

# Dealing With Policies And Protocols Of Banking Institutions In Texas

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# Introduction

- Banking is one of the most heavily regulated industries, and regulators want to ensure that the banks have sound policies and that the banks' representatives follow those policies.
- Due to this pressure, banks are careful to follow policies that may, at times, frustrate customers and third parties.
- Further, there are unique statutes that impact litigation with banks.
- This article attempts to address some of the common issues that arise with banking policies, protocols, and litigation-oriented statutes.

# Unique Statutes For Financial Institutions

- Parties often want records and documents from financial institutions, and requests for same are governed by Texas Finance Code Section 59.006.
- Requestor must give at least twenty-four days to comply and offer to pay the institution the reasonable costs of complying, including the costs of copying, postage, research, delivery and attorney's fees or posts a cost bond in the estimated amount of those costs.

# Unique Statutes For Financial Institutions

- Texas Civil Practice and Remedies Code Section 17.028 outlines the procedure for serving a lawsuit and states that “citation may be served on a financial institution by: (1) serving the registered agent of the financial institution; or (2) if the financial institution does not have a registered agent, serving the president or a branch manager at any office located in this state.”

# Unique States For Financial Institutions

- Texas Finance Code Section 31.006(a) states that “a disinterested director, officer, or employee ... may not be held personally liable in an action seeking monetary damages arising from the conduct of the depository institution’s affairs unless the damages resulted from the gross negligence or wilful or intentional misconduct of the person during the person’s term of office or service with the depository institution.”

# Unique Statutes For Financial Institutions

- Texas Finance Code Section 59.002 states that it is a state jail felony if a person: “(1) knowingly makes, circulates, or transmits to another person an untrue statement that is derogatory to the financial condition of a bank located in this state; or (2) with intent to injure a bank located in this state, counsels, aids, procures, or induces another person to knowingly make, circulate, or transmit to another person an untrue statement that is derogatory to the financial condition of any bank located in this state.”

# Unique Statutes For Financial Institutions

- Texas Finance Code Section 59.007 provides that an attachment, injunction, execution, or writ of garnishment may not be issued against or served on a financial institution that has its principal office or a branch in this state to collect a money judgment or secure a prospective money judgment against the financial institution before the judgment is final and all appeals have been foreclosed by law.

# Exploitation Statute: Introduction

- The Texas Legislature now requires employees to report suspected incidences of financial exploitation to their employers, and for the financial institution, securities dealers, or financial adviser to similarly make reports to the Texas Department of Family and Protective Services (the “Department”).
- “H.B. 3921 seeks to protect the financial well-being of these individuals by authorizing financial institutions, securities dealers, and investment advisers to place a hold on suspicious transactions involving these vulnerable adults and by requiring the reporting of suspected financial exploitation.”
- This Legislation took effect September 1, 2017.

# Exploitation Statute: Definitions

- A “vulnerable adult” means someone who is sixty-five (65) years or older or a person with a disability.
- “Financial exploitation” means: (A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person’s money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.

# Exploitation Statute: Employee Reporting Obligation

- If an employee has cause to believe that financial exploitation of a vulnerable adult who is an account holder has occurred, is occurring, or has been attempted, the employee shall notify the employer of the suspected financial exploitation.
- If an employee makes such a report or the employer otherwise has cause to believe a reportable event has occurred, then the employer shall (1) assess the suspected financial exploitation and (2) submit a report to the Department not later than the earlier of the date it completes an assessment or the fifth business day after it is notified or otherwise has cause to believe that the suspected financial exploitation has occurred.

# Exploitation Statute: Holds

- If an employer submits a report, it (1) may place a hold on any transaction that: (A) involves an account of the vulnerable adult; and (B) the employer has cause to believe is related to the suspected financial exploitation; and (2) must place a hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Department or a law enforcement agency.
- This hold generally expires ten business days after the report was submitted and the employer may extend a hold for an additional thirty business days “if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation.” *Id.*
- The employer may also petition a court to extend a hold.

# Exploitation Statute: Policies

- The statute requires that an employer adopt internal policies, programs, plans, or procedures for: (1) the employees to make the notification; and (2) the employer to conduct the assessment and submit the report.
- A employer shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction.

# DPOA Statute: Introduction

- Historically, in Texas, financial institutions and others did not have to accept a power of attorney document.
- Involvement by Real Estate, Probate, and Trust Law (REPTL) Section of the State Bar of Texas to effectuate changes.
- One aspect of the new statutory provisions is to make sure that financial institutions and others accept power of attorney documents.

# DPOA Statute: Duty To Accept

- A person who is presented with and asked to accept a durable power of attorney by an agent shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification or an opinion of counsel not later than the 10th business day after the date the power of attorney is presented; or (B) request an English translation not later than the fifth business day after the date the power of attorney is presented.
- A person who requests an agent's certification or an opinion of counsel must accept the DPOA not later than the seventh business day after the date the person receives the requested certification or opinion.
- These periods can be extended by agreement.

# DPOA Statute: Restrictions

- A person cannot refuse to accept a DPOA without a reason.
- A person cannot ask for an alternative DPOA.
- A person cannot ask for an original.
- A person cannot require the agent to file the DPOA unless required by law.
- If past the deadline, the person cannot require the agent to provide a certification, opinion of counsel, or English translation.

# DPOA Statute: Agent's Certification

- A person to whom the power of attorney is presented may request that the agent provide an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney.
- The statute provides a form for the certification for parties to use.
- When to request?

# DPOA Statute: Physician's Note

- If the DPOA is springing, the person may request that the certification include a written statement from a physician that states that the principal is presently disabled or incapacitated.
- Same ten day period as the agent's certification.
- Unless otherwise defined in the DPOA, a person is considered disabled or incapacitated if a physician certifies in writing at a date later than the date of the DPOA that, based on the physician's medical examination of the person, the person is determined to be mentally incapable of managing the person's financial affairs.
- HIPPA issues?
- When to request?

# DPOA Statute: Opinion of Counsel

- The person may request from the agent an opinion of counsel regarding any matter of law concerning the power of attorney so long as the person provides to the agent the reason for the request in a writing or other record.
- If timely sought, this opinion will be prepared by the principal or agent, at the principal's expense.
- When to request?

# DPOA Statute: English Translation

- The person may request an English translation from the agent presenting the DPOA if some or all of the DPOA is not written in English.
- If timely requested (within five days of presentment), the translation must be provided by the principal or agent at the principal's expense.
- If the person asks for an English translation, then the DPOA is not considered presented until the date the person receives the translation.
- At that point the person can request a certification, doctor's statement, and/or attorney opinion.
- When to request?

# DOA Statute: Defenses

- The statutes have several different defenses that a person can raise in litigation if the decision to accept the DPOA is ever challenged.
- A person may accept a copy of a DPOA “without liability.”
- A person who in good faith accepts a power of attorney without actual knowledge that the signature of the principal is not genuine may rely on a presumption that the signature is genuine and that the power of attorney was properly executed.

# DPOA Statute: Defenses

- A person who in good faith accepts a power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the power of attorney as if: (1) the power of attorney were genuine, valid, and still in effect; (2) the agent's authority were genuine, valid, and still in effect; and (3) the agent had not exceeded and had properly exercised the authority.
- "A person may rely on, without further investigation or liability to another person, an agent's certification, opinion of counsel, or English translation that is provided to the person under this subchapter."

# DPOA Statute: Defenses

- A person is not considered to have actual knowledge of a fact relating to a power of attorney, principal, or agent if the employee conducting the transaction or activity involving the power of attorney does not have actual knowledge of the fact.
- “Actual knowledge” means the knowledge of a person without that person making any due inquiry and without any imputed knowledge.
- This is a very favorable definition of actual knowledge for financial institutions.

# DPOA Statute: Rejecting DPOA

- A person is not required to accept a power of attorney if: the person would not otherwise be required to enter into a transaction with the principal; the transaction would violate another law or a request from law enforcement; the person filed a SAR regarding the principal or agent or the principal or agent has prior criminal activity; the person has a negative business history with the agent; the person knows that the principal has revoked the agent's authority; the agent refused to provide a certification, opinion, or translation; the person believes in good faith that a certification, opinion, or translation is incorrect or deficient.

# DPOA Statute: Rejecting DPOA

- Further, the person may reject for the following reasons: the person believes in good faith that the agent does not have authority to conduct the transaction; the person has knowledge that a judicial proceeding has been instigated regarding the power of attorney document or has been completed with negative results for the document; the person receives conflicting instructions from co-agents; the person has knowledge that a complaint has been raised to the proper authorities that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent; or the law that would apply to the power of attorney document does not require the person to accept the document.

# DPOA Statute: Rejecting DPOA

- If a person refuses to accept a DPOA, then it should provide a written statement setting forth the reason for the refusal.
- However, if the person is refusing the DPOA due to a reason set forth in Section 751.206(2) or (3), then the person shall provide a written statement signed by the person under penalty of perjury stating that the reason for the refusal is a reason described by Section 751.206(2) or (3), and the person is not required to provide any additional explanation.
- Are SAR reports to be kept confidential under federal law?
- This response must be provided to the agent on or before the date the person would otherwise be required to accept the DPOA.

# DPOA Statute: New Policies

- Financial Institutions should create new policies and procedures for dealing with DPOA transactions: presentment, English translations, agent's certification, doctor certification, opinion of counsel, acceptance or rejection, etc.
- Wise to have all DPOA transactions flow through the same person or group of people.

# Arbitration

- Over the past few decades, parties have increasingly resorted to the use of arbitration clauses in a number of contractual contexts, including bank agreements.
- Recent rules would limit arbitration for class action suits against financial institution, but those rules have been put on hold.

# Arbitration

- General rule for enforcement
- Right to appeal refusal to compel
- Arbitrator's right to determine threshold issues
- Waiver
- Appeal of arbitration determination to court
- Mental competence issue

# Use of Policies In Litigation

- Plaintiffs often seek discovery on a financial institution's policies and procedures with an eye towards using that evidence against the institution.
- If a financial institution's representative or representatives did not live up to the policies and procedures, a plaintiff may argue that the institution did not live up to its fiduciary duty or the appropriate standard of care.

# Use of Policies In Litigation

- A company's policies do not evidence the standard of care.
- Some cases discuss the use of policies to show knowledge for punitive damages.
- A fiduciary may want to fight the discovery and production of its internal policies and procedures depending on why they are sought.
- Admissibility

# Conclusion

- Policies, procedures, and unique statutes impact how parties relate to financial institutions.
- The author hopes that this presentation assists financial institutions and parties to better communicate and effectuate requests so that disputes can be minimized.