population.²⁷ In fact, an examination of prime-time programming found only three percent of the characters in major and supporting roles were elderly, in comparison to the percentage of the elderly population.²⁸

However, the times are shifting as businesses want to target elderly consumers who are wealthy. In fact, the media has termed this effect the “gray dollar” as companies fight to capitalize on elderly consumers.²⁹ The trend was recognized as early as the mid-1980s in

23. LISA MIREL, ET AL., AGENCY FOR HEALTHCARE RES. & QUALITY, TRENDS IN HEALTH CARE EXPENDITURES FOR THE ELDERLY, AGE 65 AND OVER: 2001, 2006, AND 2011, at 1 (2015) (“A similar proportion (about 96 percent) of the elderly had some expenses for health care in [the three years]. . . . The average annual expense per person with expenses was about \$1,000 higher in 2011 (\$9,863) than 2001 (\$8,815 in 2011 dollars).”).

24. *Social Security Basic Facts*, SOC. SECURITY ADMIN. (Oct. 13, 2015), <https://www.ssa.gov/news/press/basicfact.html>.

25. SOC. SEC. ADMIN., INCOME OF THE AGED CHARTBOOK, 2012, at 7 (2014).

26. *Id.* at 16.

27. See Nancy Signorelli, Aaron Bacue, *Recognition and Respect: A Content Analysis of Prime-Time Television Characters Across Three Decades*, 40 *SEX ROLES* 527, 527–44 (1999).

28. *Id.* at 537.

29. John F. Wasik, *Going After the Gray Dollars*, N.Y. TIMES, Feb. 5, 1989,

other outlets as researchers started to notice the increase of the elderly in magazine advertisements.³⁰ Companies like T-Mobile and Emporia Telecom began creating innovative products like TalkPremium, a phone for seniors that comes equipped with a large keypad and is built for voice and text messaging.³¹ Amazon has also joined the market, creating an exclusive section on their website just to target those over the age of fifty.³² Other companies like Procter & Gamble Co. started research and development groups with universities to produce product ideas for consumers who are age fifty and over.³³

The marketing and advertising industry follows the demographic numbers. This is especially true in the realm of traditional television, as the average age of a viewer is fifty-four or older,³⁴ and fifty-three

<http://www.nytimes.com/1989/02/05/business/going-after-the-gray-dollars.html?pagewanted=all> (other countries, such as Japan, have already started marketing the elderly at an increased rate creating similar catch phrases as the “grey yen”); see *Chasing the Grey Yen*, THE ECONOMIST, Apr. 11, 2015, <http://www.economist.com/news/business/21647980-japanese-firms-have-wisdom-hand-down-about-selling-elderly-chasing-grey-yen> (Japanese companies have started changing their advertisement techniques and advanced their product lines to reach the large elderly population); see also Lilian Lin, Laurie Burkitt, *Targeting Grandpa: China’s Seniors Hunger for Ads*, WALL ST. J., Feb. 1, 2013, <http://blogs.wsj.com/chinarealtime/2013/02/01/targeting-grandpa-chinas-seniors-hunger-for-ads/> (“Only 8% of elderly Chinese consumers feel that marketers adequately target them with advertising and products. The study, which surveyed 600 Chinese elderly in 10 cities and 3,000 online, said seniors are eager for more offerings geared to them, such as food, beverages and travel services.”).

30. See Anthony C. Ursic et al., *A Longitudinal Study of the Use of the Elderly in Magazine Advertising*, 13 J. CONSUMER RES. 131, 131–133 (1986).

31. Kevin J. O’Brien, *Electronics Reach Out to the Ends of the Age Spectrum*, N.Y. TIMES, Sept. 5, 2009, at B4.

32. See *50+ Active and Healthy Living*, AMAZON.COM, <http://www.amazon.com/b?node=5856180011> (last visited Mar. 20, 2016).

33. See Matthew Boyle, *Aging Boomers Stump Marketers Eyeing \$15 Trillion*, BLOOMBERG BUS. (Sept. 16, 2013), <http://www.bloomberg.com/news/articles/2013-09-17/aging-boomers-befuddle-marketers-eying-15-trillion-prize> (P&G and a dozen corporate partners like Boeing Co. and Oreo cookie maker Mondelez International, Inc. have completed thirty-seven projects, involving more than fifty university faculty and expert advisers, about eighty senior citizens who provide feedback, and over 500 students of design, architecture, engineering, business, and nursing to develop products and advertisements for the elderly).

34. See Meredith Blake, *The Big Bang of Older TV Viewers*, L.A. TIMES (Feb. 22, 2014), <http://www.latimes.com/entertainment/tv/showtracker/la-et-st-aging-tv-audience-20140223-story.html>; Andy Fixmer, *From CBS, Advertisers Get the Older Viewers They Want*, BLOOMBERG BUS. (Sept. 6, 2012), <http://www.bloomberg.com/news/articles/2012-0906/from-cbs-advertisers-get-the-older-viewers-they-want>; Cecilia Kang, *TV Is Increasingly for Old People*, WASH. POST (Sept. 5, 2015), <https://www.washingtonpost.com/news/business/wp/2014/09/05/tv-is-increasingly-for-old-people/>; Derek Thompson, *Half of Broadcast TV Viewers Are 56 and Older-Yikes*, THE ATLANTIC (Mar. 5, 2015), <http://www.theatlantic.com/business/archive/2014/03/half-of-broadcast-tv-viewers-are-54-and-older-yikes/284256/>.

percent of Americans over sixty-five now use the internet or e-mail. The Census Bureau has reported 96.8% of people sixty-five and over watch television.³⁵ The internet usage numbers are expected to rise significantly as more baby boomers retire.³⁶ Mather LifeWays Institute on Aging surveyed 600 senior living organizations representing more than 1,000 communities from fifteen states.³⁷ From this data, the surveyors were able to identify the top emerging trends in senior living communities. The top trend showed that technology will play a key role in sustaining independent lifestyles.³⁸ In fact, many senior facilities are expected to offer wireless internet access, computer training, and even smart phones.³⁹

Companies have taken advantage of this change by analyzing the system from another angle. Marketing agencies, such as Coming of Age, have created successful boutique marketing firms focused solely on helping companies like AT&T and Transamerica Insurance reach the elderly population.⁴⁰ Focus on Aging, a Chicago-based company, has even created a marketing agency focused on helping companies reach the elderly through advertising, social media, and event planning.⁴¹

As companies start to include older adults, these advertisements have been analyzed and criticized in some quarters for their portrayals.⁴² The concern is the elderly typically appear in

35. WILLIAM DOUGLAS & SUZANNE BUCK, TELEVISION AND THE ELDERLY IN THE UNITED STATES 304 (2009).

36. KATHRYN ZICKUHR & MARY MADDEN, PEW INTERNET PROJECT, OLDER ADULTS AND INTERNET USE 2 (2012).

37. Mather Lifeways Inst. on Aging, *Survey of Trends in Senior Living*, MATHERLIFEWAYS INST. ON AGING, <http://www.matherlifewaysinstituteonaging.com/senior-living-providers/survey-of-trends-in-senior-living/> (last visited Mar. 20, 2016).

38. *Id.*

39. *Id.*

40. See Coming of Age, *About Us*, COMING OF AGE (Oct. 26, 2015, 8:30 PM), <http://www.comingofage.com/about-us-2/> (marketed as “The Baby Boomer & Senior Marketing Agency”).

41. Focus on Aging, *About Us*, Coming of Age, <http://www.focusonaging.com/about/> (last visited Mar. 20, 2016) (“As an established Chicago-based marketing, consulting and recruitment firm, Focus on Aging brings extensive experience for dynamically growing your business.”).

42. Monica M. Lee et al., *Representations of Older Adults in Television Advertisements*, 21 J. OF AGING STUD. 23, 29 (2007); see also Erin Lamb & Jim Gentry, *The Denial of Aging in American Advertising: Empowering or Disempowering?*, 22 INT’L J. AGING & SOC’Y 35, 35–37 (2013); Tom Robison & Don Umphery, *First- and Third-Person Perceptions of Images of Older People in Advertising: An Inter-Generational Evaluation*, 62 INT’L J. AGING & HUM. DEV. 159, 159–73 (2006) (examining perceptions of the elderly through advertising).

advertisements for medications, medical services, and other similar products. These depictions reinforce stereotypes of the elderly being over concerned with physical functions and financial vulnerability.⁴³ A recent study in the *Journal of Aging Studies* expressed the following concerns:

Our primary concern is that the overall picture of older adults that emerges from this snapshot of television advertisements misrepresents aging in ways that could be unfortunate for many viewers. These advertisements underrepresent older women, over represent older Caucasians, and they provide a skewed perspective in the characterization of older adults.⁴⁴

Nevertheless, the advertisements are being noticed. If the depictions of older people backfire, marketing departments will learn how to perfect their advertising approach.

Furthermore, recent studies estimate the average consumer has a daily media and advertisement exposure (TV, radio, internet, newspapers, and magazines) of 9.83 hours.⁴⁵ The average consumer is exposed to 362 advertisements per day, while 150 of those advertisements are most likely noticed by the consumer.⁴⁶ Looking at daytime television or particular cable channels, like the Fox News Channel, many advertisements are not designed to reach the younger population.⁴⁷ As the elderly expand their technological horizons, television is not the only media source of concern.⁴⁸

43. See Lee et al., *supra* note 42, at 28.

44. *Id.* at 29.

45. Press Release, Media Dynamics, Inc., Adults Spend Almost 10 Hours Per Day With The Media, But Note Only 150 Ads (Sept. 22, 2014) (<http://www.mediadynamicsinc.com/uploads/files/PR092214-Note-only-150-Ads-2mk.pdf>).

46. *Id.*

47. See generally Bill Carter, *Fox Viewers May Be Graying, but Their Passion Still Pays*, N.Y. TIMES, July 22, 2013, at B1 (“Fox News, for the last two years, has had a median age of 65-plus in its ratings both for the full day and for prime time . . . cable systems now pay Fox News one of the highest per-subscriber fees in television, 94 cents a month, topped in cable television only by a few networks.”).

48. See Kimberly M. Lovett, Timothy K. Mackey, *Online Threats to Senior Safety: The Direct-To Consumer Medical Marketplace and Elder Abuse*, 9 NAT’L ACAD. ELDER L. ATT’Y J. 91 (2013) (reviewing the aging population’s unique susceptibility to pharmaceutical advertisements and arguing that the current laws are not properly addressing online harms to seniors and proposing reform to current definitions of elder abuse); see also Eric L. Carlson, *Phishing for Elderly Victims: As the Elderly Migrate to The Internet Fraudulent Schemes*

To summarize, the elderly population is growing rapidly and consuming more targeted media and technology. This expanding group holds key purchasing power with the potential to spend a significant amount of wealth. Companies are increasing their advertisements towards the elderly in order to access a lucrative market. Naturally, one would expect supply to meet this type of demand. However, these changing markets also raise new problems that will need to be addressed by regulators and lawmakers.

III. PROBLEMATIC ISSUES

As marketers shift toward targeting the elderly consumer, precautions must be taken. Companies have long ago discovered some target audiences cannot be advertised to in the same manner as others. Examples of this can be seen with advertisements targeting young audiences.⁴⁹ This is particularly true with the outcry toward harmful substances.⁵⁰ The federal government and the state have chosen to create regulations on advertising based on problematic results for certain consumers, and the elderly should be among those consumers.

A. *The Rise of Elder Abuse*

Many elderly consumers are very capable with their finances and have viable cognitive abilities. Generalizations about the elderly, as with many groups, are often fraught with exceptions. Many sixty-five year olds are happy, healthy, and active, rejecting the typical understanding or notion of what it means to be “elderly.” This is particularly true given increased life expectancy.⁵¹ However, certain statistics need to be recognized in public policy and applied to the

Targeting Them Follow, 14 ELDER L.J. 423 (2006) (“[M]embers of older generations are using the Internet with increasing frequency, and many of them become prime targets of fraudulent schemes against which they have no method of self-defense because of limited knowledge and scarce resources.”).

49. See 15 U.S.C. § 45 (2013); see *Hasbro, Inc.*, 116 F.T.C. 657 (1993) (implementing FTC regulations); see also *Mattel, Inc.*, 79 F.T.C. 667 (1971); J. HOWARD BEALES, FED. TRADE COMM’N, *ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT*, FED. TRADE COMM’N (2004) (reviewing advertising to kids and the FTC).

50. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 11-31, 123 Stat. 1776 (2009) (to protect the public and create a healthier future for all Americans, the Family Smoking Prevention and Tobacco Control Act, signed into law on June 22, 2009, gives FDA authority to regulate the manufacture, distribution, and marketing of tobacco products).

51. KOCHANEK ET AL., *supra* note 13.

law.⁵²

With age comes the inevitable decline of physical vigor and mental awareness. In 2015, over five million people, ages sixty-five and older, suffer from some form of Alzheimer's.⁵³ Some predict that by 2025 this number will increase by forty percent to over seven million.⁵⁴ This number has drawn the attention of the medical community.⁵⁵

A recent study by the National Institutes of Health determined 3.4 million Americans age seventy-one and older—one in seven people in that age group—have dementia.⁵⁶ The elderly are statistically susceptible to dementia in a way that younger individuals are not.⁵⁷ Dementia is defined as, “the loss of cognitive functioning, which means the loss of the ability to think, remember, or reason, as well as behavioral abilities, to such an extent that it interferes with a person's daily life and activities.”⁵⁸

There are different levels and types of dementia that affect a person's cognitive functioning.⁵⁹ Some forms can be devastating while others are milder and less recognizable.⁶⁰ This wide range and variety of dementia should cause some concerns for policy makers as companies spend substantial resources to persuade the elderly to make transactions. The high incidence of dementia creates a host of serious challenges as legislatures determine how to protect the elderly

52. A key element in addressing financial elder abuse is to educate the public regarding the issue. Local and national organizations have been developed to help with this process. *See generally* Nat'l Comm. for the Prevention of Elder Abuse, *About NCPEA*, NAT'L COMMITTEE FOR THE PREVENTION OF ELDER ABUSE (2013) <http://www.preventelderabuse.org/about/> (“The National Committee for the Prevention of Elder Abuse (NCPEA) is an association of researchers, practitioners, educators, and advocates dedicated to protecting the safety, security, and dignity of America's most vulnerable citizens.”).

53. ALZHEIMER'S ASSN, 2015 ALZHEIMER'S DISEASE FACTS AND FIGURES 16 (2015).

54. *Id.* at 24.

55. Nat'l. Inst. on Aging, U.S. Dep't of Health & Human Servs., *One in Seven Americans Age 71 and Older Has Some Type of Dementia*, NAT'L INST. ON AGING (Oct. 30, 2007), <https://www.nia.nih.gov/newsroom/2007/10/one-seven-americans-age-71-and-older-has-some-type-dementia-nih-funded-study>.

56. *Id.*

57. *See* Lawrence Frolik & Alison P. Barns, *An Aging Population: A Challenge to The Law*, 42 HASTINGS L.J. 683, 697 (1991) (noting that most, though apparently not all, dementia is caused by Alzheimer's disease).

58. *Dementia: Hope Through Research*, NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, http://www.ninds.nih.gov/disorders/dementias/detail_dementia.htm#19213_2 (last visited Oct. 20, 2015).

59. *Id.*

60. *Id.*

without restricting the consumer's own rights and personal autonomy. As Lawrence Frolik wrote:

The value of protecting an individual must be balanced against that individual's right to and need for autonomy and independence. Because of the perceived vulnerability of the elderly, it is too easy to see and focus only on the perceived need for protection and to overlook the equally compelling right to autonomy.⁶¹

In the realm of consumer protection, there is a distinct need for the federal government and the states to recognize the unique balance between self-autonomy and proper protection.

A growing concern with dementia is the problem of the elderly person's susceptibility to financial abuse. The elderly population struggles to retain independence without problematic commercial encounters. As the elderly population grows, so does the problem of financial elder abuse. Precise statistics on the amount of elder abuse that occurs are unavailable. This is due to the fact for every one case of financial elder exploitation or abuse reported it is estimated that there are twenty-five more cases that go unreported.⁶²

Financial abuse can include misuse of an elderly person's money without knowledge or permission or denying an elderly person access to his or her own funds or property. Financial abuse that is subject to action is commonly defined as:

When a person wrongfully takes or appropriates money or property of a vulnerable person, without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the vulnerable person.⁶³

The majority of elder abuse takes place at home.⁶⁴ Ninety-five

61. Frolik & Barns, *supra* note 57, at 706.

62. NAT'L CTR. ON ELDER ABUSE, FACT SHEET: ELDER ABUSE PREVALENCE AND INCIDENCE 1 (2005).

63. OR. REV. STAT. § 124.110(1)(a) (2015); *see* CAL. WELF. & INST. CODE § 15610.30 (West 2015); FLORIDA STAT. ANN. § 825.103 (West 2014); REV. CODE WASH. §§ 74.34.015-.020(6) (2013).

64. AM. PSYCHOLOGICAL ASS'N, ELDER ABUSE AND NEGLECT: IN SEARCH OF SOLUTIONS 1 (2015).

percent of the elderly live on their own or with family and not in an institutional setting.⁶⁵ Many elderly can grow isolated and, therefore, more susceptible to fraudulent solicitation practices.⁶⁶ A recent study published by MetLife Mature Market Institute estimates the financial loss by victims of elder financial abuse and exploitation is at least \$2.9 billion dollars.⁶⁷ These numbers create concern regarding how well the elderly are able to keep track of their finances and their susceptibility to influence. In fact, state courts have already had to deal with these matters for over half a century as more civil cases are being filed for the common-law claim of undue influence of an elderly person.⁶⁸

As elder abuse grows, many have called on legislatures to take action.⁶⁹ In 2013, many legislatures responded. Twenty-nine states and the District of Columbia proposed legislation on financial crimes and exploitation against the elderly.⁷⁰ Twenty states enacted legislation or adopted resolutions in 2014.⁷¹ Financial elder abuse statutes typically define an “elderly person” as a person 65 years of age or older and usually add the additional definition of “vulnerable person.”⁷² For example, in Oregon a “vulnerable person” includes: an elderly person; a financially incapable person; an incapacitated person; or a person with a disability who is susceptible to force,

65. *Id.*

66. *See, e.g.,* *People v. Hasslinger*, 771 N.Y.S.2d 589 (N.Y. App. Div. 2004) (affirming defendant’s conviction for conspiracy, grand larceny, and money laundering in connection with his role in stealing over one million dollars from an elderly woman who suffered from Alzheimer’s disease and dementia).

67. METLIFE, *THE METLIFE STUDY OF ELDER FINANCIAL ABUSE 2* (2011).

68. *In re Reddaway’s Estate*, 329 P.2d 886, 891–93 (Or. 1958) (setting forth the various factors for undue influence used in subsequent Oregon cases).

69. Jane A. Black, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws are Failing a Vulnerable Population*, 92 ST. JOHN’S L. REV. 289, 302 (2008); *see also* Reid Johnson, *Eradicating Elderly Exploitation: How Simple Solutions Can Protect the Elderly Population of Texas from Financial Abuse*, 15 TEX. TECH. ADMIN. L.J. 209 (2013) (analyzing Texas elder abuse statutes and proposals for improving senior protections); Taylor Lemick, *Society’s Response to the “Invisible” Abuse of Elders: Understanding and Addressing the Financial Abuse of Society’s Most Vulnerable Citizens*, 23 ELDER L.J. 151 (2015) (examining Illinois’s mandatory reporting laws for elder abuse and neglect, along with other reporting laws across the nation and recommending that new legislation be passed requiring banks and other related entities to act as mandatory reporters for financial elder abuse).

70. *Financial Crimes Against the Elderly: 2013 Legislation*, NAT’L CONFERENCE OF ST. LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2013-legis.aspx#ID> (last visited Oct. 26, 2015).

71. *Id.*

72. OR. REV. STAT. § 124.100(1)(a), (e) (2015).

threat, duress, coercion, persuasion, physical, or emotional injury because of the person's physical or mental impairment.⁷³ The elements for a financial elder-abuse claim include the assertion that there was a taking or appropriation of money or property that belongs to an elderly person and that such a taking was wrongful.⁷⁴

Often, these statutes provide causes of action that contain additional financial incentives such as treble damages and the possibility of attorney's fees.⁷⁵ The theory is that any potential financial elder abuser will be discouraged from committing the act knowing there could be incredibly large financial punishments. However, the number of elder abuse cases continues to increase.

Elder abuse statutes may also include mandatory reporting of abuse and neglect for particular people such as attorneys.⁷⁶ Anyone participating in the making of a report of elder abuse on reasonable grounds and in good faith may have immunity from civil liability.⁷⁷ Often the identity of the individual reporting the suspected abuse is confidential unless the individual consents to their information being released or by court order.⁷⁸ These protections are helpful and have led to numerous cases, but the factors of financial elder abuse, dementia, and elderly consumer still need to be addressed. Financial elder abuse is so prevalent that not even the practice of law itself is untouched.⁷⁹

It is also possible to include claims for undue influence and conversion in a claim for financial elder abuse. Generally, undue

73. *Id.* § 124.100(1)(e).

74. *See* Church v. Woods, 77 P.3d 1150, 1153 (Or. 2003) (analyzing Oregon Revised Statutes Section 124.110). The court in *Church* articulated the elements of a statutory cause of action for financial abuse as follows: "there must be (1) a taking or appropriation (2) of money or property (3) that belongs to an elderly or incapacitated person, and (4) the taking must be wrongful." *Id.* To be "wrongful," the taking or appropriation must be done either with an improper motive or by improper means. *Id.* "Improper" means includes undue influence, misrepresentation, threats, intimidation, and violence. *Id.*

75. OR. REV. STAT. § 124.100(1)(a)-(d).

76. OR. ADMIN. R. § 411-020-0020 (2015).

77. *Id.* § 411-020-0020(2).

78. *Id.* § 411-020-0020(3).

79. *See, e.g., In re Frank P. Letellier, II*, 742 So. 2d. 544, 548 (La. 1999) (holding that an attorney was properly disbarred for violating several of the guidelines for evaluating disciplinary matters concerning commingling and conversion of client funds and noting that the attorney took advantage of an obviously vulnerable victim). *See generally* Donna S. Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & POL'Y 525 (2003) (analyzing consumer protect statutes and how they should apply to attorneys practicing elder law).

influence relates to whether a beneficiary of a transfer of property or property right, by his or her conduct, gained an unfair advantage by means that reasonable persons would regard as improper.⁸⁰ The sentiment undergirding undue influence is that “the law will not permit improper influences to control the disposition of a person’s property.”⁸¹ Because actions for undue influence and conversion do not have the same financial outcome as a claim for financial elder abuse, it is unlikely a claim will be brought unless they can be brought together. Other claims like fraud and conversion may also be included in the petition.⁸²

However, a civil claim for elder financial abuse may only be brought by a guardian, conservator, trustee, personal representative, or attorney-in-fact for a vulnerable person.⁸³ This creates a barrier to recovery if a family member has discovered abuse, but does not hold one of these legal titles. Despite this barrier, states like Oregon have expanded the class of potential defendants. In Oregon, an elderly or incapacitated person may bring an action against a person for permitting another person to engage in physical or financial abuse.⁸⁴ Also, the statute of limitations for financial elder abuse is usually longer than a typical tort statute’s.⁸⁵

80. *Van Marter v. Van Marter*, 882 P.2d 134, 136 (Or. 1994).

81. *In re Reddaway’s Estate*, 329 P.2d 886, 889 (Or. 1958).

82. *See* *Hunt v. Golden*, 532 P.2d 26, 28 (Or. 1975) (awarding punitive damages based on evidence that the defendant knew of the victim’s incompetency when committing fraud). The court in *Golden* stated that “where one obtains property by a contract made with a person he knows to be incompetent and knowingly takes advantage of such incompetency to his own advantage and to the detriment of the incompetent, such action constitutes fraud and will warrant either rescission or an action for damages upon behalf of the incompetent.” *Id.*; *see also* *Lewis v. Devils Lake Rock Crushing Co.*, 545 P.2d 1374, 1378 (Or. 1976) (punitive damages can be recovered in an action for conversion); *Mustola v. Toddy*, 456 P.2d 1004, 1007 (Or. 1969) (“Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.”).

83. OR. REV. STAT. § 124.100(2), (3) (2015) (“A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse.”); *see also id.* § 124.100(2) (defining “incapacitated” as a “condition in which a person’s ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent to meet the essential requirements for the persons physical health or safety.”).

84. *Id.* § 124.100(5) (encompassing employers of care providers where the care provider has engaged in physical or financial abuse of an elderly or incapacitated person and the employer either knows such acts are occurring or should have known of such abuse).

85. *Compare id.* § 124.130 (setting the statute of limitations for abuse of an elderly or incapacitated person at seven years after discovery), *with id.* § 124.110 (providing for a two-

To be clear, aggressive advertisements towards the elderly currently would not be considered a form of elder abuse under current statutes. However, financial exploitation of the elderly will only continue to increase as the elderly population grows and participates in consumer markets. Just as lawmakers and regulators moved to protect younger consumers from undesirable advertising tactics, the future focus should be on how to protect those with diminished processing skills and susceptibility from improper advertising.

B. The Susceptibility of the Elderly in Purchasing and Product Understanding

Cognitive impairment and elder abuse actually applies directly to consumer advertising. While elder abuse often occurs in the home with relatives, commercial elder abuse is of great concern due to the fact that businesses appear trustworthy to an elderly consumer.⁸⁶ The largest proportion of money lost in financial elder abuse is through commercial elder abuse.⁸⁷ Illegal attempts by various industries involving individual perpetrators, or sometimes groups of employees, are increasing.⁸⁸

While most advertising is likely not a direct form of elder abuse, it can be problematic because the elderly are depicted as more easily persuaded and deceived.⁸⁹ Furthermore, they are often less aware of unfair business practices.⁹⁰ The elderly also use fewer informational aids, such as unit pricing and open dating, when making consumer purchases.⁹¹

Moreover, the elderly process information at a slower rate than

year statute of limitations).

86. See J. Parker, *Company Liability for a Life Insurance Agent's Financial Abuse of an Elderly Client*, 2007 MICH. ST. L. REV. 683 (2007).

87. METLIFE MATURE MKT. INST. ET AL., *BROKEN TRUST: ELDERS, FAMILY, AND FINANCES* 1, 15 (2009).

88. *Id.* at 15.

89. Lynn Phillips & Brian Sternthal, *Age Differences in Information Processing: A Perspective on the Aged Consumer*, 14 J. MKTG. RESEARCH 444 (1977); see also Frederick E. Waddell, *Consumer Research and Programs for the Elderly—The Forgotten Dimension*, 9 J. CONSUMER AFFAIRS 164 (1975) (summing up existing knowledge of consumer problems and the needs of older persons and the lack of reliable data).

90. See Gerry Zaltman et al., *Perceptions of Unfair Marketing Practices: Consumerism Implications*, 5 ADVANCES IN CONSUMER RES. 247, 253 (1978).

91. See William Bearden & J. Barry Mason, *Elderly Use of In-Store Information Sources and Dimensions of Product Satisfaction/Dissatisfaction*, 55 J. RETAILING 79 (1979).

young consumers and remember less product-related information.⁹² This is often aggravated by the fact the elderly struggle with limitations in memory capacity and memory strategies.⁹³ Long-term memory has been shown to decline with age, which is particularly true when it comes to the impairments on the source of the information retained by the older person.⁹⁴ As such, an elderly person may not remember if they acquired the information from a family conversation, local newspaper, or an advertisement that has occurred several times throughout their favorite daytime television show.⁹⁵ When information is repeated, people tend to believe it to be more valid and believable than when it is only presented once or a few times.⁹⁶ As discussed previously, the elderly are bombarded with daily advertisements that only increase this “truth factor” in repetition.⁹⁷

Often the elderly have poor source-of-context memory; therefore, if advertisements are at all misleading or even fraudulent in their assertions, it is not as easy for the elderly to determine if the source is credible. This magnifies the problem, especially when they may not even remember the source of the information that they are acting on. Professor Carolyn Yoon analyzes the problem stating:

A major drawback of an increasing flood of information available to consumers is that it can be more difficult to sort through and remember. Although it may be quite adaptive at times to rely on familiarity to make consumer judgments, it can also increase the likelihood of undesirable outcomes for older adults who do not have sufficient motivation or ability

92. Phillips, *supra* note 89, at 448; *see also* Nancy Stephens, *The Effectiveness of Time-Compressed Television Advertisements with Older Adults*, 11 J. ADVER. 48 (1982) (finding that the elderly rely heavily on televisions to bring them information but due to time compression have a hard time retaining particular elements of the information); Valarie Zeithaml, *Consumer Response to In-Store Price Information Environments*, 8 J. CONSUMER RES. 357 (1982) (analyzing in-store price practices showed the elderly had harder times with exact-price recall and comparing prices, recall of price information was strongly related to the age of the respondent).

93. Deborah Roedder John & Catherine A. Cole, *Age Differences in Information Processing: Understanding Deficits in Young and Elderly Consumers*, 13 J. CONSUMER RES. 297, 298–99 (1986).

94. Carolyn Yoon, *Cognition, Persuasion, and Decision Making in Older Consumers*, 16 MKTG. LETTERS 429, 431 (2005).

95. *Id.* at 431.

96. *Id.* at 434.

97. *See, e.g.*, AMAZON, *supra* note 32.

to scrutinize the incoming information.⁹⁸

The problem arises when there is a large amount of consumer information. The elderly use fewer processing strategies and at slower speeds, making it difficult for them to process the large amount of information provided.⁹⁹ As the market begins to send more advertisements and information towards the elderly, there will be negative side effects for some consumers who are unable to process this new overflow of information. In fact, there are arguments suggesting the elderly population exhibits the same struggles as very young consumers and, therefore, should be protected.¹⁰⁰

A recent study by economist Richard A. Lewis and data scientist David Reiley analyzed how advertising measurably affected sales to older consumers.¹⁰¹ Lewis and Reiley completed a controlled experiment on 1,577,256 existing consumers measuring the causal effect of advertising on purchases.¹⁰² The study led to striking results in regard to elderly consumers. The study found that online advertisements more heavily influenced the elderly than younger age groups.¹⁰³ Strikingly, customers aged sixty-five or older, comprising only five percent of study participants, increased purchases by twenty percent due to the advertising, representing forty percent of the total among all ages.¹⁰⁴ The study demonstrates how even small changes in advertisements, in a medium that is not dominated by the elderly, can increase the sales significantly by that particular age group.

The gaming industry offers a compelling example of marketing to the elderly.¹⁰⁵ Casinos offer enticements and advertisements for casino bus services, buffet discounts, and discounts for other amenities for older aged people.¹⁰⁶ While there is nothing inherently

98. Yoon, *supra* note 94, at 434.

99. Frolik & Barns, *supra* note 57, at 302.

100. *See id.* at 297–315.

101. Randall A. Lewis & David H. Reiley, *Advertising Effectively Influences Older Users: How Field Experiments Can Improve Measurement and Targeting*, 44 REV. INDUS. ORG. 147 (2014).

102. *Id.*

103. *Id.* at 154.

104. *Id.*

105. Erika Gosker, *The Marketing of Gambling to the Elderly*, 7 ELDER L.J. 185, 197–99 (1995).

106. *See id.*; Lynn Stuart Parramore, *How the Gambling Industry Preys on Senior Citizens*, SALON.COM (Jan. 7, 2014), http://www.salon.com/2014/01/07/how_the_gambling_industry_preys_on_senior_citizens_partner/.

wrong with advertising to this age group, or providing discounts, the potential social and legal problem arises when companies begin to target the elderly in an improper manner. For example, in some cases, casino specials coincide with the receipt of pension and social security checks.¹⁰⁷ Should this practice target the elderly who may have dementia it becomes what some would consider inappropriate and perhaps illegal.

Credit card marketing toward the elderly, whether through mail or on TV, also fall into this category.¹⁰⁸ The most disheartening examples come in a string of lawsuits filed against aging-care organizations arising from allegations of false and deceptive advertising and marketing.¹⁰⁹ A home healthcare provider in California agreed to pay \$175,000 in penalties and fees to settle a lawsuit alleging that the provider had falsely advertised that employees were screened for criminal records.¹¹⁰ A class-action lawsuit was filed in Washington against a nationwide operator of aging-care facilities because the company violated consumer-protection laws by advertising high-quality and skilled nursing care despite being understaffed and having a small budget.¹¹¹ Other cases were filed in California and Minnesota during the same timeframe, alleging false advertisements and violation of consumer-fraud statutes.¹¹²

Over the past twenty years, prescription drug advertising has taken off.¹¹³ Since 1997, when the Food and Drug Administration revised its rules and regulations on television advertising, prescription drug advertising has grown explosively, especially for therapeutic drugs.¹¹⁴ In 1996, pharmaceutical companies spent \$1.07 billion on advertising. By 2003 they were spending \$3.27 billion to advertise prescription drugs.¹¹⁵ Today this number is currently \$4.5 billion and

107. Gosker, *supra* note 105, at 194.

108. See Nathalie Matrin, *Consumer Scams and the Elderly: Preserving Independence through Shifting Default Rules*, 17 ELDER L.J. 1, 8–13 (2009).

109. CAN HEALTHPRO, FALSE ADVERTISING: DECEPTIVE MARKETING PRACTICES = REAL LIABILITY (2009) (http://www.leadingageinsurance.com/sites/lai/Documents/pdf/CNA_Alert_Bulletin_09_01_False_Advertising.pdf).

110. *Id.*

111. *Id.*

112. *Id.*

113. See Denise E. DeLorme et al., *Perceived Effects of Direct-to-Consumer (DTC) Prescription Drug Advertising on Self and Others*, 35 J. ADVER. 47 (2006).

114. *Id.*

115. *Id.*

rising.¹¹⁶

This creates the perfect trifecta: an aging population, increased advertising to the elderly, and impressionable seniors. The argument is not that prescription drugs are bad for the elderly or they should not be marketed to the elderly. Instead, future policy should be based on what the scientific community is learning about elderly consumers and whether or not public policy should restrict the manner and method in which that particular target group is reached.

In preservation of personal autonomy, the elderly should be able to choose where their money goes and how they enjoy their time. However, this should be balanced with their own wellbeing. On the other hand, businesses should not have full reign to access a significant percentage of the population that have particular ailments effecting their purchasing decisions.

IV. PROTECTIONS

Beyond financial elder-abuse statutes and undue-influence claims, there has been an increase in protections for the elderly consumer on different government fronts. In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act created the Office of Financial Protection for Older Americans as a subset of the Consumer Financial Protection Bureau (CFPB).¹¹⁷ While the Bureau provides advice and pamphlets on financial decisions for the elderly,¹¹⁸ it is still relatively young and does not have the same regulatory power as the Federal Trade Commission (FTC).

Other governmental departments have also taken steps to help the elderly. The Financial Fraud Enforcement Tax Force offers assistance to the elderly on fraud and financial exploitation.¹¹⁹ State

116. Jason Millman, *It's True: Drug Companies are Bombarding Your TV With More Ads Than Ever*, WASH. POST (Mar. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/23/yes-drug-companies-are-bombarding-your-tv-with-more-ads-than-ever/>.

117. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat 1276, 1955–2005 (2010); see generally *Financial Protection for Older Americans*, CONSUMER FIN. PROTECTION BUREAU <http://www.consumerfinance.gov/older-americans/> (last visited Oct. 28, 2015) (The Consumer Financial Protection Bureau was founded in part to help educate the elderly on scams and to provide proper investment strategies).

118. See generally *Financial Protection for Older Americans*, *supra* note 117 (providing downloadable pamphlets on managing money, powers of attorney, guardians, trustees, and government fiduciaries).

119. See Fin. Fraud Enf't Task Force, *Elder Fraud and Financial Exploitation*, STOPFRAUD.GOV, <http://www.stopfraud.gov/protect-yourself.html> (last visited Oct. 29, 2015).

attorneys general have also provided additional information to the elderly and their families.¹²⁰ Overall, there has been an increased focus by local and federal agencies on elder abuse, financial exploitation, and fraudulent and deceptive practices.

A. Federal Trade Commission

In general, advertisements fall under the authority of the FTC for unfair, deceptive, and fraudulent business practices.¹²¹ The Dissemination of False Advertisements is regulated pursuant to 15 U.S.C. § 52. The statute mandates, “It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics.”¹²² The FTC has used this statute to file multiple claims against companies that have deceptively advertised products, often targeted at the elderly consumer in health and fitness claims.¹²³

These claims included a settlement by Ultimeyes who claimed their app would “Turn Back The Clock On Your Vision” despite having little to no scientific evidence for their claim.¹²⁴ Also, supplement marketers i-Health, Inc. and Martek Biosciences Corporation agreed to settle after the FTC brought a claim alleging the companies falsely claimed they had clinical proof that the dietary supplement “BrainStrong Adult” improves adult memory.¹²⁵ The FTC recently announced that the creators of a melanoma-detection app

120. See generally CONSUMER PROTECTION, OR. DEP’T OF JUSTICE, *Elder Care*, http://www.doj.state.or.us/consumer/Pages/elder_care.aspx (last visited Oct. 29, 2015) (providing information on financial exploitation, health care services, and advocacy organizations to help the elderly in their decision making processes).

121. See 15 U.S.C. § 52 (2015).

122. *Id.* § 52(a); *id.* § 52(b) (“The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.”).

123. *Health and Fitness Claims*, FED. TRADE COMMISSION, <https://www.ftc.gov/news-events/media-resources/truth-advertising/health-claims> (last visited Oct. 29, 2015).

124. *FTC Charges Marketers of “Vision Improvement” App With Deceptive Claims*, FED. TRADE COMMISSION, <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-charges-marketers-vision-improvement-app-deceptive-claims> (last visited Sept. 17, 2015).

125. *Supplement Marketers Settle FTC Charges that “BrainStrong Adult” Memory Improvement Claims are Deceptive*, FED. TRADE COMMISSION, <https://www.ftc.gov/news-events/press-releases/2014/06/supplement-marketers-settle-ftc-charges-brainstrong-adult-memory> (last visited June 9, 2014).

were barred from making any further deceptive health claims about their product.¹²⁶ The final proposed order included a judgment for \$58,623 combined with a cease-and-desist order.¹²⁷ These examples show only a few of many companies that are targeting the elderly with misleading products.

In 2012, The FTC sent warning letters to twenty companies, comprised of real estate agents, home builders and other companies because their advertisements may be in violation of the 2011 Mortgage Acts and Practices Advertising Rule.¹²⁸ The CFPB issued notices to approximately a dozen mortgage lenders and mortgage brokers regarding potentially misleading advertisements, with a focus on advertisements targeted toward veterans and the elderly.¹²⁹

The claims brought by the FTC are not specifically in response to concerns for the elderly. These claims are examples of continued efforts to protect all consumers from deceptive advertising. However, the FTC has recognized the elderly are in need of additional protection. In a recent report from the FTC before the Subcommittee on Commerce, Manufacturing, and Trade on Elder Fraud and Consumer Protection Issues,¹³⁰ Acting Director Charles Harwood stated,

Our efforts to recognize these scams and anticipate future areas of concern are more relevant than ever, because the population of older Americans is now greater than at any point in history and is growing quickly. The Commission accomplishes its mission through aggressive law enforcement and a vigorous, ongoing campaign to educate consumers on how to avoid scams.¹³¹

126. FED. TRADE COMM'N, "*Melanoma Detection*" App Sellers Barred from Making Deceptive Health Claims, FED. TRADE COMMISSION, <https://www.ftc.gov/news-events/press-releases/2015/08/melanoma-detection-app-sellers-barred-making-deceptive-health> (last visited Aug. 13, 2015).

127. *Id.*

128. John Lynch et al., *CFPB, FTC Warn Companies Misleading Consumers with Mortgage Advertisements*, TROUTMAN SANDERS (Nov. 27, 2012) <http://www.troutmansanders.com/cfpb-ftc-warn-companies-against-misleading-consumers-with-false-mortgage-advertisements-11-27-2012/>.

129. *Id.*

130. *FTC Report on Elder Fraud and Consumer Protection Issues: Hearing Before the S. Comm. on Commerce, Mfg., and Trade*, 113th Cong. 1 (2013) (testimony of Charles Harwood, Acting Director of the Bureau of Consumer Protection of the FTC).

131. *Id.* at 1.

The FTC plans to aggressively enforce the law through education and increased outreach to the elderly, mostly through website resources.¹³² The FTC labeled the following as areas of concern for scams and threats directed to the elderly population: (1) work-from-home scams, (2) prize promotion and lottery scams, (3) identity theft, (4) healthcare fraud, and (5) internet fraud.¹³³ In the process of stepping up their efforts, the FTC also plans on delivering fraud awareness tips to older consumers and speaking with directors and other professionals in elderly facilities.¹³⁴

When the FTC brings a claim it analyzes the entire advertisement and looks at the words, phrases, and pictures in context to determine the final message conveyed to the consumer.¹³⁵ The consumer does not actually have to be deceived by the company's advertisement. The FTC looks to see if the advertisement is likely to mislead the consumer.¹³⁶ The FTC does this by determining if the advertisement would be likely to mislead "reasonable consumers" under those circumstances. If an advertisement is targeted to a specific audience, such as the elderly, the advertisement is reviewed from the perspective of a reasonable member of that group.¹³⁷ The FTC provides the following example:

If a company markets a cure to the terminally ill, the practice will be evaluated from the perspective of how it affects the ordinary member of that group. Thus, terminally ill consumers might be particularly susceptible to exaggerated cure claims. By the same token, a practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged

132. *Id.* at 10.

133. *Id.* at 4–10.

134. *Id.* at 12.

135. Sharon J. Bangert et al., *Unfair and Deceptive Advertising of Consumer Credit*, Md. B.J., Mar.–Apr. 2002, at 10.

136. *Id.*; see also Fed. Trade Comm'n v. Peoples Credit First, LLC, No. 8:03–CV–2353–T, 2005 WL 3468588, at *5–6 (M.D. Fla. Dec. 18, 2005); Fed. Trade Comm'n v. Kitco of Nevada, Inc., 612 F.Supp. 1282 (D.Minn. 1985) (holding that an individual may be held liable under the FTCA for corporate practices if the FTC proves the corporate practices were misrepresentations or omissions of a kind usually relied on by reasonably prudent persons and that consumer injury resulted).

137. JAMES C. MILLER, III, FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION I (1983).

in light of the knowledge and sophistication of that group.¹³⁸

In summary, the FTC Policy Statement on Deception identifies three elements that underlie all deception cases: (1) there must be a representation, omission or practice that is likely to mislead the consumer; (2) the act or practice must be examined from the perspective of the reasonable consumer; and (3) the representation, omission, or practice must be material.¹³⁹

The question, as it is with all subjective standards, is what particular traits should be taken into account? Does the reasonable elderly person include the dementia statistics addressed previously? Does the category include consumers with cognitive issues, slower processing abilities, and a lack of long-term memory? As discussed, the elderly population has a range of perspectives and abilities. The question is whether or not these types of standards will be able to adequately protect seniors as they increase in age.

V. IMPLICATIONS ON PUBLIC POLICY MOVING FORWARD

While it is clear that the FTC and other government agencies are taking notice of the elderly population, it may not be enough. The majority of the protections mentioned are remedial since the FTC takes action only after the deceptive advertisements made an impact. Most importantly, these advertisements could be deceptive for all consumers, not just the elderly. On the other hand, state regulations or deterrents like treble damages would be difficult to implement in regard to a national advertisement campaign. The question becomes whether or not certain advertisements should be restricted, not necessarily because of their deceptive practices, but because of the possible negative side effects on the elderly.

The FTC and the government have sought to limit advertisements for food, online use, and alcohol advertising for younger consumers, not because the advertisements were deceptive or false, but because we have decided that public policy should protect that age group.¹⁴⁰ Based on the numerous struggles the elderly face

138. *Id.* at 3; *see also In re Travel King*, 86 F.T.C. 715, 719 (1975); *Porter & Dietsch*, 90 F.T.C. 770, 864–65 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (order requiring travel agencies to stop making false claims about “psychic surgery” and promoting tours for the surgery).

139. MILLER, *supra* note 137, at 1–2.

140. *See generally* William Neuman, *U.S. Seeks New Limits on foods Ads for Children*,

and the increase of elder susceptibility, the same standard should be applied to advertising for the elderly. If companies advertise tobacco products, junk foods, or alcohol consumption to children, the harm has already occurred despite the truth of the claims. The argument for protection of advertising directed at children lays on the premise of susceptibility, growing media consumption, and specific targeting.¹⁴¹ These exact same factors apply to the elderly population.

Former FTC Commissioner Swindle indicated the FTC was willing to regulate tobacco and alcohol because, “[i]f children purchase and consume alcohol or tobacco, it creates serious health risks for them—risks that they may well not fully comprehend.”¹⁴² Similar arguments can be made for the elderly. There are similar health and financial risks to seniors who are sold particular products.

It would be incredibly difficult to regulate the amount of commercial material aimed at the elderly. Furthermore, such regulation could be challenged under constitutional free-speech arguments. Instead, the government should regulate the content of advertisements to the elderly. If the content of the speech constitutes commercial speech, then a court would not have to apply strict-scrutiny analysis.¹⁴³ The government has a compelling interest in protecting the elderly and restricting content over the entire advertising industry, which could allow for narrow tailoring.

Another viable option to protect the elderly consumer is to require additional information or disclosures that would reduce the commercial’s tendency to mislead. In *Rubin v. Coors Brewing Co.*, the United States Supreme Court determined that, “in the commercial context, however, government is not only permitted to prohibit

N.Y. TIMES, Apr. 28, 2011, at B1 (regulators addressing childhood obesity by creating new advertising guidelines).

141. See William A. Ramsey, *Rethinking Regulations of Advertising Aimed at Children*, 58 FED. COMM. L.J. 361 (2006).

142. See Orson Swindle, Comm’r, Fed. Trade Comm’n, Remarks at the Aggressive Advertising and the Law Workshop (Feb. 22, 1999) (“A slight variation on these principles is necessary when it comes to alcohol and tobacco advertising that appears to be targeted at children. If children purchase and consume alcohol or tobacco, it creates serious health risks for them—risks that they may well not fully comprehend. Indeed, to protect children from these health risks, it is illegal for children to purchase alcohol and tobacco. Alcohol and tobacco advertising that appears to be targeted at children, therefore, is something that the government must consider very seriously.”).

143. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 561 n.6; see also *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”).

misleading speech that would be protected in other contexts, but it often requires affirmative disclosures that the speaker might not make voluntarily.”¹⁴⁴ While disclosure may not be entirely effective, it would assist an elderly consumer in making better purchasing decisions.

Another solution may be to address the content of the commercial itself in a different manner. It seems that as actors, celebrities, and even athletes grow older they appear on a variety of commercials promoting products to the elderly.¹⁴⁵ Celebrities like Henry Winkler (“The Fonz”) are now selling reverse mortgages. The *New York Times* summarized the situation nicely: “Instead of whispering sweet nothings into the ears of lovely co-stars, they are urging seniors to ‘call now’ for free DVDs about hearing aids, reverse mortgages, gold coins and medicines for bone loss and joint pain.”¹⁴⁶

At some point, regulation can be too aggressive and all regulation should be balanced between the needs of the market and the consumer. However, in this case it appears a problem is growing that needs to be addressed aggressively. While government restrictions should be limited, the United States Supreme Court has found the following:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions.¹⁴⁷

While it would be considered absurd to restrict all celebrities from participating in commercials targeting the elderly, the FTC could implement particular restrictions based on the type of product being promoted.

There needs to be a balance between federal and state regulation. Too much FTC interference only increases the already complex

144. *Reubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1994) (Stevens, J., concurring).

145. See, e.g., J. Peder Zane, *Why the Fonz Is Back, as TV Pitchman*, N.Y. TIMES, Mar. 7, 2012, at F1 (highlighting the uptick in older actors and actresses “pitching products to aging baby boomers”).

146. *Id.*

147. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

administrative juggernaut at the federal level. While some states have already taken a stand by enacting treble damages and attorney fees for financial elder abuse, there is still more that state legislatures can do to help deter this problem. As stated previously, a civil claim for elder financial abuse may only be brought by a guardian, conservator or attorney-in-fact for a vulnerable person.¹⁴⁸ While treble damages offer a strong incentive not to commit financial elder abuse, the combination of a lack of reporting and difficult civil cases leaves many seniors unprotected.

States should allow parties to bring cases on behalf of family members who have been taken advantage of by abusers. This would allow more individuals to be held responsible. There are two types of parties responsible for elder abuse, individuals and corporations. Treble damages should be applied to corporations in the same manner as individual abusers. The FTC and state justice departments can work in conjunction to enforce cease-and-desist orders and appropriate fines. Many states already have statutes that prohibit unfair and deceptive acts or practices affecting trade or commerce involving some transaction for personal, family or other consumer use.¹⁴⁹ However, to take a firm stance against individuals committing abuse, states should enact statutes similar to slayer statutes.

“All states have slayer laws that prohibit killers from inheriting from their victims.”¹⁵⁰ These laws vary by jurisdiction, but the general public policy is the same.¹⁵¹ No one who commits such a heinous act should benefit from their actions. This same policy should be applied to financial elder abuse. Eight states have enacted statutes which disinherit abusers.¹⁵² However, six of the eight states require criminal convictions.¹⁵³ Oregon’s statutes, for example, “apply to an

148. OR. REV. STAT. § 124.100(3)(b) (2015).

149. See JONATHAN SHELDON, NAT’L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES 12–16 (5th ed. 2001) (describing and compiling federal and state statutes, case law, and relevant practice guidelines to aid attorneys litigating unfair or deceptive practice claims).

150. Jennifer Piel, *Expanding Slayer Statutes to Elder Abuse*, 43 J. AM. ACAD. PSYCHIATRY L. 369, 369 (2015) (analyzing the history of slayer statutes and how they could be applied today to elder abuse).

151. See *id.*

152. See ARIZ. REV. STAT. ANN. § 46-456 (2013); 755 ILL. COMP. STAT. ANN. 5/2-6.2 (West 2015); KY. REV. STAT. ANN. § 381.280 (West 2015); MD. CODE ANN., CRIM. LAW § 8-801 (West 2015); OR. REV. STAT. § 112.465; WASH. REV. CODE ANN. § 11.84.020 (West 2015).

153. See Travis Hunt, *Disincentivizing Elder Abuse Through Disinheritance*:

abuser only if the decedent dies within five years after the abuser is convicted of a felony by reason of conduct that constitutes physical abuse of the decedent, as described in ORS 124.105, or financial abuse of the decedent, as described in ORS 124.110.” However, once a criminal conviction is obtained the defendant is estopped from denying the conduct for purposes of a civil action for abuse of an elderly or incapacitated person arising out of the same circumstances.¹⁵⁴

Why should family members or other interested parties be prevented from bringing claims on behalf of abused loved ones because a felony charge was not brought or didn’t meet the higher standard of proof? Oregon, among other states, has already tried to deter potential elder abusers with treble damages. States should deter potential abuses with the threat of treble damages and disinheritance if the abuser is a family member, whether or not there was a criminal conviction. Such a strong statement by legislatures would not only put individuals on notice but also show the corporate sector the gravity of financial elder abuse.

VI. CONCLUSION

The elderly population, along with its purchasing power, is growing exponentially, and elderly people are consuming an increasingly large amount of media. Companies have not ignored this target group and have increased their efforts to reach the elderly market. At the same time, the elderly population struggles with cognitive issues and the ability to process advertising. The effect of advertising on the elderly is effective and potentially dangerous. The FTC and other policymakers should take note.

Although there have been steps to protect the elderly, there is still more that can be done including content restrictions, disclosures, limitations on celebrity sponsored advertising, and strengthened civil enforcement. This should be implemented both at the state and federal level. Additionally, treble damages should be extended to the

Revamping California Probate Code § 259 and Using It as a Model, 2014 BYU L. REV. 445, 446 (2014) (critiquing Arizona, Illinois, Kentucky, Maryland, Michigan, and Oregon laws requiring criminal convictions).

154. OR. REV. STAT. § 124.140 (a defendant who is convicted in any criminal proceeding of conduct that gives rise to a cause of action under ORS 124.100–124.110, whether the conviction results from a plea or verdict, is estopped from denying the conduct for purposes of a civil action for abuse of an elderly or incapacitated person arising out of the same circumstances).

corporate sector and disinheritance triggers for individual abusers should be implemented. Finally, attorneys and the general public alike need to be further educated on the growing problem of elder abuse. With knowledge comes the ability to recognize elder abuse. Legislatures have started to notice the problem, but real results will only come when individuals and government agencies take action.