



FIFTH THIRD BANK

# Power of Attorney Risks

Presented by:

Joanne E. Hindel

Vice President and Regional Fiduciary Executive

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# Financial Institution Risks with respect to Powers of Attorney

- Frequently a financial institution is criticized for not accepting the authority of a POA agent.
- Alternatively, a financial institution can be criticized for acting pursuant to the authority of a POA agent.
- A financial institution can be subjected to adverse publicity and expenses as a result of actions taken or not taken by a POA agent.



# Basic challenges to Powers of Attorney

- A common planning tool is the power of attorney for financial decision-making
- Although powers of attorney can provide much-needed flexibility when properly executed and correctly utilized, they are also subject to challenges on a variety of grounds
- Two types of challenges that are often brought with respect to powers of attorney are:
  - A challenge to the validity of the power of attorney itself and
  - A challenge to the actions taken by the agent
- Sometimes both challenges are asserted simultaneously



# The law concerning Durable Powers of Attorney

- Concept of a power of attorney was established under common law as contract of agency
- A “durable” power of attorney is a creature of statute
- In 1954 Virginia became the first state to enact a durable power of attorney law
- Now, all states have laws authorizing the execution of durable powers of attorney but these laws are not identical, and in some instances, may contain significant differences



# The law concerning Durable Powers of Attorney

The Uniform Power of Attorney Act (2006 UPOAA) has been enacted in 26 states as of 2018 and in 2019 was introduced in Mississippi

The original Durable Power of Attorney Act, last amended in 1987, was followed by all but a few jurisdictions.

Despite initial uniformity, the majority of the states enacted non-uniform provisions to deal with specific matters that were not addressed in the original Act.



# The Uniform Power of Attorney Act

- The areas of divergence included:
  - Multiple agents
  - Later appointed fiduciary or guardian
  - Impact of dissolution of Principal's marriage to the Agent
  - Authority to make gifts
  - Standards for Agent conduct
- UPOAA is primarily a set of default rules in which the Principal can choose the extent of the Agent's authority and what rules will govern the Agent's conduct



# The Uniform Power of Attorney Act

- Sections 119 and 120 of UPOAA address the problem of third parties refusing to accept the authority of an Agent.
  - Section 119 provides protection from liability for persons that in good faith accept an acknowledged power of attorney.
  - Section 120 sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions.
  - An alternate Section 120 is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.
  - In exchange for mandated acceptance of an Agent's authority, the Act does not require persons that deal with an Agent to investigate the Agent or the Agent's actions.



# The Uniform Power of Attorney Act

- In some states that have adopted UPOAA, Sections 119 and 120 have not been adopted.
- In Ohio, for instance, these two sections were not adopted:
  - Third parties presented with statutory form powers of attorney drafted under Ohio law are not required to accept the forms
  - Third parties are then also not given the immunity from investigating the Agent's actions.



# The Uniform Power of Attorney Act

- Under UPOAA there are certain powers that a POA Agent can only exercise if specifically granted in the POA document:
  - The power to create, amend, revoke or terminate an inter vivos trust
  - The power to make gifts
  - The power to create or change rights of survivorship
  - The power to create or change a beneficiary designation
  - The power to delegate authority granted under the POA document
  - The power to waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
  - The power to exercise fiduciary powers that the principal has authority to delegate



# Interaction with other laws

- The authority of a POA Agent may be affected by other statutes that are not a part of the POA statutes in a given state.
- For instance, in Ohio, under the Ohio Trust Code, a POA agent can only act on behalf of the settlor of a trust if the authority is granted in both the POA document and the trust agreement. (ORC 5806.02(E)).
- In certain states, Uniform Commercial Code provisions may affect the immunity afforded financial institutions when acting pursuant to validly executed powers of attorney. See Tennessee Code Annotated Section 47-3-307 cited in West ex. rel. Harvey v. Regions Bank, 2011 WL 3059693 (Tenn. Ct. App., July 26, 2011).



# Lack of uniformity

- Case law and state statutes that may impact Power of Attorney laws demonstrate that there is considerable lack of uniformity around the country and even between financial institutions as to the acceptance of an agent's actions under a power of attorney.
- Certain POA statutes do not include investment accounts in the definition of bank accounts which can impact an agent's authority regarding investment management accounts held on the fiduciary side of the bank.
- This creates uncertainty for individuals who execute the power of attorney documents and makes it difficult for multi-state financial institutions to develop consistent policies and procedures regarding the acceptance of POA documents.

# Developing consistency in the review of Power of Attorney documents



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- Does your organization require that a Principal use an internally prepared form?
- How does your organization ensure that an externally drafted Power of Attorney document has been drafted in accordance with the laws of the state where it was executed?
- Who reviews the POA documents? Is this done in your legal department or in your business line or a combination of the two?



# A proposed internal review process

- A review process might be implemented that involves both the “front-line” officer (usually the trust officer) and a risk management or legal representative.
- A checklist could be created that would prompt the trust officer to address certain key aspects of the Power of Attorney document.
- If certain risk factors were triggered further review could then be conducted by risk management and /or the legal department.



# Sample checklist

- Which accounts are impacted?
- Identity of the POA Principal
  - Is the Principal acting individually or as a fiduciary
  - Is the Principal incapacitated
- Identity of the POA Agent
  - What is the relationship of the Agent and the Principal
- Who are other key people in the relationship



# Sample checklist

- Are there multiple POA Agents listed
  - Can they act independently
  - Are they to act successively
- What is the date of execution of the POA
  - Does it revoke prior POA documents
  - Do you have copies of prior documents
  - Have the POA Agents changed from those in prior documents



# Sample checklist

- What state law governs the provisions of the POA document
  - Does the Principal reside in the same state
  - Are the accounts at issue governed by the same state law



# Sample checklist

- What authority does the POA Agent hold
  - Is there a specific action that the Agent wishes to take
  - Is the specific action set forth in the POA document
  - Do you believe that the Agent is acting in the best interests of the Principal
  - Are there others, such as family members, who might object to the actions contemplated by the POA Agent



# Sample checklist

- Potential risk factors:
  - Actions of POA Agent may harm interests of other family members who had previously been favored by Principal
  - Recent changes in identity of POA Agents that might raise suspicion
  - Unclear authority of POA Agent
  - Actions by POA Agent that do not appear to be in best interests of Principal



# Sample checklist

- Questions to be addressed by risk manager or legal representative
  - What law governs the POA document
  - Has the state adopted UPOAA
  - Is the POA document executed in accordance with that state's requirements- including any acknowledgement requirement
  - Do the laws of that state require or permit a third party to accept an acknowledged POA document



# Sample checklist

- Is the contemplated action of the Agent clearly identified in the POA document
- If not, does the state law provide a default statute which grants the authority to the POA Agent
- Does the state law provide a means by which a third party can challenge or question the authority of the POA Agent



# Case law

- Tennessee Farmers Life Reassurance Co. v. Rose, 239 S. W. 3d 743 (Tenn. 2007)

Brenda Langley purchased a \$50,000 life insurance policy in 1999 and designated her three children and one grandchild as the beneficiaries of the policy.



# Tennessee Farmers v. Rose

- In August 2002, Mrs. Langley executed a durable power of attorney appointing her sister Linda Rose as her POA agent.
- Under the terms of the power of attorney document, the POA agent had the authority to: “transact all insurance business on my behalf...”
- In October 2002, Linda Rose completed a change of beneficiary form for the policy removing Mrs. Langley’s children and grandchild and naming herself as the sole beneficiary of the policy.



# Tennessee Farmers v. Rose

- Brenda Langley died in March 2003 and five days later Mrs. Rose filed a claim for the proceeds.
- In July 2003 Mrs. Langley's children also filed a claim for the insurance proceeds.
- Due to the competing claims, Tennessee Farmers filed an interpleader action to determine the proper beneficiaries of the insurance policy.



# Tennessee Farmers v. Rose

- In the lawsuit, Mrs. Langley's children asserted that their mother did not have the capacity to execute the power of attorney
- or alternatively had been coerced into executing the power of attorney naming Mrs. Rose as the POA agent.
- They also filed for summary judgment on the grounds that the POA document did not grant the POA agent the authority to change the beneficiaries of the life insurance policy.



# Tennessee Farmers v. Rose

- The trial court granted the summary judgment and the appellate court affirmed.
- The Supreme Court of Tennessee agreed to review whether the POA document authorized Mrs. Rose to change the beneficiaries of the life insurance policy.



# Tennessee Farmers v. Rose

- The Supreme Court focused exclusively on whether the POA document terms were controlled by the Uniform Durable Power of Attorney Act under Tennessee law or whether the document terms were to be interpreted without reference to the Act.



# Tennessee Farmers v. Rose

- The Court determined that the Langley POA document did not mention any provisions of the Act or clearly express an intention to adopt the language contained in the Act.
- The Court therefore concluded that the POA document was to be interpreted without reference to the Tennessee Act and therefore Mrs. Rose did hold the authority to change the beneficiaries of the insurance policy.



# Case Law

- West v. Regions Bank, No. W2010-02023-COA-R3-CV (Court of Appeals of Tennessee, Jackson 2011)
- Robert West's first wife died in 2001 and a few years later, at the age of 82, he married Clara West, age 72, who had three adult sons.
- Robert West had no children of his own but he was close to a nephew, James West.



# West v. Regions Bank

- By 2007, both Mrs. and Mrs. West needed assistance handling their financial affairs and they each executed powers of attorney naming her three sons and his nephew as their attorneys-in-fact.
- James West consulted with an attorney friend who suggested that it would be better if James West served alone as POA agent for his uncle.



# West v. Regions Bank

- The attorney drafted a new POA document and he and James West took it to Robert West who signed the document.
- In June 2007, two days after it was signed, James West started to transfer Robert West's assets to himself.



# West v. Regions Bank

- When he presented the POA document to Regions Bank where Robert West had bank accounts held in his individual name and in joint name with Clara West, the Bank required James West to execute an “affidavit of continued validity”.
- The affidavit had an indemnity provision in which James West agreed to indemnify the Bank from any claims related to the use of the POA document.



# West v. Regions Bank

- In addition to transferring bank accounts, James West sold Robert West's AT&T stock and endorsed the check representing the sale proceeds as Robert West's POA agent and then deposited the funds into his own business account.
- James West also surrendered a life insurance policy issued to Robert West and deposited the proceeds into his business account.
- In total, James West liquidated and transferred approximately \$367,000 of Robert West's assets.



# West v. Regions Bank

- On October 27, 2007, Robert West died leaving Clara West with significantly less funds for her support – his assets having been transferred and liquidated by James West.
- In January 2008, Janet Harvey was appointed as conservator of Mrs. West and as administrator of Robert West's estate.



# West v. Regions Bank

- Janet Harvey then filed a complaint against James West and Regions Bank in which she alleged that James West had breached his fiduciary duty as POA agent and had misappropriated Robert West's assets and that Regions Bank had enable and abetted James West's wrongful actions.
- In particular, the complaint alleged that the Bank knew or should have known that James West's actions were suspicious and should have required inquiry or investigation.



# West v. Regions Bank

- The Bank filed an action for summary judgment relying upon a Tennessee statute which provides that banks may recognize the authority of a power of attorney and no bank shall be liable for damages for making payments pursuant to the statute.
- The trial court granted the Bank's summary judgment but the conservator appealed and the appellate court determined that the trial court erred in granting the summary judgment.



# West v. Regions Bank

- The appellate court relied upon a Tennessee UCC statute providing that a bank could be held liable for accepting checks made payable to a principal that are deposited by a fiduciary into the fiduciary's personal account.
- The appellate court remanded the case to the trial court to address the issue of whether the Bank acted in a commercially reasonable manner.



# Common situations involving POA documents

## Situation #1:

- Jane Morgan is the Principal of an investment management account at Bank and wishes to add her husband, John, who is her POA Agent to the account.
- She anticipates that he may add or withdraw from the account, establish investment objectives for the account and terminate the account in the event she loses capacity.
- At the moment Jane has full capacity but wants to add her husband now in case something happens to her in the future.



# Common situations

## Situation #2:

- John Morgan contacts the Bank and advises that his wife, Jane has suffered a stroke and is unable to handle her affairs.
- He indicates that he holds a POA for his wife and would like to now direct all transactions pertaining to her investment management account.
- He has told Bank that he plans to withdraw all the funds and move them into an account in his name so they can attempt to shield the funds from nursing home costs.



# Common situations

## Situation #3:

- Sally Morgan who is Jane Morgan's daughter contacts the Bank and advises that she is the POA Agent for her mother under a more recent POA document.
- Bank knows that Sally is not the daughter of John Morgan and that John and Sally do not get along.
- On review of the POA document provided by Sally, Bank determines that it is dated after the POA document submitted by John and that it revokes all prior POA appointments made by Jane.
- Sally also wants to move all the funds in the investment management account into an account in her name and directs Bank to not tell this to John Morgan.



# Common situations

## Situation #4:

- Jane Morgan has established her own revocable trust and has named Bank as her trustee.
- John Morgan informs Bank that Jane has suffered a stroke and he serves as her POA Agent.
- He tells Bank that he plans to change the beneficiaries of Jane's trust and will remove Sally Morgan as a beneficiary.



# Common situations

## Situation #5:

- Jane Morgan became the trustee of the Andrew Morgan trust established by her father when he died.
- Bank is managing an investment management account for Jane Morgan as trustee of the Andrew Morgan trust.
- John Morgan informs Bank that Jane has suffered a stroke and can no longer handle her financial affairs and he, John, will now direct Bank with respect to the Andrew Morgan trust because he is the POA Agent for Jane.



# Conclusion

- Two types of challenges that are often brought with respect to powers of attorney are:
  - a) A challenge to the validity of the power of attorney itself and
  - b) A challenge to the actions taken by the agent
- Sometimes both challenges are asserted simultaneously



# Conclusion

- Frequently a financial institution is criticized for not accepting the authority of a POA agent.
- Alternatively, a financial institution can be criticized for acting pursuant to the authority of a POA agent.



# Conclusion

- Develop a process to ensure an orderly review of the POA document and authority of the POA agent.
- Consider the governing state’s law but also be sure to consider the particular circumstances of the situation at hand.
- As a last resort request a court determination as to the authority of the POA agent.

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