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New Power of Attorney Law Corrects Some Flaws, Not All

BY ADAM LEITMAN BAILEY AND DOV TREIMAN

On Oct. 14, 2009, these authors critiqued the then brand new Statutory Short Form Power of Attorney (POA) statute. In brief, we found it to be a disaster. Now sitting on the governor's desk, awaiting signature, is a heavily amended version of the statute addressing a number of the issues we and others like us raised. While not all of the issues were addressed, we urge the governor to sign this version, as flawed as it still is. Whether Democrats or Republicans, the New York Legislature has real estate attorneys thinking about Ronald Reagan's comment that the nine scariest words in the English language are "I'm from the government and I'm here to help."

Real estate fraud has rocked our nation, causing shattering amounts of property and money lost and causing the creation of special branches at the Federal Bureau of Investigation, the U.S. Attorney's office and even at the New York District Attorney's office. In spite of this, last year's POA law gave fraudsters ample reason to celebrate. The POA, allowing fraudsters to steal without even showing up to the heist, is the most common device used to commit mortgage and property fraud by allowing fraudsters to pretend that they were asked that they close the deal on the owner's behalf.

We and others like us have espoused requiring a governmental or verifiable identification to be presented with the power of attorney. We have recommended that a reliable phone number for the power giver be part of the POA form. These requests went unheeded. The new POA law still leaves out these simple protections. From using a single-sheet form, we now have a complicated document with misleadingly named optional rider, still too puzzling for many an attorney. Thankfully, with great efforts from the New York State Bar Association and its Real Property Section together with counsel at a number of title companies, a new law has passed the Legislature which will make using a power of attorney less manageable than the old form, but vastly better than last year's statute.

A Still Newer POA Form

The 2009 version and the 2010 version both opt for a vastly larger, vastly more

Adam Leitman Bailey

Dov Treiman

complicated form than the form originally devised in 1948. This remains a problem. While the 2009 version of the statute was full of traps for those who had no idea what they were reading, at least the 2010 version has people signing on to what they probably do want to have happen. So, for example, the 2010 version no longer automatically revokes all previous POA's. This one change alone is a vast improvement for folks who give POA's to various people for a wide variety of purposes. Under the 2009 statute, every new POA accidentally killed all the others. That has been corrected in the 2010 statute.

In our 2009 critique, we expressed fear that there would be three POA forms floating around: the pre-2009, the 2009, and the 2010. This is just what happened. However, the new law seeks to address that problem by making the changes retroactive to the effective date of the 2009 statute and "any statutory short form power of attorney…executed after Aug. 31, 2009 shall remain valid as will any revocation of a prior power of attorney that was delivered to the agent before the effective date of this act." Note, therefore, that all the accidental POA revocations under the 2009 are specifically preserved in the newest form of the statute.

Technical Correction

The 2010 bill touts itself as a mere technical correction and places great emphasis on the fact that it makes wording consistent where it previously was not. However, this masks over its numerous substantial substantive changes. Both we and various bar groups wrote of the many kinds of transactions that apparently unintentionally got swept up in the 2009 statute. These are now excluded from the 2010 statute and, given the retroactivity of the 2010, probably serves to validate nunc pro tunc POA's that were invalid under the 2009 statute.

These include POA's given as part of a business transaction; powers coupled with an interest; POA's given to secure loans; POA's for securing stock transfers; proxies; POA's prescribed by governmental agencies; POA's given to people one hires to file governmental documents, such as accountants dealing with the IRS; POA's given to asset managing institutions; POA's given as part of holding some position in a business entity or condominium; a power contained in a business agreement or condominium arrangement; POA's given to condominium managers; POA's given to brokers for real property transactions; designation of an agent for acceptance of process; and POA's created by statutes generally.

Ordinary Sales

The 2010 statutory list of exemptions from the new POA does not specifically exempt real estate transactions by ordinary citizens looking to sell their homes. There are several exemptions in the new section1 which a court could construe to obviate the need for a new conforming POA, but the argument could persuasively be made that such exemption was not within the intendment of the statute. For example, new §5-1501C(1)(c) exempts powers "of attorney given primarily for a business or commercial purpose…to facilitate transfer or disposition of…assets, whether real, personal, tangible or intangible." Ordinary homes sales are probably not "for a business or commercial purpose" and therefore the 2010 statute still incorporates them into the kinds of transactions requiring the new statutory POA.

Third Party Powers

New GOL §5-1501C(4) also exempts from the new POA requirements "a power authorizing a third party to prepare,

execute, deliver, submit and/or file a document or instrument with a government or governmental subdivision, agency or instrumentality or other third party." This seems to exempt from the new POA law situations requiring the execution of a deed or mortgage. In order to read it that way, it would mean that there is no need for "a third party" to execute any document for any purpose. While this is a plausible reading of the words contained in this section, it makes the exception so wide that there would be nothing left to be an exception to.

This wording speaks of authorizing a "third party." So it seems that the authority granted to the agent (the second party) on the POA is restricted, but the power granted to the "third party" is unrestricted. The statute does not specify who or what this "third party" might be, other than that it must be a financial institution.2 The concept of a document signed by a first party granting power to a third party of any kind without making that third party into a second party (agent) is utterly mind boggling. One dreads to think what the courts will think this section means.

The Gifts Rider

Since the exemption of ordinary work-a-day house sales cannot reliably be deemed to be exempted by the 2010 statute, title companies are going to have to assume that the statute does indeed apply to such sales and these companies must examine to what extent the practices they adopted in 2009 are going to have to be continued under the 2010 version. One of these includes the requirement that if the power of attorney is not accompanied by a statutory gifts rider (SGR)3 and there is a serious question that the property is being sold for less than full value, the title closer will either insist on contact with the giver of the POA or that there be executed an affidavit that the property is indeed being sold at full value.

In this regard, it should be noted that the 2010 version of the law changes the applicability of the rider from "major gift transactions and other transfers" to "certain gift transaction." Presumably, the Legislature eliminated "and other transfers" to clarify that a statutory gifts rider is not necessary for a sale for less than full value.

Compulsory Acceptance

One aspect of the 2009 statute that saw only minor revision in 2010 was that section that created a new species of lawsuit to force one receiving proof of the existence of a power of attorney to deal with the agent as a fully authorized person. Now that we have had a year of track record with that section, we can summarize in two syllables what it has accomplished: nothing. There is not a single reported decision to come down indicating that anyone has commenced one of these special proceedings.

On the other hand, stories continue to pour in to our offices about institutions completely refusing to accept powers of attorney at all of any form whatsoever. Some banks have even gone so far as to falsely claim that New York abolished powers of attorney. While we have not received any numbers as to how many transactions there have been where someone has simply defied the law requiring recognition of these documents, the evidence certainly suggests that the statutory procedure for compelling their acceptance has proven to be a completely toothless tiger. With the price of a Supreme Court index number nowadays at $210, this comes as little surprise.

Technical Issues

The 2010 law also answers a variety of questions for which various parties critiquing the 2009 statute saw a need for answers. Thus, for example, the 2010 law allows any "person" to be an agent except an estate or a trust. It has long been understood that "person" includes a variety of business entities. Also, for example, divorces sever agencies granted to spouses, provided only that the agent-spouse knew of the divorce.

The 2009 statute varied some between referring to "arbitration" and "alternative dispute resolution" when discussing the kinds of things that the agent could handle for the principal. The 2010 statute eliminates the surviving dozen or so references to "arbitration" and replaces them with "alternative dispute resolution." In doing so, it joins only a handful of other enactments in New York that so much as refer to "alternative dispute resolution" at all,4 some of which say things along the lines of "arbitration or other alternative dispute resolution mechanisms." Notably, the pertinent part of the CPLR, Article 75, only uses the term "arbitration."5 We can see in this the desire of the drafters of the amendments to be cutting edge, even if at the cost of a certain loss in clarity.

Further Revision

Of particular note is the 2010 enactment's directive that the Law Revision Commission study "all aspects of the implementation" of both the 2008 enactment and the 2010 revision of it. Under the terms of the bill, the first report is due Sept. 1, 2010 and will address the statutory gifts rider. The second report on the entire statute in both its original and amended form is due a little more than a year later.

Conclusion

While the 2010 amendments to the power of attorney statute, if signed into law, remain an imperfect and, in some particulars, undesirable law, the 2009 statute was an error of such enormous magnitude that we would find ourselves urging the governor to sign practically anything to undo its mischief.

We do very much like the feature calling upon the Law Revision Commission to study the situation and make recommendations and we believe that until that report comes in, the 2010 statute is good enough to live with.

Adam Leitman Bailey is the founding partner and Dov Treiman is a partner of Adam Leitman Bailey, PC.

Endnotes:

1. GOL 5-1501C
2. Proposed GOL 5-1501(2)(q).
3. Originally called a Statutory Major Gifts Rider (SMGR) under the 2009 statute.
4. GBL §23; Insurance Law §4906; Family Court Act §§735 and 759; Public Health Law §4906; Transportation Law §198; VTL §417-a; Workers' Comp. Law §§13, 20, & 25.
5. We suppose "arbitration" is becoming a disfavored word because it resembles "arbitrary."