

Memorandum 90-119

Subject: Study L-3046 - Recognition of Authority of Agent Under
Statutory Form Power of Attorney (Draft of Tentative
Recommendation)

At the July meeting, the Commission decided to devote further study to a provision making statutory form powers of attorney more effective by fashioning a remedy against third persons who unjustifiably refuse to recognize the authority of the agent under the power of attorney. This question is before the Commission because proposed Civil Code Section 2480, providing liability for attorney's fees against third persons who unreasonably refuse to honor a statutory form power of attorney within a reasonable time, was deleted from Senate Bill 1777 (the Commission's bill proposing the Uniform Statutory Form Power of Attorney Act) due to objections from the California Bankers Association and the California Land Title Association. The provision was supported by the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section.

The issue of recognition of the agent's authority under a statutory form power of attorney needs to be resolved in the upcoming legislative session. While we will be considering the same general issue in the course of preparing the comprehensive power of attorney statute, the staff believes that the statutory form power of attorney should be treated separately. The statutory form is simple, short, and easy to understand, so that a stricter duty may be imposed on third persons to accept the exercise of the power. A third person may have a legitimate complaint that it is too burdensome to review and interpret a lengthy, custom-made power of attorney, but this is not the case with the statutory form. Ultimately, the Commission may decide to apply a general rule to both statutory forms and other powers of attorney, but until that decision is made, a provision directed to the statutory form is needed and appropriate. It is premature to propose a general rule on compelling recognition of an agent's authority, since work on the comprehensive power of attorney statute has just begun.

Background

As originally proposed in the Commission's *Recommendation Relating to Uniform Statutory Form Power of Attorney Act* (December 1989), 20 Cal. L. Revision Comm'n Reports 415 (1990), the section read as follows:

§ 2480. Compelling third person to honor power of attorney

2480. If a person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor it within a reasonable time, the attorney in fact may compel the person to honor the power of attorney in an action for that purpose brought against the person. If an action is brought under this section, the court shall award attorney's fees to the attorney in fact if the court finds that the person acted unreasonably in refusing to honor the power of attorney.

Comment. Section 2480 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). The section is drawn Probate Code Section 13105 (affidavit procedure for collection or transfer of personal property of small estate). The person to whom the power of attorney is presented may, for example, act reasonably in refusing to honor it where it is not absolutely clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, for example, the person may reasonably refuse to honor the power of attorney if the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney.

A typical concern of those who supported enactment of this section was that financial institutions often refuse to honor a power of attorney and require execution of a power of attorney on the financial institution's own form. This is obviously not a practical option in many cases, and defeats the purpose of the power of attorney; it is an impossible requirement to satisfy if the principal has become incompetent.

In his letter of April 11, 1990, Lawrence E. Green, Executive Vice President and Counsel, California Land Title Association (CLTA), expressed the following concern with proposed Section 2480 as proposed in SB 1777:

In insuring title to real property or assignments of trust deeds the title industry needs to be able to evaluate a power of attorney in the context of the parties involved, the specific transaction and the risks assumed in deciding whether to rely upon the power of attorney in insuring

title. Therefore, the CLTA objects to the addition to the Uniform Act authorizing an action to compel reliance upon the power of attorney in the context of assuming risks relative to the conveyances and insurance of real property.

CLTA's objection can be seen as a question of the degree to which a business is free to choose its customers without fear of liability. Apparently, neither CLTA nor CBA feels safe in relying on the "acted unreasonably" standard in proposed Section 2480.

In an attempt to provide more certainty as to the meaning of "unreasonably" and to deal with a concern of the State Bar, the staff had earlier suggested revising proposed Section 2480 as follows:

(a) If a person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor it within a reasonable time, the attorney in fact may compel the person to honor the power of attorney in an action for that purpose brought against the person.

(b) If an action is brought under this section, the court shall award attorney's fees to the attorney in fact if the court finds the person acted unreasonably in refusing to honor the power of attorney.

(c) For the purposes of subdivision (b), a person does not act unreasonably in refusing to honor a power of attorney if the refusal is authorized or required by a provision of a federal or state statute or regulation. Subject to subdivision (d), for the purposes of subdivision (b), a person does not act unreasonably in refusing to honor a power of attorney if the refusal is authorized or required by a provision of a contract or agreement between the person and the principal or by a custom or practice in the industry. Nothing in this subdivision limits other grounds that may constitute a reasonable refusal to honor a power of attorney.

(d) For the purposes of subdivision (b), a refusal to honor a power of attorney under this chapter is unreasonable if the only ground for the refusal is that the power of attorney is not on a form prescribed by the person to whom the power of attorney is presented. Nothing in this subdivision limits other grounds that may constitute an unreasonable refusal to honor a power of attorney.

This revision provided three escape hatches for the banks and title companies -- refusal based on statutes and regulations, on contract or agreement, or on custom and practice. Subdivision (d) covered the case that most concerned the State Bar Section and others who submitted comments on this proposal -- the insistence that the power of attorney be executed on the financial institution's own form.

Limit Compulsion and Liability to Third Persons in Privity?

As noted above, CLTA expressed the concern that a title company should not be subject to being forced by court order to deal with an agent, and be liable for "unreasonably" refusing to issue title insurance in this case. This raises an important issue that should be addressed. A distinction can be drawn between (1) a case where the third person to whom the agent presents the power of attorney holds the principal's property (such as a deposit account in a bank or a bailee) or owes money or a contractual duty to the principal and (2) a case where the third person would be free to refuse to deal directly with the principal. Put another way, the agent should not have greater rights and powers than the principal.

In the title company situation as we understand it, the company should be as free to refuse to deal with the agent as with the principal. It is possible, however, that CLTA is saying a bit more than this. (See excerpt from Mr. Green's quoted above.) CLTA may be saying that the agent under the power of attorney may presumptively be in a lower position than the principal, if we correctly interpret Mr. Green's reference to the "context of the parties involved." The staff believes CLTA has a good point on the first issue -- that the agent should not be in a better position than the principal -- but we would not want to accept the second argument -- that the agent should be in a lesser position than the principal.

A simple way to deal with the issue is to provide that the third person may be compelled to honor the power of attorney in the same manner and to the same extent that the principal acting on his or her own behalf could compel the third person to act. The attached staff draft adopts this approach.

"Custom or Practice in the Industry"

A related matter concerns the compromise language under consideration at an earlier time which deemed reasonable a refusal to accept the authority of the agent under a power of attorney if the refusal was in accord with a custom or practice in the industry. The freedom of contract principle should not extend so far as to provide statutory ratification for a practice that tends to frustrate the

ability to make powers of attorney effective. We assume in the preceding discussion that if one title company refuses to issue title insurance at the request of the agent under the power of attorney that the agent can get title insurance from another company. But if it turns out that the "custom and practice" of the title insurance industry is generally to refuse to issue title insurance at the request of agents under powers of attorney, a statute that promotes such customs and practices by treating them as inherently reasonable is self-defeating.

In a letter considered at the July meeting, Harley J. Spitler addressed this point:

. . . the words "or by a custom or practice in the industry" should be deleted. That exception is both unnecessary and uncertain. Ex: Insurance companies and title companies could simply by informal arrangement create a "practice" in their industry of refusing to honor the directions of the agent acting under a DPA [durable power of attorney]!

The staff agrees with Mr. Spitler and we have not included this language in the draft tentative recommendation.

Staff Recommendation

The staff agrees with the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section and with Mr. Spitler and others that the enforcement provision is important. We urge the Commission to review the attached draft of a tentative recommendation, make any needed revisions in it, and approve distribution after the September meeting. We should be able to obtain comments from interested persons and organizations in time for consideration at the November Commission meeting, at which time the Commission can determine whether to submit a recommendation to the Legislature in 1991.

Respectfully submitted,

Stan Ulrich
Staff Counsel

TENTATIVE RECOMMENDATION

relating to

RECOGNITION OF AGENT'S AUTHORITY
UNDER STATUTORY FORM POWER OF ATTORNEY

The Uniform Statutory Form Power of Attorney Act was enacted in 1990 to provide a simple, readily understood, and widely usable power of attorney form.¹ In order to fully accomplish its purposes, the statutory form needs to be accepted by third persons with whom the agent desires to transact business on behalf of the principal. Judging from past experience with powers of attorney prepared by attorneys and with statutory and nonstatutory forms, the intentions of persons who believe they have put their affairs in order, consistent with the applicable law, have been frustrated by the unwillingness of some third persons to honor a power of attorney and accept the authority of the agent under a power of attorney.² In many cases, this reluctance may simply be a bureaucratic reaction to the variety of powers of attorney that the particular business or institution may be faced with, resulting in a policy of honoring only those powers of attorney executed on the company's own form. Thus, some businesses have adopted a general policy of not honoring powers of attorney unless executed on a form approved by the business itself. In other cases, the third person may genuinely be in doubt as to the authority of the agent even after taking the time to examine the power of attorney.

1. Civ. Code §§ 2475-2499.5, enacted by 1990 Cal. Stat. ch. [SB 1777], § 2. This legislation was enacted on recommendation of the Law Revision Commission. See *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990).

2. See, e.g., Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1990 California Durable Power of Attorney Handbook §§ 2.56-2.61 (Cal. Cont. Ed. Bar), discussing policies of banks with regard to accounts, safe deposit boxes, and trusts, title companies, insurance companies, and stock transfer agents.

Existing law attempts to deal with this problem by protecting third persons from liability in specified circumstances. Civil Code Section 2404 protects a third person who relies on the agent's affidavit in support of the statutory form, the same as any other power of attorney.³ This affidavit protects a third person from liability for actions undertaken in good faith reliance on the affidavit as to issues of termination and revocation of the power of attorney,⁴ but has no compulsory effect on third persons. Similarly, Civil Code Section 2512 protects a third person who acts in good faith reliance on a power of attorney, including a statutory form power of attorney,⁵ if the power of attorney is presented by the named agent, appears to be valid on its face, and includes a notary public's acknowledgment.⁶ This protection should work well with a statutory form power of attorney presented to a third person by the agent named in the instrument because the statute requires it to be acknowledged before a notary public⁷ and the facial validity of the form should be easy to determine. As before, however, these provisions encourage but do not compel acceptance by third persons.

3. For background on Civil Code Section 2404, see *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980). This general provision in the Uniform Durable Power of Attorney Act (Civ. Code §§ 2400-2407) applies to the Uniform Statutory Form Power of Attorney Act (Civ. Code §§ 2475-2499.5) as provided in Civil Code Section 2480(a).

4. The appropriate extent of the protection afforded by Civil Code Section 2404 for powers of attorney generally is the subject of a pending study by the Law Revision Commission. See also *Recommendation Relating to Recognition of Trustees' Powers* [September 1990], ___ Cal. L. Revision Comm'n Reports ____ (19__).

5. See Civ. Code § 2480(c).

6. For background on Civil Code Section 2512, see *Recommendation Relating to Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986).

7. See Civ. Code §§ 2475 (form), 2476(c) (acknowledgment of principal's signature).

The Law Revision Commission recommends adding a provision to the Uniform Statutory Form Power of Attorney Act to address these problems. The proposed legislation would permit the agent under a properly executed power of attorney to bring an action to compel a third person to accept the agent's authority to the same extent as the principal would be able to compel the third person to act if an action were brought on the principal's own behalf.⁸ This provision would permit an action against a business, insurance company, financial institution, or other person who holds property of the principal, who owes a debt to the principal, or who owes a duty or performance to the principal. It would not permit the agent to compel a third person to act where the principal could not do so. Thus, a business that could choose not to accept the principal as a customer would be completely free to decline to deal with the agent.

In order to make the proposed remedy effective, the proposed legislation also requires the court to award attorney's fees in an action to compel acceptance of the agent's authority if the court finds that the third person acted unreasonably in refusing to accept the agent's authority.⁹ The proposed legislation makes clear, however, that a third person would not be acting unreasonably if the refusal to accept the agent's authority under the power of attorney was authorized or required by a state or federal statute or regulation or by a provision in a contract or agreement between the third person and the principal. On the other hand, the proposed legislation provides that a third person will not be found to have acted reasonably if the sole reason for refusing to accept the agent's authority was insistence on use of the third person's own form.

8. This rule is similar to the power of a decedent's successor to enforce delivery or payment of property under the affidavit procedure for collection and transfer of property of a small estate. See Prob. Code § 13105(b). The general power of attorney statute in Minnesota also contains a similar provision. See Minn. Stat. Ann. § 523.20 (West Supp. 1990).

9. This provision is also drawn from the affidavit procedure for collection and transfer of a small estate to a successor. See Prob. Code § 13105(b).

PROPOSED LEGISLATION

§ 2480.5. Compelling third person to honor power of attorney; liability for attorney's fees

(a) If a person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor agent's authority under the power of attorney within a reasonable time, the person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the person, to the same extent as the principal would be able to compel the person to honor the authority of the principal acting in the principal's own behalf.

(b) If an action is brought under this section, the court shall award attorney's fees to the attorney in fact if the court finds that the person acted unreasonably in refusing to accept the agent's authority under the power of attorney.

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a power of attorney, a person does not act unreasonably in refusing to accept the agent's authority under a power of attorney in any of the following circumstances:

(1) If the refusal is authorized or required by a provision of a state or federal statute or regulation.

(2) If the refusal is authorized or required by a written provision of a contract or agreement between the person and the principal.

(d) Notwithstanding subdivision (c), a refusal to accept an agent's authority under a statutory form power of attorney under this chapter is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the person to whom the power of attorney is presented.

Comment. Section 2480.5 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivisions (a) and (b) are drawn in part from Probate Code Section 13105(b) (compelling payment or delivery under affidavit procedure for collection or transfer of personal property of small estate). See also Section 2404 (affidavit of lack of knowledge of termination of power of attorney).

Subdivision (a) permits the agent under a power of attorney to bring an action to compel a third person to honor the power of attorney

to the same extent as the principal could bring an action against the third person to compel the third person to act. Under this rule, a third person who could not be forced to do business with the principal consequently may not be forced to deal with the agent. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the agent's authority.

In addition, as provided in subdivision (b), if the refusal to deal with the agent is found to be unreasonable, the third person will also be liable for attorney's fees incurred in the action to compel compliance. The determination of reasonableness depends on the particular circumstances of each case. A person to whom the power of attorney is presented may, for example, act reasonably in refusing to accept the agent's authority where it is not clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, a third person may reasonably refuse to honor the power of attorney if, for example, the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney. See also Section 2512 (protection of person relying in good faith).

Subdivision (c) provides some specific guidelines as to the meaning of the reasonableness rule in subdivision (b) as it relates to the liability for attorney's fees. However, subdivision (d) makes clear that a third person's preference for its own power of attorney form is never a reasonable ground for refusing to accept the authority of an agent under a properly executed and effective power of attorney.