Defending Your Principals:
Suing Agents Under the Revised Illinois Power of Attorney Act

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Suits against POA agents for breach of fiduciary duty and other claims are growing more common. Here's an in-depth review of the causes of action available against an agent under the revised Illinois Power of Attorney Act and how lawyers on either side can serve their clients.

An unintended consequence of modern medicine is that most older adults will live with some level of mental incapacity or cognitive impairment for years, not months. Illinois law generally allows an incapacitated individual's health care and finances to be managed either through powers of attorney or guardianship. Ideally, the older adult will execute powers of attorney for health care and finance while he or she has capacity because doing so allows the older adult to select who manages his or her affairs and set the scope of the agent's authority. It is also private.

Because older adults are living with impairments for extended periods, agents under powers of attorney are increasingly under attack by interested parties (a.k.a., heirs apparent) who demand access to information and accountability for the agent's actions. The costs of these lawsuits can be extraordinary. This article will provide an in depth review of the causes of action that may be brought against an agent under powers of attorney for health care and property, under the Illinois Power of Attorney Act (the "Act"), which was substantially revised in 2011.

Who can bring an action under the Illinois Power of Attorney Act

Only "interested persons" can file an action under the agency-court relationship section of the Act.[1] Note that the definition of "interested person" under this section is different than that of "interested person" under the Probate Act.[2] Interested persons under the agency-court relationship section of the Act[3] include:

i. The principal (i.e., the person who executed the agency document) or agent (i.e., the person acting for the principal under said document);

ii. A guardian of the person, guardian of the estate, or other fiduciary charged with management of the principal's property (such as a trustee);

iii. The principal's spouse, parent, or descendant (note that this does not necessarily include a sibling);

iv. A person who is a presumptive heir-at-law of the principal;

v. A person named as a beneficiary to receive any property, benefit, or contractual right upon the principal's death, or as a beneficiary of a trust created by or for the principal;

vi. A provider agency as defined in Section 2 of the Elder Abuse and Neglect Act (i.e., an Elder Abuse Investigator);[4]

vii. A representative of the Office of the State Long Term Care Ombudsman;

viii. A government agency having regulatory authority to protect the welfare of the principal; and

ix. The principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare (note that "sufficient interest" is not defined; it is unclear whether filing an action would in and of itself demonstrate sufficient interest).

Where to bring an action under the Illinois Power of Attorney Act

An action may be brought in four venues. If an Illinois guardian has been appointed, then a proceeding under the "agency-court relationship" section of the Act is to be filed in the county where a guardian was appointed. If no guardian has been appointed, then the proceeding can filed in the county in which (1) the agent resides, (2) the principal resides, or (3) the principal owns real property.[5]

Initial consideration – does the principal lack capacity to control or revoke the agency?

The threshold question in any lawsuit against an agent is whether the principal lacks the capacity to control or revoke his or her agency.[6] Before the court will hear an action under this section, the court must first find "that the principal lacks either the capacity to control or the capacity to revoke the agency."[7] For purposes of determining whether

1. 755 ILCS 45/2-10(a).
2. 755 ILCS 45/2-10(f); 755 ILCS 5/1-2.11.
3. 755 ILCS 45/2-10(f).
4. A "provider agency" means any public or nonprofit agency in a planning and service area appointed by the regional administrative agency with prior approval by the Department on Aging to receive and assess reports of alleged or suspected abuse, neglect, or financial exploitation. *See* 320 ILCS 20/2(h).
5. 755 ILCS 45/2-10(h).
6. 755 ILCS 45/2-10(a).
7. 755 ILCS 45/2-10(a).

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a principal is "incapacitated," and therefore cannot control or revoke his or her agency, the court must find either:

i. that the principal has been adjudicated a disabled person under the Probate Act; or
ii. (a) licensed physician has examined the principal and has determined that the principal lacks decision making capacity; (b) that physician has made a written record of his or her determination within 90 days after examining the principal; and (c) the written record has been delivered to the agent.[8]

Typically, courts require a hearing on this issue before moving forward to a hearing on the merits.

The court's focus will always be the health, safety, and financial security of the principal, so your allegations should revolve around these themes, not around your beneficiary client.

Actions brought under the "agency-court relationship" section of the Illinois Power of Attorney Act

An interested person can seek to invalidate a power of attorney based on (1) failure to comply with formalities; (2) lack of capacity; and (3) undue influence. An interested person can also petition for construction of the power of attorney, request an accounting, and seek to remove the agent based on breach of duty. Each of these causes of action is discussed below.

Failure to comply with formalities. For a power of attorney for property to be valid it must be witnessed by one person and notarized by another.[9] The power of attorney for health care must be witnessed by one person.[10] The following individuals *cannot* serve as a witness or notary public:[11]

i. The attending physician or mental health service provider of a principal, or a relative of the physician or provider;

ii. an owner, operator, or relative of an owner or operator of a health care facility in which the principal is a patient or resident. The prohibition on the operator of a health care facility extends to directors and executive officer of an operator that is a corporate entity but not other employees of the operator;

iii. a parent, sibling, or descendant, or the spouse of a parent, sibling or descendant, of either the principal or any agent or successor agent, regardless of whether the relationship is by blood, marriage, or adoptions (essentially no family except spouses); and

iv. agent or successor agent for property or health care (only as to the document in which he or she is named).

If any of the prohibited individuals serves as a necessary witness or notary, that witness or notary is invalid and the document fails.

Lack of capacity. The Act does not specify a capacity standard and the appellate court has not explicitly stated the capacity required to execute a power of attorney. The most appropriate standard to apply, however, is generally understood to be the capacity to contract.

At common law, powers of attorney were forms of agency defined by contract.[12] Current statutory powers of attorney remain essentially the same as their common law predecessors except that the powers do not terminate when the principal becomes disabled.[13] Because the Act evolved from agency law, a court is likely to recognize the contractual capacity standard associated with agency law as the standard applied to capacity to execute powers of attorney under the Act. Our experience indicates that this is the accepted standard.

The Illinois Supreme Court defined capacity to contract as the ability "to comprehend and understand the terms and effect of the contract"[14] or the ability to "understand, in a reasonable manner, the nature and effect of the act in which he is engaged."[15] Thus, for purposes of proper execution of a power of attorney, the question becomes whether the principal understood the terms of the power of attorney (i.e., the powers his or her agent would have) and the effect this designation of authority would have over his personal and financial affairs.

Undue influence. There is no Illinois appellate case involving undue influence as a basis for invalidating a power of attorney. However, powers of attorney have been invalidated at the trial level on the basis of undue influence. Undue influence is a common cause of action in will contests, for which case law shows two ways to allege the cause of action: (1) undue influence arising from a fiduciary relationship, and (2) general allegations of undue influence.

Undue influence arising from a fiduciary relationship. The petitioner has the burden of proving four elements, after which point the burden shifts to the respondent (i.e., the agent) to demonstrate, by clear and convincing evidence, that the execution of the power of attorney was free of undue influence.[16] The following four elements are drawn from an appellate case involving a will contest.[17]

1. A fiduciary relationship existed between the principal and the person who substantially benefits under the agency document;

2. The primary beneficiaries were in a position to dominate and control the dependent principal;

3. The principal reposed trust and confidence in such beneficiaries; and

4. Such beneficiaries were instrumental in or participated in the procurement or preparation of the agency document.

In regard to the first element, while there is no case law to this effect, a fiduciary relationship must exist between the agent and principal prior to the execution of the power of attorney document. The power of attorney cannot be the underlying basis for the fiduciary relationship required by this first element because one cannot assert a legitimate agency relationship on the one hand and litigate against it on the other. If, for example, the agent was acting as the trustee of a trust from which an agent benefited at the time the power of attorney was

8. 755 ILCS 45/2-3(c-5)
9. 755 ILCS 45/3-3.6.
10. 755 ILCS 45/4-5.1.
11. 755 ILCS 45/3-3.6; 755 ILCS 45/4-5.1.
12. *See Halladay v. Underwood*, 90 Ill.App. 130 (1st Dist. 1899) ("authority of an agent must find its source in some work or conduct of the principal, indicative of his intention").
13. 755 ILCS 45/4-3.
14. *Sands v. Potter*, 165 Ill. 397, 402, 46 N.E. 282, 283 (1896).
15. *Jackson v. Pillsbury*, 380 Ill. 554, 573, 44 N.E.2d 537, 546 (1942).
16. *Calvert v. Pawlinski (In re Estate of Pawlinski)*, 407 Ill.App.3d 957, 965, 942 N.E.2d 728, 735 (1st Dist. 2011).
17. *In re Estate of Roeseler*, 287 Ill.App.3d 1003, 1018, 679 N.E.2d 393, 404 (1st Dist. 1997) (note, because the appellate court has not yet applied these elements to a principal-agent relationship, the case cited is in the context of a will contest.)

signed, then this element could be met.[18]

However, it is questionable what "substantial benefit" a fiduciary receives from being named agent under a principal's power of attorney. Case law in will contests reflects that the "substantial benefit" the perpetrator is alleged to have received must be tangible personal or real property.[19]

Arguably, an individual already in a fiduciary relationship with the principal receives no benefit, tangible or otherwise, by nomination as an agent under power of attorney for health care. Rather, the agent is saddled with the responsibility of making health decisions for a principal. Similarly, there is arguably no benefit from nomination as agent under power of attorney for property. Managing a principal's assets for the principal's benefit is not a benefit to the agent.

Moreover, being in a position to take advantage of a principal's assets only becomes a benefit to the agent if assets are actually misappropriated. If the agent misappropriates the principal's assets, however, the Act provides a method for removing the agent for breach of duty, which is discussed below. Thus, an argument can be made against pleading a presumption of undue influence arising from a fiduciary relationship in an attempt to invalidate powers of attorney.

General allegation of undue influence. Because raising the presumption of undue influence may be a challenge, it would behoove practitioners to also make general allegations of undue influence. Again, the case law that outlines what this requires is from will contest cases, which defines the action "to be any improper or wrongful constraint, machination or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely."[20]

The Illinois Supreme Court held that "undue influence which will invalidate a will must be directly connected with the instrument, must be operative when the will is made, must be directed towards the procuring of the will in favor of certain parties, and must destroy the freedom of the testator's action."[21] The influence "must render the instrument obviously more the offspring of the will of another or others than his own."[22] The pleading must contain a "specific recital of the manner in which the free will of the [individual] was impaired at the time the instrument was executed."[23]

An interested party's allegations should center around the date upon which the powers of attorney were executed and should include as much detail as possible in light of case law which requires a specific recital as to how the principal's free will was impaired.[24]

Construction of the power of attorney. An action to construe the terms of the power of attorney can also be brought under the Act. "If the court finds that the agency requires interpretation, the court may construe the agency and instruct the agent, but the court may not amend the agency."[25]

The statutory form would not likely require construction. If, however, the power of attorney is modified to include additional provisions regarding, for example, gifting or visitation, a construction action could be necessary to interpret the meaning of the additional terms.

Accountings. While the agent is required to keep a record of all receipts, disbursements, and significant actions taken under the authority of the agency (hereafter an "accounting"), the agent is only required to disclose this information as directed in the power of attorney or as required in section 2-7(c).[26] Pursuant to section 2-7(c), the following individuals or entities can request an accounting without court order (i.e., outside of court):

i. the principal, a guardian, another fiduciary acting on behalf of the principal, and, after the death of the principal, the personal representative or successors in interest of the principal's estate;

ii. a provider agency as defined in Section 2 of the Elder Abuse and Neglect Act (i.e., an Elder Abuse Investigator);[27]

iii. a representative of the Office of the State Long Term Care Ombudsman;[28] and

iv. a representative of the Office of Inspector General for the Department of Human Services, acting in the course of an assessment of a complaint of financial exploitation of an adult with disabilities pursuant to Section 35 of the Abuse of Adults with Disabilities Intervention Act.[29]

While the statute authorizes the court to levy financial penalties against an agent who does not tender an accounting to an elder abuse agency or a State Long Term Care Ombudsman within 21 days after a request is made, it does not otherwise provide a timeframe.[30]

Section 2-7(c) also provides that an accounting can be ordered by the Court under section 2-10. The following are interested persons under section 2-10 who are not entitled to an accounting absent a court order directing the same:

i. The principal's spouse, parent, or descendant;

ii. A person who is a presumptive heir-at-law of the principal; and

iii. A person named as a beneficiary to receive any property, benefit, or contractual right upon the principal's death, or as a beneficiary of a trust created by or for the principal.[31]

Presumably, the above-identified interested persons must allege adequate grounds to necessitate an accounting for the court to order the agent to provide one. The statute does not identify sufficient grounds to entitle one to an accounting. However, experience suggests that the individual must allege more than an interest in wanting to see how his or her potential inheritance is being spent.

This requirement demonstrates the underlying policy behind powers of attorney: they are intended to allow a principal's affairs to be governed privately, by the person the principal selected.

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18. *Janowiak v. Tiesi*, 402 Ill.App.3d 997, 1008, 932 N.E.2d 569, 581 (1st Dist., 2010) (holding a trustee-beneficiary relationship is a fiduciary relationship as a matter of law).

19. *See Pepe v. Caputo*, 408 Ill. 321, 97 N.E.2d 260 (1951); *Estate of Roeseler*, 287 Ill.App.3d at 1006, 679 N.E.2d at 396; *Schmidt v. Schwear*, 98 Ill.App.3d 336, 424 N.E.2d 401 (5th Dist. 1981); *In re Estate of Glogovsek*, 248 Ill.App.3d 784, 618 N.E.2d 1231 (5th Dist. 1993) (where the purported undue influencers were the beneficiaries of the Decedent's wills); *see also La Salle National Bank v. 53rd-Ellis Currency Exchange*, Inc., 249 Ill.App.3d 415, 618 N.E.2d 1103 (1st Dist. 1993) (where the purported undue influencer was the beneficiary of a 20-year lease of property held in a land trust); *see also Waterman v. Hall*, 270 Ill.App. 558, 566, 1933 Ill.App. LEXIS 550 (1st Dist. 1993) (where the purported undue influencer was the beneficiary of deeds to real property).

20. *Powell v. Bechtel*, 340 Ill. 330, 338, 172 N.E. 765, 768 (1930).

21. *Challiner v. Smith*, 396 Ill. 106, 109, 71 N.E.2d 324, 326 (1947).

22. *Id.*

23. *Bailey v. State Bank of Arthur*, 121 Ill.App.3d 17, 21, 458 N.E.2d 1326, 1328 (4th Dist. 1983).

24. *Id.*

25. 755 ILCS 45/2-10(c).

26. 755 ILCS 45/2-7(c).

27. A "provider agency" means any public or non-profit agency in a planning and service area appointed by the regional administrative agency with prior approval by the Department on Aging to receive and assess reports of alleged or suspected abuse, neglect, or financial exploitation. *See* 320 ILCS 20/2(h).

28. The Ombudsman must be "acting in the course of an investigation of a complaint of financial exploitation of a nursing home resident under Section 4.04 of the Illinois Act on the Aging [20 ILCS 105/4.04];" 755 ILCS 45/2-7.

29. 20 ILCS 2435/35.

30. 755 ILCS 45/2-7(d).

31. *See* 755 ILCS 45/2-7(c)(5); 755 ILCS 45/2-10.

an accounting is sought, it is generally good practice for the agent to provide to interested persons copies of bank statements or a more comprehensive accounting, even without court order. By doing so, your client may avoid court, which allows the agent to keep costs down and fend off disputes. However, if the agent has reason to believe the principal would not want the interested person to have access to that information, the agent should reconsider this advice.

Breach of fiduciary duty. The final cause of action that can be brought against an agent pursuant to section 2-10 is for breach of fiduciary duty. Here is a summary of initial considerations every interested person and their counsel should consider before filing a breach of fiduciary duty action against an agent.

Do your homework. Be wary of filing a lawsuit against an agent under power of attorney before reaching out to resolve issues outside of court. Such reaching out usually results in one of two things: (1) you can resolve your client's concerns without court involvement, thereby reducing the financial and emotional costs for everyone involved; or (2) the agent will be non-responsive, which you can use against him or her in your case.

Provide a paper trail. Breach of duty is most cleanly and expeditiously proven through a paper trail. If your client has documents, such as bank statements or past due notices, that demonstrate when and how the agent breached his or her duty, attach them as exhibits. Often, however, these documents are in the exclusive possession of the agent. In that case, consider petitioning the court for an accounting pursuant to section 2-7(c) prior to filing a breach action which may allow your client to avoid defending against a motion to dismiss.

Keep in mind that if your client is in another fiduciary relationship with the principal (such as the trustee of a trust from which the principal benefits), you have a right to request an accounting from the agent absent court order.[32]

Frame the allegations around what the court must ultimately find. The court must find that (i) the agent is not acting for the benefit of the principal in accordance with the terms of the agency; or (ii) that the agent's action or inaction has caused or threatened substantial harm to the principal's person or property in a manner not authorized or intended by the principal.[33] Remember to keep it about the principal. The court's focus will always be the health, safety, and financial security of the principal, so your allegations should revolve around these themes, not around your client.

Agents are often family members who may inherit from the principal upon his or her death. This "conflict of interest" alone will not support a breach of fiduciary duty action.

Self-dealing and conflicts of interest are not per se breaches—be specific and allege the harm caused. The Act states that "an agent who acts with due care for the benefit of the principal shall not be liable or limited merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal or acts in a different manner with respect to the agency and the agent's individual interests."[34]

For example, in one case, the petitioner alleged her sister, the agent, had a conflict of interest because she would receive a larger inheritance if she spent less on the principal's care. Because agents are often family members who may inherit from the principal upon his or her death, without more (i.e., proof that the agent's care of the principal was inadequate), this "conflict of interest" does not have legs to win a breach of fiduciary duty action.

In another case, a petitioner sued his mother's agent, also the petitioner's brother, and alleged that he was breaching his duty by living in his mom's home rent-free. What his petition did not state was that their mother allowed the agent to live rent-free for the previous decade and his contribution to the home, which was paid off, had been and continued to be groceries. Absent other allegations of wrongdoing or evidence that the principal needed additional income such that the agent should be contributing more, this sort of "self-dealing" is not likely a breach.

Generally the goal of a breach of fiduciary duty action is to have the agent removed and recover any losses that have been incurred as a result of his or her breach. If the court finds that the agent has breached his or her duties to the principal, the court may appoint a guardian of the estate or person "to exercise any powers of the principal under the agency, including the power to revoke the agency, or may enter such other orders without appointment of a guardian as the court deems necessary to provide for the best interests of the principal."[35] Such "other orders" typically include removal of the agent and if a successor agent is named and wishes to act, he or she may assume status as agent. If no successor agent is named or if the successor agent refuses to act, then a guardian will be appointed.

Importantly, the court will not allow an agent to pay or be reimbursed from the principal's estate for his attorney's fees and costs incurred in defending a proceeding brought pursuant to section 2-10 if either (i) "the court finds that the agent has not acted for the benefit of the principal in accordance with the terms of the agency and the Illinois Power of Attorney Act" or (ii) "the agent's action caused or threatened substantial harm to the principal's person or property in a manner not authorized or intended by the principal."[36] The take-away is caution: attorneys need to carefully vet potential clients who are being sued for breach of fiduciary duty because if they lose they are responsible for attorneys' fees.

Regarding fees incurred by a petitioner who sues under section 45/2-10, the Act ensures that the government will be repaid if it prevails, but it does not ensure the same protection for a private individual.[37] While there is no case law on reimbursement of a petitioner yet, equity will favor reimbursement.

Holding an agent accountable after the principal's death

After the death of the principal, the Act authorizes the personal representative or successors in interest of the principal's estate to request "a record of all receipts, disbursements, and significant

32. *See* 755 ILCS 45/2-7(c).
33. 755 ILCS 45/2-10(b).
34. 755 ILCS 45/2-7(a).
35. 755 ILCS 45/2-10(b).
36. 755 ILCS 45/2-10(d).
37. 755 ILCS 45/2-10(e).

actions taken under the authority of the agency."[38] If questions regarding the agent's management of the principal/decedent's assets remain, the executor can petition the court for issuance of a citation to discover pursuant to 755 ILCS 5/16-1, and depose the agent. If the executor finds that funds were misappropriated, the executor can petition for the issuance of a citation to recover assets.[39]

If the executor was the former agent against whom an accounting is sought, an interested person can file a petition for issuance of citation to discover to the executor/former agent under 755 ILCS 5/16-1 and the court may appoint a special administrator to represent the estate if necessary.

Conclusion

The revised Act provides strong tools to protect a principal from an unscrupulous agent. It also provides excellent protection for an agent who plays by the rules. Attorneys should always keep in mind that protection of the principal, however, is paramount, and apply the tools in the revised Act accordingly. ■

38. 755 ILCS 45/2-7(c)(1).
39. 755 ILCS 5/16-1.