The Uniform Power of Attorney Act and Financial Institutions

Linda S. Whitton
Reporter, Uniform Power of Attorney Act
Professor of Law, Valparaiso University School of Law
linda.whitton@valpo.edu

Introduction

During the three-year drafting process for the Uniform Power of Attorney Act, the Drafting Committee reviewed current state power of attorney legislation and case law, the results of a national survey on power of attorney legislative reform issues,[1] and input from many constituencies.[2] These constituencies included practicing attorneys, the banking and insurance industries, and elder protection advocates. A number of these groups, including the American Bankers Association, were represented by advisers or observers at the drafting committee meetings.

The Reporter for the Act met regularly with the National Conference of Lawyers and Corporate Fiduciaries to discuss drafts of the Act with bank, trust company, and investment company counsel. The American Bankers Association also put together an informal work group of such counsel for the purpose of identifying the power of attorney issues most important to financial institutions. These issues were then addressed by the Drafting Committee through further modifications to interim drafts of the Act. The following memo outlines these issues and the provisions in the Uniform Power of Attorney Act that address them.

Protection Against Liability for Accepting a Power of Attorney

The majority of reported case decisions hold that third persons may rely on unambiguous terms in a power of attorney and are not responsible for monitoring the application of the principal's property.[3] However, liability may exist if a power of attorney is accepted for

---

[1] Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, Natl. Conf. Commrs. Unif. St. Laws. (2002) (available at http://www.law .upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm).

[2] From January 2004 to May 2006, the Author, as Reporter for the Uniform Power of Attorney Act, met numerous times with the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, committees of the American College of Trust and Estate Counsel, and the leadership and committees of the ABA Section of Real Property, Trust and Estate Law. She also participated in programs for the National Academy of Elder Law Attorneys, the New York State Bar Association Trusts and Estates Law Section, and the DC Bar Association Trusts and Estates Section.

[3] *See e.g. Milner v. Milner*, 395 S.E.2d 517, 521 (Va. 1990) (finding that "when dealing with a broad power of attorney, there is no obligation on a third party to go behind the power") (citations omitted); *Parr v. Reiner*, 143 A.D.2d 427, 429 (N.Y. App. Div. 1988) (finding that respondents were "entitled to rely upon the unambiguous terms" contained in the power of attorney); *Rheinberger ex rel. Estate of Adams v. First Natl. Bk.*, 150 N.W.2d 37, 42 (Minn. 1967) (finding no evidence that bank should have known the agent's transfer was for an illegitimate purpose and no duty to insure that the agent did not misuse the funds); *but see Houck v. Feller Living Tr.*, 79 P.3d 1140 (Or. Ct. App. 2003) (finding that the self-dealing transaction put the bank on inquiry notice that the agent may not be acting within the scope of his authority).

a transaction that exceeds the scope of authority conveyed in the power,[4] if the power of attorney is a forgery,[5] or if the power of attorney has been revoked.[6] The Uniform Power of Attorney Act (the "Act") provides significant protection for third persons against such liability.

The Act provides that a person who in good faith (*i.e.*, with "honesty in fact"[7]) accepts an acknowledged power of attorney[8] may rely upon that power of attorney unless the person has *actual knowledge* that: 1) the signature is not genuine; 2) the power of attorney is void, invalid, or terminated; 3) the purported agent's authority is void, invalid, or terminated; or 4) that the agent is exceeding or improperly exercising the agent's authority.[9] *Furthermore, third persons who conduct activities through employees are held to be without actual knowledge of a fact "if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact."*[10] Thus, a financial institution is protected against liability for accepting a forged, invalid, or revoked power of attorney provided that the employee who accepted the power of attorney did so honestly and without actual knowledge that it was forged, invalid, or revoked.

The actual knowledge standard, which is the cornerstone of protection for good faith acceptances, was chosen because of the practical realities facing financial institutions. Financial institutions generally do business in multiple offices and often in multiple cities and jurisdictions. To impute "knowledge" to all branches of an institution when notice of a fact is given to one office could create unmanageable burdens for institutions presented with hundreds of powers of attorney per week. Bank and trust company counsel also indicated to the Drafting Committee that privacy regulations may prohibit the trust department of a financial institution from communicating client information to the retail department, and vice versa. As a consequence, it may not be possible for a notice of power of attorney revocation received by one department to be communicated to another. Thus, an imputed notice or knowledge standard is not appropriate for financial institutions in the context of power of attorney transactions. The Act's broad protections for good faith acceptance of an acknowledged power of attorney coupled with the Act's explicit rejection of any imputed knowledge standard substantially narrows the bases for financial institution liability.

---

[4] Daniel A. Wentworth, *Durable Powers of Attorney: Considering the Financial Institution's Perspective*, PROB. & PROP. 37, 39-40 (Nov./Dec. 2003) (discussing *Grabowski v. Bk. of Boston*, 997 F. Supp. 111 (D. Mass. 1997)).

[5] *Id.* at 39 (discussing *In re Estate of Davis*, 632 N.E.2d 64 (Ill. App. Ct. 1994)).

[6] *Id.* (noting that "some revocations may not apply to acts permitted by the financial institution if it acts without knowledge of the revocation").

[7] Unif. Power Atty. Act § 102(4) (2006), *available at* http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf [*hereinafter* UPOAA].

[8] For purposes of third person reliance on an acknowledged power of attorney, the Act provides that "acknowledged" means "purportedly verified before a notary public or other individual authorized to take acknowledgements." *Id.* at § 119(a).

[9] *Id.* at § 119(b) & (c).

[10] *Id.* at § 119(f).

With respect to liability for transactions that exceed the agent's scope of authority, the Act lessens the likelihood of such transactions by providing statutory construction language for all of the common subject areas that might be included in a general grant of authority.[11] While this default language can be modified in the power of attorney, third persons accepting a power of attorney have a statutorily-defined baseline for the meaning of authority over subject areas such as "banks and other financial institutions"[12] and "insurance and annuities."[13] The Act also provides that express authority is required for certain activities that have a high propensity for dissipating the principal's property or undermining the principal's estate plan.[14] The list of actions that require an express grant of authority includes: 1) creation, amendment, revocation or termination of an inter vivos trust; 2) creation or change of rights of survivorship; and 3) creation or change of beneficiary designations.[15] The clarity provided by the Act with respect to delegation of authority lessens the likelihood that a principal or the third person who accepts the power of attorney will misunderstand the authority conveyed.

An additional protection under the Act for financial institutions is the ability to request and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney.[16] This opinion of counsel must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.[17]

Protection Against Liability for Rejecting a Power of Attorney

In addition to the broad protections for acceptance of a power of attorney, the Act also provides clear safe harbors for legitimate refusals. Under the Act a person is not required to accept an acknowledged power of attorney if:

> (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
>
> (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
>
> (3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
>
> (4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;

[11] *Id.* at §§ 204-217.
[12] *Id*. at § 208.
[13] *Id.* at § 210.
[14] *Id*. at § 201(a).
[15] *Id*.
[16] *Id.* at § 119(d)(3).
[17] *Id.* at § 119(e).

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.[18]

Only when a refusal does not meet one of the foregoing safe harbors is the person subject to a court order mandating acceptance and to liability for the costs and attorney's fees incurred to obtain the mandate.[19]

At the time the drafting activities for the Act commenced, eleven states already recognized some level of liability for unreasonable refusals of powers of attorney.[20] The absence of financial institution liability cases in those jurisdictions suggests these provisions have effectively encouraged timely acceptances of powers of attorney without creating unreasonable liability risks. The greater liability risk to financial institutions may actually be posed by state statutes that are silent about who bears the risk of loss from power of attorney fraud or forgery or those that fail to provide protections for good faith acceptances and refusals.[21]

Protection of Vulnerable Clients

Although the Act does not require third persons to investigate any of the facts that may be relevant to the power of attorney transaction before accepting the power of attorney, the Act permits a third person to request and rely upon, without further investigation, an agent's certification of any factual matter concerning the principal, the agent, or the

---

[18] *Id*. at § 120, Alternative A. The Act offers adopting states a choice between this alternative provision and one labeled Alternative B which limits liability to refusals of an acknowledged statutory form power of attorney. The statutory safe harbors in Section 120, Alternative B are the same as in Alternative A except that the section is limited to acknowledged statutory form powers of attorney rather than all acknowledged powers of attorney.

[19] Unif. Power Atty. Act §§ 120(c), Alternative A; 120(d), Alternative B.

[20] Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-607(2) (West 2005); Fla. Stat. Ann. § 709.08(11) (LexisNexis 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (LexisNexis Supp. 2007); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2007); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2007). To date, New Mexico and Idaho have adopted the Act raising to thirteen the number of states that recognize liability for unreasonable power of attorney refusals.

[21] *See generally* Wentworth, *supra* note 4. It is interesting to note that a rare case litigating a bank's refusal to accept a power of attorney occurred in a state *without* any statutory basis for recognizing that liability. *Maenhoudt v. Stanley Bank*, 115 P.3d 157. 161 (Kan. App. 2005) (finding material issues of genuine fact related to a bank's unqualified refusal to honor a power of attorney and reversing lower court's grant of summary judgment).

power of attorney.[22] Thus, financial institutions that are concerned about protecting their clients, or about substantiating their own good faith in accepting a power of attorney, may request the agent to certify any factual matter. Like an opinion of counsel, an agent's certification must be provided at the principal's expense unless it is requested later than seven business days after the power of attorney is presented for acceptance.[23] The Act also permits a third person to refuse a valid power of attorney if the person believes in good faith that "the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent."[24] While the Act does not require third persons, including financial institutions, to operate as watch dogs for financial abuse, the Act provides third persons with the tools and protections to do so if they so choose.

Conclusion

As states have begun studying the Uniform Power of Attorney Act for adoption, some financial institutions have expressed concern that they may face liability under the Act for rejecting an acknowledged power of attorney. Careful examination of the Act and case law reveals that financial institutions are actually provided much broader protection for both good faith acceptance and good faith rejection of powers of attorney than currently exists under most state statutes. Limiting the liability exposure of financial institutions to the facts actually known by the employee conducting the transaction eliminates liability on any imputed notice or knowledge basis. Even acceptance of a power of attorney obtained through fraud or forgery will not result in liability for the institution where no actual knowledge existed of these facts. Furthermore, the statutory safe harbors for rejection of a power of attorney cover any reasonable basis upon which a financial institution may wish to reject the power of attorney. While an institution is not required to further substantiate its decision to accept or reject the power of attorney, the Act permits it to request additional information, at the principal's expense, in the form of an opinion of counsel or an agent's certification. In sum, the Uniform Power of Attorney Act provides much needed clarity and protection for those who are asked to accept powers of attorney—protection that is not available under most current state statutes or the common law.

[22] UPOAA § 119(d)(1).
[23] *Id.* at § 119(e).
[24] *Id.* at §§ 120(b)(6), Alternative A; 120(d)(6), Alternative B. In order for refusal on this basis to be protected, the third person must make, or have actual knowledge that another person has made, a report of this belief to adult protective services. *Id.*