

STATEMENT OF STUART E. SCHIFFER
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE

Mr. Chairman, I appreciate the opportunity to appear before you to discuss some of the important issues which are the focus of today's hearing. We are grateful for this Committee's bipartisan approach to and leadership on this increasingly important topic. I also would like to thank this Committee's former Chairman, Senator Grassley, for his work in putting the issues on the national agenda.

As the Committee is aware, until a few weeks ago, the Attorney General was the Department's only Senate-confirmed official. Thus, this Administration is still in the process of formulating its policies and priorities. However, I will endeavor briefly to discuss some of the Department's ongoing efforts.

The number of Americans over 65 will more than double to about 70 million in the next 30 years, with those needing long term care projected to double from about 7 million to 14 million. Previous testimony before this Committee, as well as government, academic, and media reports indicate that seriously inadequate care remains a persistent problem in some nursing homes and other long-term care facilities. Caring for growing numbers of older people at home also presents increasing challenges and risk of abuse and neglect, as well as huge demands on and ensuing stress of caregivers. Against this backdrop, and to respond to these growing problems, the Department is pursuing its nursing home initiatives and elder justice efforts. A primary objective of these efforts has been to enhance enforcement, training, coordination, public awareness and research at all levels.

Given the complexity of the issues, and their increasing demographic significance, the Department's efforts to combat elder abuse, neglect and exploitation have been multi-faceted, and include the following: (1) stepped up prosecution, (2) education and training, (3) broad-based interagency and multi-disciplinary coordination, (4) promotion of medical forensics, and (5) funding, research, programs, and statistics, to fight elder victimization.

1. Stepped up Prosecution

Elder abuse and neglect in institutional, community and domestic settings, and financial fraud, exploitation, and discrimination targeting older victims are at issue in federal civil, criminal, and civil rights cases brought pursuant to a variety of federal statutes and theories.

Cases involving Institutional Abuse and Neglect

Historically, cases involving elder abuse and neglect in institutional settings were the province of federal regulatory, and state and local law enforcement efforts. Enforcement differed significantly from state-to-state and community-to-community, depending on existing state laws, enforcement practices, and resources. The majority of cases were pursued against low-level employees, such as Certified Nurses Aides (CNAs), although several Medicaid Fraud Control Units and at least one District Attorneys office have pursued civil and/or criminal cases against owners, operators, and/or corporate entities responsible for wrongdoing. In addition, a few state Attorneys General have pursued consumer fraud cases against long term care facilities that did not deliver the services and care they promised.

In the last few years, the Department has begun to pursue cases involving allegations of abuse and neglect by long term care providers. In pursuing these cases, a central priority is - at each step along the way - to balance the law enforcement and public health goals. Said another way, we have attempted to

handle these cases so that they serve to deter future wrongdoing, recoup lost funds, protect residents, and improve care.

Civil cases - False Claims Act and Bankruptcy

The majority of cases alleging institutional abuse and neglect - failures of basic care leading to profound malnutrition, dehydration, pressure ulcers, scalding, and other illness, injury or death - have been pursued under the civil False Claims Act, a financial fraud statute. The theory in these cases is straightforward - the United States paid for requisite care and services that the defendant knowingly did not provide, but for which it sought reimbursement. Two courts have affirmed this theory and about ten failure of care cases have settled in the last five years. Resolution of these cases - pursued against single facilities and smaller chains - has included payment of monetary damages, and, importantly, contractual or injunctive remedies designed to protect residents and improve care. Settlement terms in the majority of these cases have required imposition of a temporary monitor and implementation of specific protocols and training to improve care, for example in wound care or diabetes management, if that is where the entity demonstrated problems.

The last two and one-half years presented new challenges with the financial decline and bankruptcy filings of five of the seven largest nursing home chains - owning approximately 300 to 450 facilities each. For five such substantial entities to file for bankruptcy in such a short a period (in addition to many smaller entities) was extraordinary (and the subject of a hearing by this Committee last September). The Department's False Claims Act investigations against some of these entities involved monetary claims of tens or hundreds of millions of dollars, in addition to troubling failure of care claims.

The Department of Health and Human Services closely monitored whether and to what extent the care offered by the bankrupt facilities was compromised as a result of their financial problems and drew up "contingency plans" in the event any of the chains suddenly closed or liquidated. The Department of Justice worked closely with HHS to negotiate appropriate settlements balancing the factors set forth above. On the one hand, bankruptcy should not provide general amnesty for massive fraud. On the other hand, the Departments of Justice and Health and Human Services were mindful of the potential public health ramifications of the sudden closure of any one of the chains.

The only one of the five large chain cases to have emerged from bankruptcy to date settled False Claims Act allegations for more than \$100 million, \$20 million of which was attributable to failure of care claims - the largest such case ever settled. In addition, the corporation entered into a ground-breaking corporate integrity agreement with the HHS Inspector General, covering not only financial integrity but quality of care. The agreement calls for a temporary monitor (paid for by the defendant). In addition, because the chain consisted of more than 350 facilities, instead of requiring specific protocols, the agreement calls for implementation of systemic controls, improvements, and training, with the goal that those changes become standard operating procedure even after the agreement is no longer in place.

Criminal cases

The Department has pursued criminal cases that have implications for older nursing home residents; others are in the pipeline. One case involved a resident of an Arkansas nursing home who was found bleeding in a ditch. She was returned to the nursing home, cleaned up, and briefly taken to a hospital. Her records were falsified to say that she had fallen out of bed. She died within 24 hours. Officials at the facility were charged with false statements to federal officials, including the FBI, regarding the events leading to the resident's death. In another case, a nurse was prosecuted when she falsified records to conceal a medication error.

An entity that is convicted of a criminal offence related to abuse or neglect, is subject to mandatory exclusion from federal health care programs. Thus, in a case where a subsidiary of a major nursing home chain pled guilty to criminal financial charges, the Department worked closely with HHS to obtain an agreement with the defendant that would protect residents from the sudden closure of the facilities as the result of the mandatory exclusion. The "divestiture agreement" required the entity to divest itself of the facilities it owned before the exclusion took place and provided for sanctions if it failed to do so.

In addition, public corruption can lead to the requisite nursing home standards being improperly compromised, in turn harming residents. A federal criminal public corruption case in Oklahoma, led to the conviction of the deputy commissioner for health and a nursing home owner of soliciting and offering to pay a bribe, respectively.

Civil Rights cases

The Civil Rights Division pursues cases under the Civil Rights of Institutionalized Persons Act (CRIPA), where public nursing homes or other public institutions have neglected or abused residents entrusted to their care, or have failed to meet residents' constitutional or federal statutory right to adequate care and services. These cases generally involve an extensive investigation of the conditions and practices at the facility, efforts to remedy the offending practices, and, where necessary, the filing of a CRIPA action. Resolution of CRIPA suits generally include reaching a written agreement with the jurisdiction that provides for remedial relief in each one of the areas in which the institution failed to meet the needs of the residents, such as medical and nursing care; psychiatric care and services; physical, occupational and speech therapy; protection from harm, abuse and neglect; and undue or improper use of restraints. In order to ensure ongoing compliance, the agreements typically provide for extensive monitoring of the remedial agreement with onsite Monitors and/or full access provisions. In a case against the City of Philadelphia's public nursing home, the Department brought CRIPA and False Claims Act causes of action simultaneously in the same case.

Elder abuse and neglect in domestic and community settings

Elder abuse and neglect cases are most often handled by state and local law enforcement. If, however, federal funds are involved or a federal statute has been violated, the Department has jurisdiction. For example, a failure of care case (similar to the False Claims Act cases pursued against nursing homes) may be pursued against a home health care agency that knowingly bills the United States for services it did not render or rendered so poorly as to constitute no services at all. Mail fraud, wire fraud, or other federal criminal charges also may be considered in such a case.

In addition, Congress recently enacted legislation - supported by the Department - giving State Medicaid Fraud Control Units jurisdiction to pursue abuse cases against assisted living and other community-based facilities, even if they do not receive Medicare or Medicaid funding.

Health care fraud

Health care fraud also harms elders in another fashion. Those who defraud programs intended to benefit older Americans steal from all those who contribute to and rely on those programs. The Department's extensive health care fraud efforts, in partnership with other federal and state enforcement agencies, in FY 2000 won or negotiated more than \$1.2 billion in judgments, settlements and administrative impositions in health care fraud proceedings and cases. Of that amount, more than \$717 million was collected and returned to various state and federal health care programs, with \$577 million returned to the Medicare Trust Fund. These finds now can be used properly - to fund the requisite care for those

who need it.

Financial Fraud, Exploitation, and Discrimination

Older people in declining health, mobility, and sometimes cognitive capacity, are not only more vulnerable to physical and psychological abuse and neglect, but also to financial exploitation. Indeed, there seems to be a correlation between the two, with victims of financial exploitation appearing to be at higher risk for other forms of abuse and neglect. The Department's United States Attorneys' offices and its Criminal and Civil Divisions - using mail fraud, wire fraud, credit card fraud, conspiracy, money laundering, and other federal criminal charges - have successfully prosecuted many people who defraud older people through telemarketing, Internet, credit card, and advance-fee fraud. Three major undercover operations directed at telemarketing fraud, for example, resulted in prosecution of more than 1,400 persons for telemarketing-fraud charges. Sentences in these cases have ranged as high as 14 and 18 years. In one very recent case, a telemarketer who preyed upon elderly victims - including an 82-year-old woman who told the defendant that her husband was in the hospital dying of cancer - was sentenced in the Central District of California to 115 months imprisonment.

The Department's Civil Rights Division also has been pursuing several types of cases against those who exploit or discriminate against older people. Some predatory lenders target older persons - usually elderly minority women -- for loans with higher prices and more onerous terms and conditions than for other borrowers. Older persons can lose substantial equity or even their homes as a result of such predatory lending practices. The Civil Rights Division has brought cases to redress these problems under the Fair Housing Act, which prohibits discrimination on the basis of race and gender, and the Equal Credit Opportunity Act, which prohibits discrimination on those grounds and on the basis of age. The Division also has brought cases under statutes such as the Americans with Disabilities Act and the Fair Housing Act to redress discrimination against older people with disabilities. For example, the Division has brought suits under the Fair Housing Act against local governments that blocked the development or operation of group homes for persons with Alzheimers.

2. Education and training

The number of entities with potential involvement in elder issues is daunting. Often there are more than twenty different entities or types of professionals in any given community with information about and potential authority relating to elder abuse, neglect and exploitation. Many of these entities are unaware of the others existence, let alone role. There has been substantial demand for the Department, which has trained more than 1000 people in the last two years, to play a leadership role in bringing together, training, and coordinating the many diverse entities.

3. Coordination and Outreach

Given the myriad entities involved in this issue, improved coordination is imperative. The Department has reached out to healthcare, social service, public safety, academics, and advocates, as well as to industry. We have promoted a number of broad-based multi-disciplinary collaborations not only at the national policy level, but also at the state and grass roots. These efforts in part emulate well-established and funded infrastructure that exists for child and juvenile issues. State Working Groups (SWG) have been formed (or expanded where they existed), including representatives of the many entities that play a role in nursing home abuse and neglect prevention. These SWGs provide a forum for key players to share information and skills, identify problem facilities and best practices.

Coordination at the federal level has been significantly enhanced by productive monthly Nursing Home

Steering Committee meetings attended by numerous components of the Departments of Justice and Health and Human Services to address specific cases and policy issues. In the last few months, an interagency working group focusing on elder abuse and neglect issues has met regularly to discuss each entities' activities and potential areas for collaboration.

In addition, the Criminal Division has begun a pilot project with U.S. Attorneys' offices in five metropolitan areas and the AARP, to establish Elder Fraud Prevention Teams that can educate older Americans in those areas about consumer fraud scams targeting them. These teams involved partnerships among AARP state offices and multiple federal, state and local law enforcement agencies in each area.

4. Medical-Forensic issues

There is wide-spread consensus that detection, diagnosis, research, training, availability of experts and multi-disciplinary cooperation are less advanced in the area of elder abuse and neglect than in other areas, such as child abuse and domestic violence. This has an impact on our ability to pursue and treat elder abuse and neglect, because it often goes undetected. Moreover, the medical community is rarely trained to diagnose or report it. Even when it is identified, there are very few experts who can provide medical forensic testimony in any ensuing case. The Department thus hosted a roundtable discussion entitled Elder Justice: Medical Forensic Issues in Elder Abuse and Neglect, to address these issues. Healthcare, law enforcement, and social service experts participated.

Recommendations from the medical forensic roundtable that could have a significant impact on the ability of law enforcement to pursue elder abuse and neglect cases included (1) creation of national or regional forensic centers for elder abuse and neglect, similar to those for child abuse and neglect, (2) creation of multi-disciplinary fatality review teams to evaluate cases of suspected elder abuse and neglect, again, similar to those for other types of family violence, and (3) training of a group of geriatric-forensic experts, similar to pediatric-forensic experts, who are of great assistance in identifying cases, referrals to and interaction with the justice system.

5. Funding, Research, Programs, and Statistics to Fight Elder Victimization

The Department of Justice through its Office of Justice Programs (OJP), makes grants, funds training, technical assistance, coordination efforts and other programs, sponsors research, publishes statistics, and identifies needs. Through these and other activities, OJP works to improve understanding, prevention, intervention, and prosecution of crimes and assist victims. Given the many entities with involvement in these issues, the dire need to expand our knowledge, improve detection, multi-disciplinary coordination and law enforcement efforts at all levels, OJP is uniquely situated to tap into expertise, apply lessons learned in other areas, and take a national view of this issue.

Conclusion

The cost of elder abuse and neglect is high. The Committee can be assured that the Department of Justice will continue to play a lead role and to work with this Committee in addressing the myriad issues which I have briefly discussed this morning.