

PENN ATTORNEYS TITLE ALERT

DATE: 08/09/10

RE: Title Alert 2010-12 Powers of Attorney

The use of powers of attorney ("POA") in real estate transactions is becoming more prevalent; however, there is some risk in relying on them. Although there is no general prohibition to the use of POAs, there are certain issues that need to be addressed before insuring a transaction involving a POA:

1. Why is the POA being used?

In the absence of a compelling reason, such as disability or incapacity of the Principal¹ (assuming the POA is durable as discussed below) or the Principal is incarcerated, you should insist on the Principal executing and acknowledging the appropriate documents. Technology allows the ability to send documents almost anywhere, so unless the individual is in some remote location without access to fax or internet, the Principal should be able to sign and acknowledge the documents firsthand.

2. What type of transaction is being insured?

Due to their nature, the allowance of the use of a POA for reverse mortgages is extremely limited:

If the transaction is a reverse mortgage, Penn Attorneys will not accept a POA unless it is approved in advance of closing and the Principal is physically present at the settlement and executes the note, mortgage and HUD-1 settlement sheet. The Agent can sign the balance of the documents.

If the Principal is a borrower who is giving a mortgage (in either a purchase or refinance transaction), the lender will also have to approve the POA. Please note that the lender's approval of a POA does not take the place of our need to approve the POA.

3. Does the POA give the agent the power to act in the current transaction?

The POA must be reviewed to ensure that it gives the Agent authority to do what he/she proposes to do. Although ideal, a POA need not be specific as to the property or transaction being insured. As long as the POA contains the statutory power "to engage in real property transactions", the agent has the broad authority to handle a broad range of real estate transactions, including buying, selling, and mortgaging the property. Absent the statutory language, the POA must include the authority to sell real estate (if a sale) or mortgage real estate (if a refinance).

Care should be exercised when asked to use a POA when the property is owned by the Principal in a capacity different from how the POA was executed. For example, if title is held by John J. Doe, Trustee of the John J. Doe Trust, we will not be able to rely on a POA executed by John J. Doe unless the POA includes the power to act on John's behalf as trustee of the trust and the trust agreement allows for the use of an agent. Similar analysis is required when POAs are proposed when an entity (LLC, corp., etc.) is in title, and when the Principal is acting as executor/administrator of a decedent's estate. **When presented with such a scenario, please contact Penn Attorneys for approval.**

4. Is the Agent personally involved in the transaction or benefit from the transaction?

A transaction in which the POA is being used to transfer the Principal's property to the Agent (or a related party) creates a specter of self-dealing, especially if no consideration is being paid for the transfer. **Therefore, in any transaction in which the Agent is personally involved, or in which there is no or nominal consideration, please contact Penn Attorneys for approval.**

¹ "Principal" refers to the person who executed the POA. "Agent" refers to the person appointed in the POA to act on behalf of the Principal (sometimes referred to as an attorney-in-fact).

Powers of Attorney

5. Does the POA meet the statutory requirements under 20 Pa.C.S.A. §5601, et seq.?

This statute requires a specific Notice at the beginning of the POA, and requires an Acknowledgment executed by the Agent. In order to record the POA, which Penn Attorneys requires if it is used in a real estate transaction, it must contain the statutory Notice and Agent Acknowledgment. Furthermore, and more importantly, **if the Agent does not sign the Agent Acknowledgment, the Agent has no authority to act under the POA.**

The statutory requirements only pertain to POAs executed and acknowledged in Pennsylvania subsequent to April 12, 2000. POAs executed prior to that date, or in another state, do not have to meet these requirements as long as they are properly acknowledged. In addition, Military POAs are not subject to these statutory requirements (see Title Alert 2005-10 for more info. regarding Military POAs).

6. Is the POA durable?

To be durable, the powers given to an Agent in a POA must survive the disability or incapacity of the Principal after the POA is executed. All POAs executed after December 16, 1992 are presumed to be durable unless otherwise stated in the POA. POAs executed before that date must contain a statement that it is durable or that it survives the subsequent disability or incapacity of the Principal.

If the Principal is currently disabled or incapacitated, the POA must be durable for it to be used.²

7. When does the POA take effect? Has it expired?

Some POAs only take effect upon the disability/incapacity of the Principal. If presented with such a "springing" POA, proof must be provided that the Principal is disabled/incapacitated, usually in the form of a letter from at least one treating physician (the POA itself might require letters from 2 physicians).

If the POA contains an expiration date, it is invalid after that date and cannot be used.

8. Is the Principal still alive?

A POA terminates upon the death of the Principal; therefore, proof must be provided that the Principal is still alive at the time of settlement. Absent evidence to the contrary, such proof can be by affidavit signed by the Agent.

9. Has the POA been revoked by the Principal?

The revocation of a POA terminates the Agent's authority to act; therefore, proof must be provided that the POA has not been revoked by the Principal. Absent evidence to the contrary, such proof can be by affidavit signed by the Agent. NOTE: *a POA executed by a married person in which the spouse is appointed as Agent is deemed revoked upon the entry of a final decree in a divorce action involving those parties.*

10. How old is the POA?

In general, POAs do not expire unless specifically stated in the document. However, the more time that has passed since a POA was executed, the greater the risk becomes, especially with regard to Issues 6, 7 and 8 above. When presented with an older POA, extra care should be given in making sure it is durable, that the Principal is still alive and that the POA has not been revoked.

Due to the various and multiple issues pertaining to POAs, it is suggested that you advise your clients to provide a copy of any POA intended to be used well in advance of settlement.

² The date of incapacity should also be determined to make sure that the Principal was competent to execute the POA.

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