

Memorandum 90-84

Subject: Study L-3046 - Statutory Power of Attorney

We assume that the legislation recommended by the Commission proposing enactment of the Uniform Statutory Form Power of Attorney Act will be enacted by the Legislature this year. This memorandum presents for Commission consideration a provision that was deleted from the Commission's recommended legislation before it was enacted by the Legislature.

Substance of Deleted Provision; Support and Opposition

The deleted provision would require that the court award attorney fees to the agent (attorney in fact) if the court finds that a third person (such as a bank) acted unreasonably in refusing to honor the statutory form power of attorney.

The Executive Committee of the Estate Planning, Trust and Probate Law Section wrote a letter in support of the Commission recommended legislation. The letter included the following:

In particular, we support the present provisions of the bill that provide that, when a third party unreasonably refuses to honor an otherwise valid statutory power, such third party must bear the expense of a court action (if any) brought to require them to honor the power. There are similar provisions in the small estates administration provisions of the Probate Code, which do not seem to cause any particular practical difficulties.

On the other hand, the California Bankers Association and the California Land Title Association both opposed the bill because it included this provision. We decided to delete the provision from the bill to eliminate this opposition.

Revisions to Deal With Objections to Commission Recommended Provision

A copy of the letter of opposition from the California Land Title Association is attached as Exhibit 1. Although we received no written letter of opposition from the California Bankers Association (CBA), a representative of CBA did call to indicate concern about the provision.

In an effort to eliminate the opposition of CBA, the staff revised the provision proposed by the Commission to read:

(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 deals with the case that most concerned the State Bar Section and the persons who submitted comments on this proposal--the refusal of a financial institution to honor a comprehensive power of attorney (prepared by a lawyer) and instead insisting that the power of attorney be executed on the financial institution's own form.

The revision does not deal with the concern expressed by the California Land Title Association. A distinction can be drawn between the case where the person to whom the power of attorney is presented holds property of the principal (such as a deposit account in a bank) and the case where the person to whom the power of attorney is presented is one who issues title insurance. Persons who wrote the Commission concerning this matter expressed concern that some title insurance companies would not issue title insurance when a transaction was made by an agent under a power of attorney. The title insurance

companies take the position that they should be free to determine whether or not they will issue title insurance, and that the exercise of a power of attorney in connection with a particular transaction is only one of the circumstances that will be considered in making that determination. The agent can always try to get title insurance from another company if one company declines to issue the title insurance. However, this alternative is not available where the person to whom the power of attorney is presented holds the property of the principal. Accordingly, the staff believes that this distinction between the two types of cases would justify limiting the scope of the provision to the case where the power of attorney is presented to a person holding property of the principal. If the Commission desires to recommend such a limited provision, subdivision (a) of the provision set out above could be revised to read:

(a) ~~If a person to whom~~ a properly executed statutory form power of attorney under this chapter is presented to a person who holds property of the principal and the person refuses to honor ~~it~~ the power of attorney 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.

Staff Recommendation

The staff agrees with the State Bar Section that the provision is an important one. We urge the Commission to review the provision, make any needed revisions in it, and distribute a Tentative Recommendation recommending enactment of the revised provision. When the comments received from interested persons and organizations are reviewed by the Commission, the Commission can determine whether to submit a recommendation to the Legislature.

Respectfully submitted,

John H. DeMouilly
Executive Secretary



CALIFORNIA LAND TITLE ASSOCIATION

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April 11, 1990

CA LAW REV. COMMISSION

APR 12 1990

RECEIVED

The Honorable Robert Beverly
Member of the Senate
State Capitol
Sacramento, California 95814

Re: Senate Bill 1777


Dear Bob:

The CLTA Legislative Committee has a concern with SB 1777 dealing with powers of attorney.

Section 2480 of the Civil Code as added by SB 1777 requires a person to honor the power of attorney or face an action compelling them to honor it along with the potential for an award of attorney's fees. This provision is one of five recommended additions by the Law Revision Commission to the Uniform Statutory Form Power of Attorney Act.

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.

Sincerely,


Lawrence E. Green
Executive Vice President
and Counsel

LEG:vo

cc: Gene Wong, Consultant, Senate Judiciary Committee
California Law Revision Commission