DEALING WITH POLICIES AND PROTOCOLS OF BANKING INSTITUTIONS IN TEXAS

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David maintains an active trial and appellate practice for the financial services industry. David is the primary author of the Texas Fiduciary Litigator blog (txfiduciarylitigator.com), which reports on legal cases and issues impacting the fiduciary field in Texas. David's financial institution experience includes (but is not limited to): account litigation, breach of contract, foreclosure litigation, lender liability, receivership and injunction remedies upon default, non-recourse and other real estate lending, class action, RICO actions, usury, various tort causes of action, breach of fiduciary duty claims, and preference and other related claims raised by receivers.

David has specialized in estate and trust disputes including: trust modification/clarification, trustee resignation/removal, breach of fiduciary duty and related claims, accountings, will contests, mental competency issues, and undue influence. David's recent trial experience includes:

Represented a trustee in federal class action suit where trust beneficiaries challenged whether it was the authorized trustee of over 220 trusts;

Represented trustees regarding claims of mismanagement of assets;

Represented a trustee who filed suit to modify three trusts to remove a charitable beneficiary that had substantially changed operations;

Represented a trustee regarding dispute over the failure to make distributions;

Represented a trustee/bank regarding a negligence claim arising from investments from an IRA account;

Represented individuals in will contests arising from claims of undue influence and mental incompetence;

Represented estate representatives against claims raised by a beneficiary for breach of fiduciary duty;

Represented beneficiaries against estate representatives for breach of fiduciary duty and other related claims; and

Represented estate representatives, trustees, and beneficiaries regarding accountings and related claims.

David is one of twenty attorneys in the state (of the 84,000 licensed) that has the triple Board Certification in Civil Trial Law, Civil Appellate, and Personal Injury Trial Law by the Texas Board of Legal Specialization. Additionally, David was a member of the Civil Trial Law Commission of the Texas Board of Legal Specialization. This commission writes and grades the exam for new applicants for civil trial law certification. David is a graduate of Baylor University School of Law, *Magna Cum Laude*, and Baylor University, B.B.A. in Accounting.

David has published over twenty (20) law review articles on various litigation topics. David's articles have been cited as authority by: federal courts, the Texas Supreme Court (three times), the Texas courts of appeals (El Paso, Waco, Texarkana, Tyler, Beaumont, and Houston), McDonald and Carlson in their Texas Civil Practice treatise, William V. Dorsaneo in the Texas Litigation Guide, Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over one hundred and fifty (150) continuing legal education courses.

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I. INTRODUCTION

Banking is one of the most heavily regulated industries in the United States. Banks have regular audits by governmental agencies to, in part, 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.

The author would also direct the reader to an excellent article written by Michael K. O'Neal: *Financial Institutions Litigation: Regulatory Considerations*, Suing, Defending, and Negotiating With Financial Institutions Course, State Bar of Texas, February 10-11, 2011.

II. UNIQUE STATUTORY PROTOCOLS FOR BANK LITIGATION

A. Obtaining Bank Documents

Parties often want records and documents from financial institutions. Requests for these types of documents are governed by Texas Finance Code Section 59.006, which became effective September 1, 1999. Prior to the enactment of that statute civil discovery of customer records maintained by financial institutions was governed by Texas Civil Practice and Remedies Code Section 30.007.

Texas Finance Code Section 59.006(a) provides, in pertinent part: "This section provides the exclusive method for compelled discovery of a record of a financial institution relating to one or more customers. This section does not create a right of privacy in a record..." Tex. Fin. Code Ann. § 59.006(a).

Texas Finance Code Section 59.006(b) provides that a financial institution shall produce a record in response to a record request only if the institution is given at least twenty-four days to comply and the requestor pays 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. *Id*. at § 59.006(b). If these conditions are not met, then a court may not order a bank to produce any documents and may not hold a bank in contempt of the subpoena. *Id*. at § 59.006(b-1).

Section 59.006(c) provides that if the affected customer is not a party to the proceeding, the requesting party also should give the customer notice of its rights to file a motion to quash and seek the customer's written consent. *Id*. at § 59.006(c). Section 59.006(d) provides that if the customer who is not a party does not execute the written consent before the compliance is due, then the requesting party may seek the production of any complying documents to the court in camera and the court will decide if the document is relevant and may order any necessary redactions. *Id*. at § 59.006(d). In any event, the court shall enter a protective order that prevents the record from being disclosed to a person who is not a party to the proceeding and being used for any purpose other than resolving that dispute. *Id*.

Compliance with Section 59.006 is a valid basis for a court to grant a protective order. *See Enviro Prot., Inc. v. Nat'l Bank of Andrews*, 989 S.W.2d 454, 456 (Tex. App.—El Paso 1999, no pet.); *Calhoun v. Ying*, No. 01-05-00489-CV, 2006 Tex. App. LEXIS 6636 (Tex. App.—Houston [1st Dist.], July 27, 2006). A financial institution that desires an award of attorney's fees under this provision should expressly plead for same. *In re Estate of Gaines*, 262 S.W.3d 50, 60 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

It should be noted that a governmental agency does not have to comply the payment provisions of the statute where its request arises out of the investigation or prosecution of a criminal offense. Tex. Fin. Code Ann. § 59.006(a)(3); *Preston State Bank v. Willis*, 443 S.W.3d 428, 440 (Tex. App.—Dallas 2014, pet. denied).

B. Serving Financial Institutions With Citation

Some parties take the approach that they can serve a citation on any bank employee and have effective service. That is not true.

Section 17.028 outlines the procedure for giving notice of a lawsuit to a "financial institution" as defined by Section 201.101 of the Texas Finance Code. Tex. Civ. Prac. & Rem. Code Ann. § 17.028. Texas Civil Practice and Remedies Code Section 17.028 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." Tex. Civ. Prac. & Rem. Code Ann. § 17.028(b); *Bank of N.Y. Mellon v. Redbud 115 Land Trust*, 452 S.W.3d 868 (Tex. App.—Dallas 2014, pet. denied). "[W]hen a procedure for giving notice and obtaining jurisdiction is statutorily established, that method is generally exclusive and the form prescribed must be followed with reasonable strictness." *Colson v. Thunderbird Bldg. Materials*, 589 S.W.2d 836, 840 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.). "Thus, when there is a specific statute that sets out the steps that must be taken, the inquiry is not whether the defendant had actual knowledge of the proceeding against him; rather, the question is whether that knowledge was

conveyed to him in the manner required by the statute." *Id*.

A party suing a financial institution in Texas must serve process on the institution in accordance with Section 17.028; otherwise, service is ineffective. *See Bank of N.Y. v. Chesapeake 34771 Land Trust*, 456 S.W.3d 628, 629-30, 635 (Tex. App.—El Paso 2015, pet. denied) (service on secretary of state was not sufficient under Section 17.028); *The Bank of New York Mellon v. Redbud 115 Land Trust*, No. 05-13-01149-CV, 452 S.W.3d 868, 2014 Tex. App. LEXIS 13050, 2014 WL 7014373, at *2-*3 (Tex. App.—Dallas Dec. 5, 2014, no pet. h.)(concluding that Section 17.028 is the exclusive method for serving a financial institution, foreign, or domestic); *Perez v. Bank of Am., N.A.*, No. 13-CV-285, 2013 U.S. Dist. LEXIS 159791, 2013 WL 5970405, at *4 (W.D. Tex. Nov. 7, 2013)(concluding that, "[t]o properly serve a financial institution under Texas law[,]"a plaintiff must abide by Section 17.028); *see also Bank of New York Mellon v. Soniavou Books, LLC*, 403 S.W.3d 900, 903 (Tex. App.—Houston [14th Dist.] 2013, no pet.)(concluding that bank was not properly served under Section 17.028 in light of plaintiff's concession that it did not serve bank in accordance with Section 17.028 in suit challenging foreclosure sale).

A party wanting to serve a bank with citation should research the bank's agent for service, which is not difficult to do, and serve that individual accordingly. Otherwise, a bank can file a motion to quash service. Further, any default judgment entered against the bank will be subject to reversal because of improper service of process.

C. Suing Bank Representatives

The Texas Legislature has provided protection for bank employees and personnel. Texas Finance Code Section 31.006 provides that: "The provisions of the Business Organizations Code regarding liability, defenses, and indemnification of a director, officer, agent, or employee of a corporation apply to a director, officer, agent, or employee of a depository institution in this state." Tex. Fin. Code Ann. § 31.006(a).

Furthermore, a plaintiff may not hold a "disinterested" employee liable unless the plaintiff establishes that that employee acted with gross negligence or wilful or intentional misconduct:

> Except as limited by those provisions, a disinterested director, officer, or employee of a depository institution 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.

Id.

The statute defines "disinterested" as:

> A director, officer, or employee of a depository institution is disinterested with respect to a decision or transaction if:
>
> (1) the person fully discloses any interest in the decision or transaction and does not participate in the decision or transaction; or
> (2) the decision or transaction does not involve any of the following: (A) personal profit for the person through dealing with the depository institution or usurping an opportunity of the depository institution; (B) buying or selling an asset of the depository institution in a transaction in which the person has a direct or indirect pecuniary interest; (C) dealing with another depository institution or other person in which the person is a director, officer, or employee or otherwise has a significant direct or indirect financial interest; or (D) dealing with a family member of the person.

Id. at 31.006(b).

Finally, a bank officer or director may rely on certain information provided to him or her:

> A director or officer who, in performing the person's duties and functions, acts in good faith and reasonably believes that reliance is warranted is entitled to rely on information, including an opinion, report, financial statement or other type of statement or financial data, decision, judgment, or performance, prepared, presented, made, or rendered by:
>
> (1) one or more directors, officers, or employees of the depository institution, or of an entity under joint or common control with the depository institution, who the director or officer reasonably believes merit confidence;
> (2) legal counsel, a public accountant, or another person who the director or officer reasonably believes merits confidence; or

(3) a committee of the board of which the director is not a member.

Id. at § 31.006(c).

D. Slander of Bank Offense

In the Texas Finance Code, 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." Tex. Fin. Code Ann. § 59.002. *See also* Tex. Fin. Code Ann. § 89.101 (criminal slander of state or federal savings association).

E. Attachments, Injunctions, Execution, and Garnishments Against Banks

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. Tex. Fin. Code Ann. § 59.007. *See also* 12 U.S.C. § 91 (similar language for national banks). Further, an attachment, injunction, execution, or writ of garnishment issued for the purpose of collecting a money judgment or securing a prospective money judgment against a customer of the financial institution is governed by Section 59.008, which is described below, and not Section 59.007.

F. Claims Against Bank Customers

Often, banks receive notices, subpoenas, citation, orders, etc. regarding a customer. Texas Finance Code Section 59.008 provides that a claim against a customer shall be delivered or served at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state. Tex. Fin. Code Ann. § 59.008(a). If a financial institution files a registration statement, a claim against a customer is not effective as to the financial institution if the claim is served or delivered to a different address. *Id*. at § 59.008(a).

Once properly served, the customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other remedy, to prevent or suspend the financial institution's response to a claim against the customer. Id. at § 59.008(c). If the customer does not meet this burden, it should not be able to assert a claim against the financial institution for compliance with the court order. *Yazdchi v. Tradestar Invs., Inc.*, 217 S.W.3d 517 (Tex. App.—Houston [14th Dist.] Sept. 26, 2006, no pet.) (court of appeals affirmed the trial court's summary judgment for a financial institution in connection with account holders' breach of contract action where the institution, pursuant to a turnover order, gave the holders' money to a receiver where the customer did not meet his burden to prevent the institution from complying with the order).

Furthermore, Texas Civil Practice and Remedies Code Section 31.010 provides that a financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership shall be provided and may rely on: (1) a certified copy of the order or injunction of the court; or (2) a certified copy of the order of appointment of a receiver, including a certified copy of: (A) any document establishing the qualification of the receiver; (B) the sworn affidavit under; and (C) the bond. *Id*. A financial institution that complies with this section is not liable for compliance with a court order, injunction, or receivership to: (1) the judgment debtor; (2) a party claiming through the judgment debtor; (3) a co-depositor with the judgment debtor; or (4) a co-borrower with the judgment debtor. *Id*. Under this provision, a financial institution is entitled to recover reasonable costs, including copying costs, research costs, and, if there is a contest, reasonable attorney's fees. *Id*.

III. NEW STATUTORY CHANGES TO THE DURABLE POWER OF ATTORNEY ACT

A. Introduction

Historically, in Texas, financial institutions and others did not have to accept a power of attorney document. If an agent wanted to conduct a transaction, the financial institution could demand alternative power of attorney forms, that the principal conduct it, or simply refuse to do it.

The Texas Legislature has recently instituted broad changes to the Texas Estates Code's Texas Durable Power of Attorney Act regarding durable power of attorney provisions. The Real Estate, Probate, and Trust Law (REPTL) Section of the State Bar of Texas supported HB 1974 because that section wanted to plan around expensive guardianships by the use of durable power of attorney documents. Those planners were frustrated by financial institutions not accepting those documents. Accordingly, one aspect of the new statutory provisions is to make sure that financial institutions and others accept power of attorney documents. The provisions also potentially allow broad additional powers to designated agents; powers that

would even allow the agents to benefit themselves from the principal's assets. The legislative history provides:

> The Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL) proposes H.B. 1974, which provides several changes to the Texas Durable Power of Attorney Act intended to ensure that validly-executed durable powers of attorney (DPOA) can be used more effectively in Texas, in furtherance of the legislative goal of reducing the need for guardianship proceedings, and to provide additional powers to the designated agents. DPOAs are vital for planning for the possibility of incapacity, and are specifically included as an alternative to guardianship under the Estates Code. But many Texas citizens have been unable to effectively use DPOAs due to their rejection for arbitrary or unexplained reasons. H.B. 1974 makes DPOAs more readily available.
>
> Overview: H.B. 1974 makes important changes to the statute by: providing for reasonable acceptance of DPOAs in a timely fashion so that guardianship can be avoided; eliminating risk to persons who accept DPOAs by allowing them to rely on an agent's certification that the DPOA is valid for the purpose it is being presented or an opinion of the agent's counsel who is hired at the principal's expense; giving the person who is asked to accept the DPOA numerous valid reasons to reject, some of which cannot be challenged by the principal or agent; and providing a mechanism to have a court decide any disputes. This bill does not require someone to automatically accept a DPOA and does not shift liability to those who do accept a DPOA. Rather, it provides new liability protection to those who accept a DPOA without knowledge that it was invalid and includes new procedures to properly reject a DPOA. Similar provisions have been enacted in 30 other states without issue.

B. Application of Statute

The new statutes apply to "(1) durable power of attorney, including a statutory durable power of attorney, created before, on or after the effective date of the Act [September 1, 2017]; (2) a judicial proceeding concerning a durable power of attorney pending on, or commenced after, the effective date of this Act." Section 16(a), H.B. 1974. Also, certain provisions [Section 751.024; Chapter 751, Subchapters A-2, B, C, and D; and Chapter 752] only apply to durable powers of attorney executed after the date of the Act. *Id*. at 16(b). Moreover, if a court finds that the application of a provision of the new statutes would substantially interfere with the effective conduct of a judicial proceeding or would prejudice the rights of a party, then the court can apply the former law for that purpose and in those circumstances. *Id*. at 16(d).

The new power of attorney statutes apply to durable powers of attorney as that term is defined in Texas Estates Code Section 751.021. Tex. Est. Code Ann. § 751.0015 ("This subtitle applies to all durable powers of attorney except: (1) a power of attorney to the extent it is coupled with an interest in the subject of the power, including a power of attorney given to or for the benefit of a creditor in connection with a credit transaction; (2) a medical power of attorney … (3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; or (4) a power of attorney created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.").

If the document complies with the statutory definition of durable power of attorney, then a "person" is required to comply with the statute. The term "person" commonly means: "a human being regarded as an individual." NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) ("person" means); WEBSTER'S THIRD NEW INT'L DICTIONARY (2002) ("person" is "an individual human being," "a human being as distinguished from an animal or thing"). However, the term may also include an artificial person, such as a government agency, partnership, association, corporation, trust, or other legal entity. *See, e.g.*, Tex. Gov't Code § 311.005 (unless a statute or context employing the word or phrase requires a different definition, "person," when used in a statute, "includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity"). *See also Colorado County v. Staff*, 510 S.W.3d 435, n.59 (Tex. 2017). Therefore, the term "person" should be construed very broadly.

C. Definition of Durable Power of Attorney

To be a durable power of attorney, the document must be in writing or other record that designates a person as an agent and grants authority to act in place of the principal, signed by the principal or another at the principal's direction, be acknowledged, and contain words that: 1) the power of attorney document is not affected by the subsequent disability or incapacity of the principal, 2) the power of attorney becomes effective on the disability or incapacity of the principal, or 3) other similar words that clearly indicate that the authority conferred on the agent shall be exercised notwithstanding the principal's subsequent disability or incapacity. Tex. Est. Code Ann. § 751.021(a).

The power of attorney document must be signed by the principal or another person that the principal directs to sign for him or her. *Id*. Accordingly, a person that is not physically able to sign a power of attorney document may nonetheless be able to execute the same via another person. The Legislature has a form for a statutory durable power of attorney, and the new form is attached to this paper as Appendix A. A statutory durable power of attorney is legally sufficient under this subtitle if:(1) the wording of the form complies substantially with the wording of the form prescribed by Section 752.051; (2) the form is properly completed; and (3) the signature of the principal is acknowledged. Tex. Est. Code Ann. § 752.004.

A signature on the power of attorney is presumed to be genuine, and the durable power of attorney is presumed to be executed under the statute defining a durable power of attorney if the officer taking the acknowledgment has complied with Texas Civil Practice and Remedies Code Section 121.004(b). *Id*. § 751.0022. That statute provides: "An acknowledgment or proof of a written instrument may be taken outside this state, but inside the United States or its territories, by: (1) a clerk of a court of record having a seal; (2) a commissioner of deeds appointed under the laws of this state; or (3) a notary public." Tex. Civ. Prac. & Rem. Code Ann. § 121.004(b).

The principal can appoint co-agents, and unless the power of attorney document provides otherwise, each co-agent can exercise authority independently of the other. Tex. Est. Code Ann. § 751.021. The statutory durable power of attorney form expressly has a provision discussing co-agents and their authority to act. *Id*. at § 752.051.

D. Agent's Acceptance of Duties

An agent does not have to sign any document or make any other declaration regarding accepting the position of agency. Rather, a person accepts the appointment simply by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance of the appointment. Tex. Est. Code Ann. § 751.022.

E. Agent's Right to Reimbursement and Compensation

The new statute now provides that unless a durable power of attorney document provides otherwise, that an agent is entitled to the reimbursement of any reasonable expenses incurred on the principal's behalf and compensation that is reasonable under the circumstances. Tex. Est. Code Ann. § 751.024. The new durable statutory power of attorney form has a provision dealing with an agent's right to reimbursement and compensation where the principal has the ability to revoke that right. Tex. Est. Code Ann. § 752.051.

F. Powers Of Attorneys From Other Jurisdictions

A power of attorney document that is executed in a different jurisdiction is valid in Texas if, when executed, the execution complied with: "(1) the law of the jurisdiction that determines the meaning and effect of the durable power of attorney as provided by Section 751.0024; or (2) the requirements for a military power of attorney as provided by 10 U.S.C. Section 1044b." Tex. Est. Code Ann. § 751.0023(b).

Section 751.0024 provides that the meaning and effect of a durable power of attorney is determined by the law of the jurisdiction indicated in the document. *Id*. at § 751.0024. If the document does not designate the controlling law, then it is controlled by the law of the jurisdiction of the principal's domicile if the principal's domicile is indicated in the document. If the domicile is not indicated, then the document is controlled by law of the jurisdiction in which the principal executed the document. *Id*. It should be noted that the new statutory durable power of attorney form expressly states that it is controlled by Texas law. *Id*. at § 752.051.

Power of attorney documents prepared in other jurisdictions generally follow the law of that jurisdiction regarding whether it is a durable power of attorney. *Id*. § 751.021(b). "If the law of a jurisdiction other than this state determines the meaning and effect of a writing or other record that grants authority to an agent to act in the place of the principal, regardless of whether the term 'power of attorney' is used, and that law provides that the authority conferred on the agent is exercisable notwithstanding the principal's subsequent disability or incapacity, the writing or other record is considered a durable power of attorney under this subtitle." *Id*.

G. Conflict-Of-Law Issues

The durable power of attorney act does not supersede any other law applicable to financial institutions or other entities, and to an extent that there is a conflict, the other law applies. Tex. Est. Code Ann. § 751.007.

The remedies under the new power attorney statute are not exclusive and other rights and remedies under other laws still exist. Tex. Est. Code Ann. § 751.006.

Regarding the construction of powers of attorney and the statutes, courts should construe them to make them uniform "to the fullest extent possible" with the laws of other states with similar provisions. *Id*. at § 751.003. Accordingly, though not binding, persuasive authority from other states should be considered by courts in construing Texas powers of attorneys and the statutes.

H. Persons Now Generally Required To Accept Power Of Attorney Documents (With Limited Exceptions)

Historically, in Texas, persons were not required to accept power of attorney documents. They could reject them for any reason and did not have any obligation to explain why they were not accepting them. That has now changed. Section 751.201 of the Texas Estates Code provides:

> [A] person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification under Section 751.203 or an opinion of counsel under Section 751.204 not later than the 10th business day after the date the power of attorney is presented, except as provided by Subsection (c); or (B) if applicable, request an English translation under Section 751.205 not later than the fifth business day after the date the power of attorney is presented, except as provided by Subsection (c).

Tex. Est. Code Ann. § 751.201(a).

A person who requests: "(1) an agent's certification must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested certification; and (2) an opinion of counsel must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested opinion." *Id*. at § 751.201(b).

The statute does provide that the parties can agree to extend the periods provided above. *Id*. at § 751.201(c). Therefore, the principal or agent presenting a durable power of attorney for acceptance and the person may agree to extend a time period prescribed above. No format for the agreement or time period during which the agreement may be entered into is specified, but it is prudent that the agreement be in writing, dated, and signed by both parties before the end of the original ten business-day period. The Author has attached a proposed form agreement altering the statutory timing requirements as Appendix C.

Importantly, a person is not required to accept a power of attorney if the agent does not provide a requested certification, opinion of counsel, or English translation. *Id*. at § 751.201(e).

A durable power of attorney is considered accepted on the first day the person agrees to act at the agent's discretion under the power of attorney. Tex. Est. Code Ann. § 751.208. Therefore, persons should implement procedures that will avoid an unintentional acceptance of the power of attorney before a decision has been made to accept or reject it.

I. Timeline Considerations

The statute does not describe "business days." Under the Texas Government Code, in computing business days, a person should exclude the first day and include the last day, and if the last day is a Saturday, Sunday, or legal holiday, the person should extend the period to include the day that is not a Saturday, Sunday, or legal holiday. Tex. Gov. Code Ann. § 311.014.

J. When Does The Agent Present The Power Of Attorney To Start The Clock?

The event that triggers a person's time period to accept the power of attorney document is the presentment of the document and a request to accept it by an agent. Tex. Est. Code Ann. § 751.201(a). This should normally be a fairly easy assessment. For example, an agent may present a power of attorney document and want to write a check, wire money in or out, deposit money, obtain a loan, change an account agreement, request statements, etc. Each request will be focused on a particular transaction or request some action by the person. However, Section 751.201(a) does not use the term "transaction" or require the request to involve an action by the person; rather it uses a broader phase: "who is presented with and asked to accept a durable power of attorney by an agent…" *Id*. That could encompass an agent bringing in a power of attorney document before a particular transaction or request for action occurs. For example, an agent may bring such a document in before the principal is incapacitated because they live in another location and want to simply keep it "on file" in case it is needed in the future. When the agent delivers the power of attorney document without an immediate transaction or request of action in mind, does that start the clock for the person to reject the power of attorney document?

The safest answer at this time is to document the incident and clarify whether the agent is presenting it to the person and requesting that the person accept it. The Author has a proposed in Appendix B a form agreement that could be used to clarify whether the agent is "presenting" the power of attorney. If there is no associated transaction or requested action, the agent may agree that he or she is not seeking a determination on acceptance at this time, which would not start the clock. If he or she does request acceptance, even without a transaction in mind, the person should take the safest course and start the process for accepting or rejecting the document.

The author is of the opinion that Section 751.201(a) must mean that a power of attorney document is offered for acceptance when there is a

request to consummate a particular transaction or to take some affirmative action. Granted, that section does not limit it to "transactions," but other provisions clearly contemplate a transaction or request for action being associated with the request. Section 751.206 provides the reasons that a person may reject a power of attorney document, and many of those reasons revolve around facts that actually use the term "transaction." Tex. Est. Code Ann. § 751.206(1), (2), and (3). The statutes discussing an agent's powers are primarily done in reference to "transactions." *Id*. at §§ 752.102-752.115.

For example, the provision discussing the power to conduct banking transactions states:

> The language conferring authority with respect to banking and other financial institution transactions in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) continue, modify, or terminate an account or other banking arrangement made by or on behalf of the principal;
> (2) establish, modify, or terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the attorney in fact or agent;
> (3) rent a safe deposit box or space in a vault;
> (4) contract to procure other services available from a financial institution as the attorney in fact or agent considers desirable;
> (5) withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution;
> (6) receive bank statements, vouchers, notices, or similar documents from a financial institution and act with respect to those documents;
> (7) enter a safe deposit box or vault and withdraw from or add to its contents;
> (8) borrow money at an interest rate agreeable to the attorney in fact or agent and pledge as security the principal's property as necessary to borrow, pay, renew, or extend the time of payment of a debt of the principal;
> (9) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, bills of exchange, checks, drafts, or other negotiable or nonnegotiable paper of the principal, or payable to the principal or the principal's order to receive the cash or other proceeds of those transactions, to accept a draft drawn by a person on the principal, and to pay the principal when due;
> (10) receive for the principal and act on a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument;
> (11) apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and
> (12) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Id. at 752.106.

A statute should be construed as a whole rather than in its isolated provisions. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). A court should not give one provision a meaning that is out of harmony or inconsistent with the other provisions, although it may be susceptible to such a construction standing alone. *City of Waco v. Kelley*, 309 S.W.3d 536, 542 (Tex. 2010). Accordingly, a court should construe presentment of a power of attorney document to include an actual transaction or other request for action. Until that issue is decided, a person should be careful to clarify in writing any issues concerning presentment with an agent.

K. Person Cannot Request Alternative POA Form And Originals Are Not Required

Historically, many institutions have rejected power of attorney forms and required agents to have the particular institution's power of attorney form executed by the principal. This was very problematic when the principal was incapacitated and not able to execute a new form. Accordingly, the new statutory changes now state that a person who is asked to accept a durable power of attorney that meets the statutory requirements set forth above and includes the appropriate authority for the transaction cannot request "an additional or different form of the power of attorney." Tex. Est. Code Ann. § 751.202(1). Therefore, the person cannot request a power of attorney that is otherwise valid be revised to include additional language. *Id*.

Further, the person may not require that the agent file or record the power of attorney document "in the office of a county clerk unless the recording of the instrument is required by Section 751.151 or another law of this state." *Id*.

However, pursuant to Section 751.203 of the Texas Estates Code, a person may request that "the agent presenting the power of attorney provide to the

person an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney." Tex. Est. Code Ann. § 751.203. Therefore, the Author believes that a person can require the agent to include a requested factual statement in the certificate. *Id*.

Further, unless otherwise required by statute or by the durable power of attorney document, a photocopy or electronically transmitted copy of an original durable power of attorney document has the same effect as the original instrument and may be relied on without liability by the person who is asked to accept it. *Id*. at 751.0023(c).

L. Agent's Certification

As stated above, the 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. *Id*. at § 751.203(b). A copy of this form is attached hereto as Appendix D (with one modification to add lines for additional factual matters).

Section 751.203(c) of the Texas Estates Code states: "[a] certification made in compliance with this section is conclusive proof of the factual matter that is the subject of the certification." *Id*. at § 751.203(c). Further, "[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." *Id*. at § 751.210.

Accordingly, the author suggests that persons generally request agent's certifications for any transaction, including individual check transactions. Of course, a person may have a particular circumstance where it wants to omit the requirement for an additional certification, and that may be done where reasonable.

It may be convenient for a person to have a form certification on hand and to provide a notary service for agents wanting to make a transaction. With respect to employees notarizing a certification, there is no per se prohibition to an employee doing so. In fact, Texas Finance Code Section 59.003 provides: "[a] notary public is not disqualified from taking an acknowledgment or proof of a written instrument as provided by Section 406.016, Government Code, solely because of the person's ownership of stock or a participation interest in or employment by a financial institution that is an interested party to the underlying transaction." Tex. Fin. Code Ann. § 59.003.

If a dispute ever arises, however, a person should be aware that the fact that the employee notarized the certification may be used as evidence. For that reason, the better practice would be for a non-interested third party to notarize the certification.

The Author has provided a proposed form for a request for an agent's certification as Exhibit F.

M. Physician's Written Statement

If the power of attorney becomes effective on the disability or incapacity of the principal, the person may also request that the certification include a written statement from a physician that states that the principal is presently disabled or incapacitated. *Id*. at § 751.203.

Unless otherwise defined in the power of attorney document, a person is considered disabled or incapacitated for the purposes of the durable power of attorney if a physician certifies in writing at a date later than the date of the power of attorney document 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. Tex. Est. Code Ann. § 751.00201.

For any springing durable power of attorney document (one that becomes effective upon the disability or incapacity of the principal), a person has the right to request a writing from a doctor stating that the principal is disabled or incapacitated. The author would recommend that a person request that physician's written statement for any springing power of attorney document that is presented. The Author has provided a proposed form for a physician's written statement as Exhibit E.

The request for medical information about a principal raises HIPAA privacy issues. 45 C.F.R. Section 164.502, which pertains to the general permissible uses and disclosures of protected health information, protects the disclosure of a person's medical information. The protected health care information is individually identifiable health information held or transmitted by a covered entity (which includes most health care providers) in any form or media, whether electronic, paper or oral and includes the patient's past, present, and future physical or mental health condition. 45 C.F.R. Section 164.508 pertains to the uses and disclosures of protected health information for which an authorization is required. A provider must obtain the principal's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations, or otherwise permitted or required by the privacy rule. All authorizations must be in plain language, and contain specific information regarding the information to be disclosed or used, the person(s) disclosing and receiving the information, expiration, right to revoke in writing, and other data and terms. A medical power of attorney holder may potentially sign a release for this type of information. Tex. Health & Safety Code Ann. § 166.157. A medical power of attorney or other written authorization should

specifically state that medical care information can be shared with the agent who has been assigned power of attorney. That way, any health care provider reviewing the medical power of attorney can be assured that he or she will not be in breach of HIPAA privacy rules, and subject to related fines, if a principal's health care information needs to be shared with the named representative.

In the end, if the principal's physician will not provide any written information about the principal's ability to manage their financial affairs, then the person does not have to accept the durable power of attorney and may reject it. So, the burden is on the agent to obtain the medical opinion if they want the person to close the transaction.

N. Opinion Of Counsel

Before accepting a power of attorney, 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. *Id*. at § 751.204(a). If timely sought, this opinion will be prepared by the principal or agent, at the principal's expense. *Id*. at § 751.204(b). However, if the person requests the opinion later than the tenth business day after the date the agent presents the power of attorney and there has not otherwise been an agreed-upon extension, the principal or agent may, but is not required to, provide the opinion and it will be done at the requestor's expense. *Id*. at § 751.204(c).

The Author recommends that when the person is presented with a power of attorney document that is prepared in another state or that does not meet the statutory form, that the person timely requested an opinion of counsel on whether the power of attorney document is enforceable and valid. Further, if the person has any doubt regarding the propriety of the transaction, the person should request an attorney's opinion that the transaction is appropriate and not in breach of any duties that the agent owes the principal.

The Author has provided a proposed form for a request for an opinion of counsel as Exhibit F.

O. English Translation

The person may request from the agent presenting the power of attorney document that the agent provide an English translation of the power of attorney document if some or all of the power of attorney document is not written in English. *Id*. at § 751.205(a). If timely requested (within five days of getting the power of attorney document), the translation must be provided by the principal or agent at the principal's expense. *Id*. at § 751.205(b). However, if, without an extension, the person requests the translation later than the fifth business day after the date the power of attorney is presented, the principal or agent may, but is not required to, provide the translation at the requestor's expense. *Id*. If the person asks for an English translation, then the power of attorney is not considered presented until the date the person receives the translation. *Id*. at § 751.201(d). At that point the person can request a certification and/or attorney opinion.

A person should generally request an English translation when presented with a power of attorney document that is not in English. If nothing else, this will delay the time periods for compliance and/or requesting an agent's certificate or opinion of counsel. The durable power of attorney is not considered presented for acceptance until the date the person receives the translation. In this instance, the author advises not requesting an agent's certification, physician's written statement, or the opinion of counsel until after receipt of the English translation in order to extend the period allowed to accept or reject the power of attorney.

The Author has provided a proposed form for a request for an English translation as Exhibit F.

P. Person Accepting Power Of Attorney Has Defenses

The statutes have many different protections for those who are asked to accept a power of attorney document.

The statutes protect a person who receives a copy of a power of attorney document: "a photocopy or electronically transmitted copy of an original durable power of attorney . . . may be relied on, without liability, by a person who is asked to accept the durable power of attorney to the same extent as the original." Tex. Est. Code Ann. § 751.0023(c).

A signature on a power of attorney that purports to be the signature of the principal is presumed to be genuine. *Id*. at § 751.022. 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. *Id*. at § 751.209(a). Additionally, 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. *Id*. at § 751.209(b).

These provisions provide limited protections to the person accepting the power of attorney document. The person is protected if it acts in good faith and without actual knowledge of a defect. That simply

means that there may be a fact issue regarding "good faith" or "actual knowledge." The statute also does not state whose burden it is to prove "good faith" or "actual knowledge" or the lack thereof.

The statutes protect a person receiving a certification, opinion, or translation: "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." Tex. Est. Code Ann. § 751.210. So, if the certification has false statements, the person has no duty to investigate those facts and may rely on the certification without liability to a third party. For example, if the agent states that the principal has never revoked the power of attorney, but the principal really did so, then a financial institution that conducted a transaction with the agent has a defense if the executor of the principal's estate later sues based on the transaction.

It should be noted that the provision dealing with a certification, opinion, or translation does not expressly have a "good faith" or "actual knowledge" requirement. It appears that this defense is unqualified. But there is an argument that a person that knows that a certification, opinion, or translation is false did not "rely" on it and cannot take advantage of the liability protection.

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. *Id*. at § 751.211. A person is 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 has actual knowledge of the fact. *Id*. at § 751.211. "Actual knowledge" means the knowledge of a person without that person making any due inquiry and without any imputed knowledge. *Id*. at § 751.002.

This is a very favorable definition of actual knowledge for financial institutions. A principal may have relationships in multiple parts of a financial institution: commercial (loans), retail (accounts), and fiduciary (trust administration, investment advisor). The fact that a person in the trust department may know something about the principal and agent will not be imputed to the teller that closes a transaction for the agent. The transaction will be judged solely by the teller's actual knowledge without the teller making any inquiry with other parts of the financial institution and without the teller being imputed the knowledge of the trust administrator.

Q. Defenses and Protections for Person Accepting POA Could Be Broader

It is helpful to compare the protections in the power of attorney act with other statutory protections. Regarding joint accounts, a financial institution has a statutory protection from account holders' claims arising from the bank paying a party to the account. A multiple-party account may be paid, on request, to any one or more of the parties to that account. Tex. Est. Code Ann. §113.202.

Moreover, the Estates Code has specific provisions allowing a financial institution to pay account parties for joint accounts, P.O.D. accounts, and trust accounts. Tex. Est. Code Ann. §§ 113.203, 113.204, 113.205. Moreover, "[a] financial institution that pays an amount from a joint account to a surviving party to that account in accordance with a written agreement under Section 113.151 is not liable to an heir, devisee, or beneficiary of the deceased party's estate." Tex. Est. Code Ann. §113.207.

The Estates Code also expressly states that payment in accordance with these provisions discharges a financial institution from liability. Section 113.209 states:

> (a) Payment made in accordance with Section 113.202, 113.203, 113.204, 113.205, or 113.207 discharges the financial institution from all claims for those amounts paid regardless of whether the payment is consistent with the beneficial ownership of the account between parties, P.O.D. payees, or beneficiaries, or their successors.
>
> (b) The protection provided by Subsection (a) does not extend to payments made after a financial institution receives, from any party able to request present payment, written notice to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving the notice, the successor of a deceased party must concur in a demand for withdrawal for the financial institution to be protected under Subsection (a).
>
> (c) No notice, other than the notice described by Subsection (b) or any other information shown to have been available to a financial institution affects the institution's right to the protection provided by Subsection (a).
>
> (d) The protection provided by Subsection (a) does not affect the rights of parties in disputes between the parties or the parties' successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

Tex. Est. Code Ann. §113.209. Therefore, a financial institution cannot be liable for paying funds in an account to a party on the account. For example, in *Nipp v. Broumley*, the court of appeals noted that the defendant, as a party to the account, had a right to withdraw all of the money in the CDs he held with his mother and that the bank could not be held liable for allowing him to do so even though the son did not have any beneficial ownership in those funds. 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.). The estate's only claims were against the defendant and not the bank. *See id. See also Bandy v. First State Bank*, 835 S.W.2d 609, 615-16 (Tex. 1992) (holding bank is not liable for paying funds to one of named holders of a joint account, even after executor of other named holder's estate demanded payment); *Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887–CV, 2010 Tex. App. LEXIS 4376, at *12-13 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.); *MBank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1992, no writ) ("Thus, between competing interests in a joint account, the bank is fully discharged from liability when it pays the other party on the account, unless one of the parties gives written notice to the bank that no payment should be made.").

R. Grounds For Refusing Acceptance

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; 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.

The statute provides:

(1) the person would not otherwise be required to engage in a transaction with the principal under the same circumstances, including a circumstance in which the agent seeks to: (A) establish a customer relationship with the person under the power of attorney when the principal is not already a customer of the person or expand an existing customer relationship with the person under the power of attorney; or (B) acquire a product or service under the power of attorney that the person does not offer;

(2) the person's engaging in the transaction with the agent or with the principal under the same circumstances would be inconsistent with: (A) another law of this state or a federal statute, rule, or regulation; (B) a request from a law enforcement agency; or (C) a policy adopted by the person in good faith that is necessary to comply with another law of this state or a federal statute, rule, regulation, regulatory directive, guidance, or executive order applicable to the person;

(3) the person would not engage in a similar transaction with the agent because the person or an affiliate[1] of the person: (A) has filed a suspicious activity report as described by 31 U.S.C. Section 5318(g) with respect to the principal or agent; (B) believes in good faith that the principal or agent has a prior criminal history involving financial crimes; or (C) has had a previous, unsatisfactory business relationship with the agent due to or resulting in: (i) material loss to the person; (ii) financial mismanagement by the agent; (iii) litigation between the person and the agent alleging substantial damages; or (iv) multiple nuisance lawsuits filed by the agent;

(4) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before an agent's exercise of authority under the power of attorney;

(5) the agent refuses to comply with a request for a certification, opinion of counsel, or translation under Section 751.201 or, if the agent complies with one or more of those requests, the requestor in good faith is unable to determine the validity of the power of attorney or the agent's authority to act under the power of attorney because

[1] "Affiliate" means "a business entity that directly or indirectly controls, is controlled by, or is under common control with another business entity." Tex. Est. Code § 751.002(2).

the certification, opinion, or translation is incorrect, incomplete, unclear, limited, qualified, or otherwise deficient in a manner that makes the certification, opinion, or translation ineffective for its intended purpose, as determined in good faith by the requestor;

(6) regardless of whether an agent's certification, opinion of counsel, or translation has been requested or received by the person under this subchapter, the person believes in good faith that: (A) the power of attorney is not valid; (B) the agent does not have the authority to act as attempted; or (C) the performance of the requested act would violate the terms of: (i) a business entity's governing documents; or (ii) an agreement affecting a business entity, including how the entity's business is conducted;

(7) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding to construe the power of attorney or review the agent's conduct and that proceeding is pending;

(8) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding for which a final determination was made that found: (A) the power of attorney invalid with respect to a purpose for which the power of attorney is being presented for acceptance; or (B) the agent lacked the authority to act in the same manner in which the agent is attempting to act under the power of attorney;

(9) the person makes, has made, or has actual knowledge that another person has made a report to a law enforcement agency or other federal or state agency, including the Department of Family and Protective Services, stating a good faith belief 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;

(10) the person receives conflicting instructions or communications with regard to a matter from co-agents acting under the same power of attorney or from agents acting under different powers of attorney signed by the same principal or another adult acting for the principal as authorized by Section 751.0021, provided that the person may refuse to accept the power of attorney only with respect to that matter; or

(11) the person is not required to accept the durable power of attorney by the law of the jurisdiction that applies in determining the power of attorney's meaning and effect, or the powers conferred under the durable power of attorney that the agent is attempting to exercise are not included within the scope of activities to which the law of that jurisdiction applies.

Id. at § 751.206.

S. Party Refusing A Power Of Attorney Must Give A Timely Response.

Generally, if a person refuses to accept a power of attorney, then that person should provide the agent a written statement setting forth the reason or reasons for the refusal. *Id*. at § 751.207. However, if the person is refusing the power of attorney due to a reason set forth in Section 751.206(2) or (3), then the person shall provide to the agent 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. *Id*. at § 751.207(b). This response must be provided to the agent on or before the date the person would otherwise be required to accept the power of attorney. *Id*. at § 751.207(c).

It is very important to note that Federal law requires a suspicious activity report be kept confidential and prohibits disclosure of a report of any information revealing its existence. 31 U.S.C. § 5318(g)(2)(A); 31 CFR § 103.18(e). Accordingly, making specific reference to 751.206(3)(A) would likely violate federal law. If a person has to file a SAR, and that is the basis for rejecting a power of attorney document, the author recommends that the person retain an attorney to provide a legal opinion on the person's duties under federal law. The durable power of attorney act expressly states that other laws that apply to financial institutions trump the act's provisions. Tex. Est. Code Ann. § 751.007. So, if there is a conflict, federal law would control.

T. New Vulnerable Persons Statute Impacts Use of Power of Attorney Documents

If the person is a financial institution, broker, or financial advisor, it should create policies regarding the exploitation of vulnerable persons. The Texas Legislature recently created new statutes that require employees to report suspected financial exploitation, a person to assess that conduct and to report to a governmental agency, persons to institute policies for this reporting, and for persons to potentially put a hold on transactions where suspected financial exploitation is occurring.

"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.

Tex. Fin. Code Ann. § 280.001(3).

This statute expressly references the use of power of attorney documents. *Id*. Further, the Texas Estates Code § 751.206(9) dealing with valid reasons to refuse to accept power of attorney documents expressly references reports of financial exploitation. Tex. Est. Code § 751.206(9).

So, persons should evaluate who is benefiting from the transaction, and if there is evidence that the agent is benefiting, there should be an evaluation of whether a report of financial exploitation should be made.

U. Cause Of Action For Wrongfully Refusing Power Of Attorney

The principal or agent may bring an action against a person who wrongfully refuses to accept a power of attorney. *Id*. at § 751.212(a). This suit may not be commenced until after the date the person is required to accept the power of attorney. *Id*. at § 751.212(b). The exclusive remedies are that the court shall order the person to accept the power of attorney and may award the plaintiff court costs and reasonable and necessary attorney's fees. *Id*. at § 751.212(c). The court shall dismiss an action that was commenced after the date a written statement was provided to the agent. *Id*. at § 751.212(d). If the agent receives a written statement after the date a timely action is commenced, the court may not order the person to accept the power of attorney, but instead may award the plaintiff court costs and reasonable and necessary attorney's fees. *Id*. at § 751.212(e). To the contrary, a court may award costs and fees to the defendant if: (1) the court finds that the action was commenced after the date the written statement was timely provided to the agent; (2) the court expressly finds that the refusal was permitted; or (3) Section 751.212(e) does not apply and the court does not issue an order ordering the person to accept the power of attorney. *Id*. at § 751.213.

V. Person May Bring Suit To Construe Power Of Attorney

A person who is asked to accept a power of attorney may bring an action requesting a court to construe, or determine the validity or enforceability of, the power of attorney. *Id*. at § 751.251(b). This provision does not expressly allow a person to receive an award of attorney's fees or court costs from the agent or principal. The person may potentially also assert a request for a declaratory judgment regarding the effectiveness of the power of attorney document, and that statute allows a trial court to potentially award fees. Tex. Civ. Prac. & Rem. Code Ann. 37.009.

W. Agent Can Change Rights of Survivorship And Beneficiary Designations If Granted That Authority

If the principal provides for such power in the power of attorney document, the agent may create or change rights of survivorship or beneficiary designations.

1. Power To Create Or Modify Survivorship And Beneficiary Rights

Section 751.031 provides that if the principal grants the following authority in the power of attorney document, the agent may: "(1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; or (5) delegate authority granted under the power of attorney." Tex. Est. Code Ann. 751.031(b). The provision does limit this right: an agent who is not "an ancestor, spouse, or descendant of the principal may not exercise authority under the power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise." *Id*. at §751.031(c). However, that limitation is, itself, limited by the following clause: "[u]nless the durable power of attorney otherwise provides." *Id*. So, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary, the agent can do so. If the agent is the principal's ancestor, spouse, or descendant, then the agent can name himself or herself as a beneficiary.

Unless the power of attorney otherwise provides, and agent can:

> (1) create or change a beneficiary designation under an account, contract, or another arrangement that authorizes the principal to designate a beneficiary, including an

> insurance or annuity contract, a qualified or nonqualified retirement plan, including a retirement plan as defined by Section 752.113, an employment agreement, including a deferred compensation agreement, and a residency agreement;
> (2) enter into or change a P.O.D. account or trust account under Chapter 113; or
> (3) create or change a nontestamentary payment or transfer under Chapter 111.

Id. at § 751.033.

Under Section 752.108(b) and Sections 752.113(b) and (c), unless the principal has granted the authority to create or change a beneficiary designation expressly as required by Section 751.031(b)(4), an agent may be named a beneficiary of an insurance contract, an extension, renewal, or substitute for the contract, or a retirement plan only to the extent the agent was named as a beneficiary by the principal before executing the power of attorney. *Id*. at §§ 752.108(b), 752.113(b), (c). "If an agent is granted authority under Section 751.031(b)(4) and the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides, the authority of the agent to designate the agent as a beneficiary is not subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id*. at §751.033. "If an agent is not granted authority under Section 751.031(b)(4) but the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides and notwithstanding Section 751.031, the agent's authority to designate the agent as a beneficiary is subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id*. at § 751.033(c).

So, in other words, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary of a retirement or insurance contract, he or she can do so even if he or she was not previously named a beneficiary. If the power of attorney document does not expressly allow the agent to name himself or herself, but there is a general power to enter into retirement and insurance transactions, then the agent can name himself or herself as a beneficiary only if he or she was previously so named by the principal.

2. Agent's Gifting Powers

Unless the durable power of attorney otherwise provides, a general grant of authority to make a gift only authorizes the agent to:

> (1) make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed: (A) the annual dollar limits of the federal gift tax exclusion under Section 2503(b), Internal Revenue Code of 1986, regardless of whether the federal gift tax exclusion applies to the gift; or (B) if the principal's spouse agrees to consent to a split gift as provided by Section 2513, Internal Revenue Code of 1986, twice the annual federal gift tax exclusion limit; and
> (2) consent, as provided by Section 2513, Internal Revenue Code of 1986, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual federal gift tax exclusions for both spouses.

Id. at §751.032.

The agent may make a gift only as the agent determines is consistent with the principal's objectives if the agent actually knows those objectives. *Id*. If the agent does not know the principal's objectives, the agent may make a gift of the principal's property "only as the agent determines is consistent with the principal's best interest based on all relevant factors, including the factors listed in Section 751.122 and the principal's personal history of making or joining in making gifts." *Id*.

3. Duty To Preserve Principal's Estate Plan

The statute provides that the agent should take into account the principal's estate plan in making decisions:

> An agent shall preserve to the extent reasonably possible the principal's estate plan to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on all relevant factors, including: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (4) eligibility for a benefit, a program, or assistance under a statute or regulation.

Id. at 751.122.

4. Concern With New Provisions Broadening Agent's Authority

It is not uncommon for an agent to take advantage of the power that he or she has regarding the principal's assets. The agent may start taking assets for his or her own benefit, use the principal's assets as collateral for a loan to the agent, receive assets for the agent's own benefit that should be deposited into the principal's accounts, create new accounts or change account signature cards that create an ownership interest in the agent, etc.

The new provisions of the Estates Code allow a principal to allow an agent to name himself or herself as the beneficiary of accounts, insurance products, and retirement accounts. The author has grave concerns about the way that vulnerable persons sign power of attorney documents. Principals often have diminished capacity at the time that power of attorney documents are executed. Attorneys, who are often retained by the agent, may not adequately explain all of the provisions of the power of attorney document. An agent may not even retain an attorney and may simply create such a document (from the statutory form) and have the principal sign it without any explanation.

Principals routinely use beneficiary designations as a form of estate planning. So, the principal may execute a will and omit a person or decrease a devise to that person if the principal has otherwise already provided for that person via a beneficiary designation. If a power of attorney document is signed with broad powers that the principal does not really understand, the agent may completely change the principal's estate planning by changing beneficiary designation. If the power of attorney document allows the agent to name himself or herself, then the agent can take property that should go to someone else and give it to himself or herself. In any event, the agent can redirect assets from the person the principal originally intended to have those assets and give them to someone else. There is no need for these results. In the author's opinion, the ability of an agent to effectuate transactions for the principal's benefit should not include the ability to change beneficiary designations that only impact who gets the assets once the principal is deceased. Should an agent be able to execute a new will for the principal and name himself or herself as the beneficiary of the estate or name someone else? Of course not. Yet, that is essentially what the statute allows regarding non-probate assets.

IV. NEW EXPLOITATION OF VULNERABLE PERSONS STATUTE

A. Introduction

The Texas Legislature passed, and the Governor signed, an act that creates new protections for vulnerable individuals. HB 3921 creates a new chapter 280 of the Texas Finance Code and a new Article 581, Section 45, of the Texas Securities Act in the Texas Civil Statutes. The Texas Legislature now requires employees to report suspected incidences of financial exploitation to their employers, and for the financial institution, security dealers, or financial adviser to similarly make reports to the Texas Department of Family and Protective Services (the "Department"). This legislation took effect September 1, 2017. Legislative history provides:

> Interested parties contend that certain vulnerable adults lose a significant amount of money each year to fraud and financial exploitation. 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.

B. Definitions Of Vulnerable Person And Financial Exploitation

A "vulnerable adult" means someone who is sixty-five (65) years or older or a person with a disability. Tex. Fin. Code Ann. § 280.001. The term "exploitation" means: "the act of forcing, compelling, or exerting undue influence over a person causing the person to act in a way that is inconsistent with the person's relevant past behavior or causing the person to perform services for the benefit of another person." *Id*. at § 280.001(2).

"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.

Tex. Fin. Code Ann. § 280.001(3).

C. Financial Institutions

1. Employee Reporting Obligation

Section 280.002 provides that "if an employee of a financial institution has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the financial institution has occurred, is occurring, or has been attempted, the employee shall notify the financial institution of the suspected financial exploitation." Tex. Fin. Code Ann. § 280.002. "Financial Institution" means: "a state or national bank, state or federal savings and loan association, state or federal savings bank, or state or federal credit union doing business in this state." Tex. Fin. Code Ann. § 277.001.

From a practical perspective, this provision requires employers to educate and train employees about financial exploitation so that they know when to suspect that it is occurring.

2. Financial Institution Reporting Obligation

If an employee makes such a report or the financial institution otherwise has cause to believe a reportable event has occurred, then the financial institution shall assess the suspected financial exploitation and submit a report to the Department. *Id*. at § 280.002. The report shall include: (1) the name, age, and address of the elderly person or person with a disability; (2) the name and address of any person responsible for the care of the elderly person or person with a disability; (3) the nature and extent of the condition of the elderly person or person with a disability; (4) the basis of the reporter's knowledge; and (5) any other relevant information. *Id*. (citing Tex. Hum. Res. Code § 48.051). The financial institution should submit the report not later than the earlier of: (1) the date it completes an assessment of the suspected financial exploitation; or (2) the fifth business day after the date the financial institution is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted. *Id*. Furthermore, a financial institution may at the time the financial institution submits the report also notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the financial institution suspects that the third party is guilty of financial exploitation of the vulnerable adult. *Id*. at § 280.003.

3. Who Are "Account Holders"?

The statute does not define "account" or "account holder." Texas Estate's Code section 113.001 provides that "account" means "a contract of deposit of funds between the depositor and a financial institution. The term includes a checking account, savings account, certificate of deposit, share account, *or other similar arrangement*." Tex. Est. Code § 113.001(1) (emphasis added). The vague term: "or other similar arrangement" does not provide a lot of limitation on what is meant by "account."

Section 113.004 describes multiple types of accounts, including convenience accounts, joint accounts, multi-party accounts, POD accounts, and trust accounts. Tex. Est. Code Ann. § 113.004.

"Convenience account" means an account that: "(A) is established at a financial institution by one or more parties in the names of the parties and one or more convenience signers; and (B) has terms that provide that the sums on deposit are paid or delivered to the parties or to the convenience signers "for the convenience" of the parties." *Id*. at § 113.004(1).

"Joint account" means "an account payable on request to one or more of two or more parties, regardless of whether there is a right of survivorship." *Id*. at § 113.004(2).

"Multiple-party account" means a "joint account, a convenience account, a P.O.D. account, or a trust account." *Id*. at § 113.004(3). The term does not include an account established for the deposit of funds of a partnership, joint venture, or other association for business purposes, or an account controlled by one or more persons as the authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or a regular fiduciary or trust account in which the relationship is established other than by deposit agreement. *Id*.

"P.O.D. account," including an account designated as a transfer on death or T.O.D. account, means "an account payable on request to: (A) one person during the person's lifetime and, on the person's death, to one or more P.O.D. payees; or (B) one or more persons during their lifetimes and, on the death of all of those persons, to one or more P.O.D. payees." *Id*. at § 113.004(4).

"Trust account" means "an account in the name of one or more parties as trustee for one or more beneficiaries in which the relationship is established by the form of the account and the deposit agreement with the financial institution and in which there is no subject of the trust other than the sums on deposit in the account." *Id*. at § 113.004(5). The deposit agreement is not required to address payment to the beneficiary. *Id*. The term does not include: (A) a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account; or (B) a fiduciary account arising from a fiduciary relationship, such as the attorney-client relationship." *Id*.

There are also definitions for retirement accounts in Estate's Code Section 111.051.

4. Financial Institution's Ability To Place A Hold On Transactions

If a financial institution submits a report, it "(1) may place a hold on any transaction that: (A) involves an account of the vulnerable adult; and (B) the financial institution 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." *Id*. at § 280.004. This hold generally expires ten business days after the report was submitted. *Id*. The financial institution 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 financial institution may also petition a court to extend a hold. *Id*.

5. Duty To Create Policies

The statute requires that a financial institution adopt internal policies, programs, plans, or procedures for: (1) the employees of the financial institution to make the notification; and (2) the financial institution to conduct the assessment and submit the report. *Id*. at § 280.002(d). These policies may authorize the financial institution to make a report to other appropriate agencies and entities. *Id*. at § 280.002(e). A financial institution shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction. *Id*. at § 280.004.

6. Immunity

An employee or financial institution that makes a report to the Department or to a third party is immune from any civil or criminal liability unless the employee or financial institution acted in bad faith or with a malicious purpose. *Id*. at § 280.005. Further, a financial institution that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from any civil or criminal liability or disciplinary action resulting from that action or failure to act. *Id*. at § 280.005.

7. Records

A financial institution shall provide access to or copies of records relevant to the suspected financial exploitation to the Department, law enforcement or a prosecuting attorney. The provisions in Texas Finance Code Section 59.006 relating to notice and reimbursement for customer records do not apply to these provisions.

D. Securities Dealers and Financial Advisers

1. Professionals' Duties To Report.

The new statute provides that if a securities professional has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted, the securities professional shall notify the dealer or investment adviser of the suspected financial exploitation. "Securities professionals" are agents, investment adviser representatives, or persons who serve in a supervisory or compliance capacity for a dealer or investment adviser.

2. Dealer's/Investment Adviser's Duty To Report

If a dealer or investment adviser is notified of suspected financial exploitation or otherwise has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted, the dealer or investment adviser shall assess the suspected financial exploitation and submit a report to the Securities Commissioner and the Department. The dealer or investment adviser shall submit the reports not later than the earlier of: (1) the date the dealer or investment adviser completes the dealer's or investment adviser's assessment of the suspected financial exploitation; or (2) the fifth business day after the date the dealer or investment adviser is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted. If a dealer or investment adviser submits reports, they may also notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the dealer or investment adviser suspects the third party of financial exploitation of the vulnerable adult.

3. Duty To Create Policies

Each dealer and investment adviser shall adopt internal policies, programs, plans, or procedures for the securities professionals or persons serving in a legal capacity for the dealer or investment adviser to make the notification and for the dealer or investment adviser to conduct the assessment and submit reports. The policies, programs, plans, or procedures may authorize the dealer or investment adviser to report the suspected financial exploitation to other appropriate agencies and entities in addition to the Securities Commissioner and the Department, including the attorney general, the Federal Trade Commission, and the appropriate law enforcement agency. Each dealer and investment adviser shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction.

4. Ability To Place Hold On Transactions

If a dealer or investment adviser submits reports, they: (1) may place a hold on any transaction that involves an account of the vulnerable adult, and the dealer or investment adviser 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 Securities Commissioner, the Department, or a law enforcement agency. The hold expires ten business days after the date the dealer or investment adviser submits the reports. This can be extended for up to thirty business days if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation. The dealer or investment adviser may also petition a court to extend a hold placed on any transaction.

5. Immunity

A securities professional, dealer, or investment adviser who makes a notification or report or who testifies or otherwise participates in a judicial proceeding is immune from any civil or criminal liability arising from the notification, report, testimony, or participation in the judicial proceeding, unless the securities professional, person serving in a legal capacity for the dealer or investment adviser, or dealer or investment adviser acted in bad faith or with a malicious purpose. A dealer or investment adviser that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from civil or criminal liability or disciplinary action resulting from the action or failure to act.

6. Records

A dealer or investment adviser shall provide on request access to or copies of records relevant to the suspected financial exploitation to the Department, law enforcement or a prosecuting attorney.

E. Other Reporting Duties

The Texas Human Resources Code has a general provision that requires the reporting of the exploitation of elderly or disabled individuals. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Section 48.051 states: "a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department." Tex. Hum. Res. Code § 48.051. In the Texas Human Resources Code, the term "exploitation" means "the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person's social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person." *Id*. at § 48.002. Importantly, the Texas Human Resources Code provides a criminal penalty for not reporting the exploitation: "[a] person commits an offense if the person has cause to believe that an elderly person or person with a disability has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter." *Id*. at § 48.052. Generally, this offense is a Class A misdemeanor. *Id.* The Texas Human Resources Code has similar immunity defenses for making reports. *Id*. § 48.054.

Courts have held that the qualified immunity defense is an affirmative defense and that the defendant has the burden of showing that a defendant was not acting "in bad faith or with a malicious purpose"—i.e., in good faith—when he made his report of elder abuse. *Scarbrough v. Purser*, No. 03-13-00025-CV, 2016 Tex. App. LEXIS 13863 (Tex. App.—Austin December 30, 2016, pet. denied).

Texas Family Code Section 261.106 also provides that: "[a] person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect is immune from civil or criminal liability that might otherwise be incurred or imposed." Tex. Fam. Code Ann. § 261.106(a). Courts have held that this qualified defense is an affirmative defense that a defendant has the duty to raise and prove. *Miranda v. Byles*, 390 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Howard v. White*, No. 05-01-01036-CV, 2002 Tex. App. LEXIS 4891, at *18-20 (Tex. App.—Dallas July 10, 2002, no pet.) (not designated for publication) (concluding that appellant was not entitled to statutory protection from defamation claims based on her report of child abuse because she failed to prove that her report was made in good faith).

Importantly, the new provisions provide that complying with those reporting obligations also satisfies the reporting obligations under the Texas Human Resources Code. So, there is no duty to make multiple reports.

F. Application of U.C.C. Section 3.307 To Notice Of Financial Exploitation

The statutory definition of "financial exploitation" seems very broad. Financial institutions, dealers, and financial advisers should be aware of another provision that dictates when a financial institution has notice of a

breach of fiduciary duty. Texas Business and Commerce Code Section 3.307 sets forth the rules dictating when a taker of an instrument would lose its holder-in-due-course status and potentially make financial institutions vulnerable to other causes of action, such as conversion due to having notice of fiduciary breaches. Tex. Bus. & Com. Code Ann. § 3.307. Section 307 has been explained in this way:

> When a fiduciary holds an instrument in trust for or on behalf of the represented person, he is usually authorized to negotiate the instrument only for the benefit of the represented person. When the fiduciary negotiates the instrument for his own benefit rather than for the benefit of the represented person in breach of his trust, an equitable claim of ownership on the part of the represented person arises. The represented person may assert this claim against any person not having the rights of a holder in due course. A taker cannot be a holder in due course if he has notice of the claim of the represented person. Section 3-307 determines when the taker has notice of such a claim that prevents her from becoming a holder in due course.

6 WILLIAM D. HAWKLAND & LARRY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES § 3-307:3 (Rev. Art. 3) (1999).

Section 3.307(b) of the Texas Business and Commerce Code states:

> If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:
>
> (1) notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person;
> (2) in the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is:
>
> (A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;
> (B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or
> (C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person;
>
> (3) if an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty; and
> (4) if an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is:
>
> (A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;
> (B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or
> (C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

Tex. Bus. & Com. Code Ann. § 3.307.

Although the definition of financial exploitation is broader than the provisions of Section 3.307, Section 3.307 is a good place to start to determine whether there is notice that financial exploitation may be occurring.

G. New Provisions Application To Aiding And Abetting Breach Of Fiduciary Duty, Knowing Participation, Or Conspiracy

When an exploiter takes advantage of a vulnerable person, the exploiter often does not make wise investments with the wrongfully obtained assets. In other words, when someone attempts to retrieve those assets for the vulnerable person or his or her estate, the exploiter may be judgment proof. So, the plaintiff will often look to others who have deeper pockets and may be able to pay a judgment. There are several theories in Texas that allow a plaintiff to sue a third party for the exploiter's bad conduct.

When a third party knowingly participates in the breach of a fiduciary duty, the third party becomes a joint tortfeaser and is liable as such. *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 160 S.W.2d 509, 513-14 (Tex. 1942); *Kaster v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.); *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 867 (Tex. App.—Houston [1st

Dist.] 1999), *aff'd on other grounds*, 73 S.W.3d 193 (2002). The elements are: (1) a breach of fiduciary duty by a third party, (2) the aider's knowledge of the fiduciary relationship between the fiduciary and the third party, and (3) the aider's awareness of his participation in the third party's breach of its duty. *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex. App.—Dallas 2011, no pet). There may also be an aiding-and-abetting-breach-of-fiduciary-duty claim in Texas. *See First United Pentecostal Church of Beaumont v. Parker*, 2017 Tex. LEXIS 295 (Tex. Mar. 17, 2017) (assumed that such a claim existed in Texas but held that it was not expressly so holding).

A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. *Id*.

The point is that a plaintiff may allege that the financial institution, dealer, or financial adviser knew of the exploiter's fiduciary relationship, knew that breaches were occurring, and still assisted in completing the transactions. The plaintiff may cite to these new broad statutes (and Section 3.307) as giving legal definition to when a financial institution, dealer, or financial adviser has notice of breach of fiduciary duty. If the financial institution, dealer, or financial adviser did not properly report financial exploitation as required by the statutes, then the plaintiff will certainly take advantage of that fact in proving liability and/or exemplary damages. Accordingly, these new statutes may have far-reaching ramifications for financial institutions, dealers, or financial advisers beyond the express words in those statutes.

H. Conclusion Regarding Financial Exploitation Statutes

Certainly, the author agrees that financial exploitation of vulnerable individuals is bad and should be punished. However, the new provisions seem to be very broad and have vague aspects that place new duties on financial institutions, dealers, financial advisers and their employees. These duties also seem to be placed at the expense of the financial institutions, dealers, and financial advisers. These new provisions raise many questions:

1) When should financial institutions, dealers, and financial advisers be imputed with knowledge that a client is a vulnerable person? Is it just actual knowledge or should there be a "should have known" component? Is the knowledge of one employee imputed to all other employees?
2) The burden to make a report involves vulnerable persons who have an account with financial institutions, dealers, and financial advisers. Does an employee or financial institution, dealer, or financial adviser have any duty to investigate or report under this statute any exploitation of vulnerable persons who are not account holders? What if they are borrowers or attempted borrowers? Presumably, the Texas Human Resources Code provisions will still apply even if the other newer provisions do not.
3) What evidence will be necessary to raise a "cause to believe" that employees or financial institutions, dealers, and financial advisers should make a report?
4) What will the assessment entail? Does the financial institution, dealer, or financial adviser have a duty to investigate "outside the walls"? If the assessment leads to the belief that no exploitation has occurred, does there still have to be a report?
5) The definition of "financial exploitation" is very broad and would also seem to include even proper behavior, such as a power-or-attorney holder/ agent reasonably compensating himself or herself for their services. What duties will financial institutions, dealers, and financial advisers have to report proper behavior that seems to fit within the broad definition of "financial exploitation"?
6) If financial institutions, dealers, and financial advisers have to file suit to extend a hold, can they seek attorney's fees and costs from the vulnerable individual and/or the exploiter?
7) Do the new statutes create duties that a vulnerable individual can later use as a basis for a negligence suit? Would negligence per se apply? Can vulnerable individuals sue financial institutions, dealers, and financial advisers for not assessing or reporting financial exploitation or placing or extending a hold that then leads to damages to the vulnerable individuals?
8) When do financial institutions, dealers, and financial advisers have to adopt internal policies, programs, plans, or procedures regarding assessing and reporting financial exploitation and regarding holds? Do these have to be in writing or can they be oral? Does a defendant have to turn these over in litigation? Can these be used to set a standard of care, such that if financial institutions,

dealers, and financial advisers have higher internal policies, programs, plans, or procedures than what is required by law, will the defendants have to meet their higher standards?

9) With regard to immunity, what are the legal standards for proving "bad faith or with a malicious purpose"? Who has the burden to prove that a report was made in "bad faith or with a malicious purpose"? Is the defendant presumed to act in good faith?

10) With regard to immunity for holds, what are the standards for "good faith and with the exercise of reasonable care"? Does reasonable care involve what a reasonably prudent financial institution, dealer, or financial adviser would do or simply what a normal person would do? Will the parties be required to have expert evidence on the standard of care? If financial institutions, dealers, and financial advisers are in good faith, but do not exercise reasonable care, are they able to claim immunity? If there is no immunity, what potential damages can a vulnerable individual claim (direct or consequential damages)?

V. ARBITRATION CLAUSE

Over the past few decades, parties have increasingly resorted to the use of arbitration clauses in a number of contractual contexts, including bank agreements. As one news source reported:

> Big banks are increasingly using the fine print of checking account agreements to restrict their customers' ability to settle disputes in court, even though most consumers want to keep their legal options open. Over the last four years, the share of 29 big banks that use so-called mandatory binding arbitration clauses has risen to 72 percent from 59 percent according to an analysis released Wednesday by the Pew Charitable Trusts. And of 44 large banks analyzed this year, almost three-fourths used the clauses, Pew found.

The New York Times, August 18, 2016. (https://www.nytimes.com/2016/08/18/your-money/arbitration-bank-checking-accounts.html)

That is not surprising as there are federal and state statutes that support and encourage the use of arbitration for dispute resolution. Correspondingly, courts have been very willing to assist parties in enforcing arbitration agreements.

Interestingly, there have been some legislative actions taken to limit arbitration in bank agreements. The Consumer Financial Protection Bureau's final rule to ban class-action waivers in arbitration agreements in contracts for consumer financial products took effect September 18, 2017, and compliance with the rule is required with regard to pre-dispute arbitration agreements entered into on or after March 19, 2018. Arbitration clauses in new contracts offering a consumer financial product or service will need to include specified language indicating that arbitration cannot be used to stop the consumer from pursuing a class action.

A party seeking to enforce an arbitration agreement should file a motion to compel arbitration. Typically, when the motion is granted, the trial court abates all proceedings and orders that the claimant initiate arbitration proceedings. Once in arbitration, the parties have limited discovery and agree that either a single arbitrator or a panel of arbitrators decide issues of fact and law. Therefore, by agreeing to arbitrate, the parties agree to waive their right to a jury trial. Once the arbitrator renders a decision, the prevailing party files the decision with the trial court for enforcement. Unless they expressly contract to the contrary, the parties generally have very little opportunity for appellate review over the arbitrator's decision.

A. Enforcement Of Arbitration Clauses

Arbitration is a contractual proceeding by which the parties, in order to obtain a speedy and inexpensive final disposition of disputed matters, consent to submit the controversy to arbitrators for determination. *Porter & Clements, L.L.P. v. Stone,* 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Federal and state law strongly favors arbitration. *Cantella & Co. v. Goodwin,* 924 S.W.2d 943, 944 (Tex. 1996).

Texas courts liberally enforce arbitration clauses notwithstanding the fact that a party waives its constitutional right to a jury trial and has a very limited right to appeal an arbitrator's decision. *See, e.g., Royston, Rayzor, Vickery & Williams, LLP v. Lopez,* 467 S.W.3d 494 (Tex. 2015) (enforcing arbitration clause in attorney/client agreement).

In Texas, arbitration agreements are interpreted under general contract principles. *See In re Kellogg Brown & Root,* 166 S.W.3d 732, 738 (Tex. 2005); *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex. 2003). To enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). There are no special defenses to an arbitration agreement other than normal contract defenses such as fraud, duress, and unconscionability.

B. Procedure For Compelling Arbitration

A motion to compel arbitration is procedurally akin to a motion for summary judgment and is subject to the same evidentiary standards. *See In re Jebbia*, 26 S.W.3d 753, 756-57 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Thus, the party alleging an arbitration agreement must present summary proof that an agreement to arbitrate requires arbitration of the dispute. *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 897 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *Jebbia*, 26 S.W.3d at 757. The party resisting may then contest the opponent's proof or present evidence supporting the elements of a defense to enforcement. *Jim Walter Homes, Inc.*, 207 S.W.3d at 897; *Jebbia*, 26 S.W.3d at 757. Only where a material issue of fact is raised, is there a need for an evidentiary hearing. *Jim Walters Homes, Inc.*, 207 S.W.3d at 897.

The elements of a valid arbitration agreement are: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 24 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

The term "meeting of the minds" refers to the parties' mutual understanding and assent to the expression of their agreement. *Principal Life Ins. Co. v. Revalen Dev., LLC*, 358 S.W.3d 451, 454 (Tex. App.—Dallas 2012, pet. denied). Contracts require mutual assent to be enforceable. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). Evidence of mutual assent in written contracts generally consists of signatures of the parties and delivery with the intent to bind. *Id.* By signing a contract, a party is presumed to have read and understood its contents. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 134 (Tex. 2004).

To determine whether claims fall within the scope of an arbitration agreement, a court must focus on the factual allegations rather than the legal claims asserted. *Prudential*, 909 S.W.2d at 900. When considering an arbitration agreement, a court must give "due regard" to the federal policy favoring arbitration. *Webb v. Investacorp., Inc*., 89 F.3d 252, 258 (5th Cir. 1996). A court should construe an arbitration clause broadly, and when a contract contains an arbitration clause, there is a presumption of arbitrability. *AT&T Tech., Inc. v. Commc's Workers of Am.*, 475 U.S. 643, 650 (1986).

Any doubts as to arbitrability are to be resolved in favor of coverage. *In re FirstMerit Bank N.A*, 52 S.W.3d at 754. Likewise, a court should resolve any doubts about the scope of the arbitration agreement in favor of coverage. *Id*. The court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue . . . ." *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984); *Metropolitan Property v. Bridewell*, 933 S.W.2d 358, 361 (Tex. App.—Waco 1996, no writ).

Arbitration agreements containing phrases such as "relating to" are interpreted broadly. *See Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998); *In re Bank One, N.A.*, 216 S.W.3d 825, 826-27 (Tex. 2007) (resolving doubt as to scope of arbitration agreement covering disputes "arising from or relating in any way to this Agreement" in favor of coverage); *In re Jim Walter Homes, Inc*., 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (in context of arbitration clause, Court recognized that the use of language "any" dispute "arising out of or related to" as broad language that expressly includes tort and other claims); *In re Guggenheim Corp. Funding, LLC*, 380 S.W.3d 879, 887 (Tex. App.—Houston [14th Dist.] 2012, original proceeding); *TMI Inc. v. Brooks*, 225 S.W.3d 783, 791 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (holding that phrase "arising out of and/or related to" in arbitration agreement is "broad form in nature, evidencing the parties' intent to be inclusive rather than exclusive."). The phrase "relates to" is a very broad term. *Schwarz v. Pully*, No. 05-14-00615, 2015 Tex. App. LEXIS 8115 (Tex. App.—Dallas August 3, 2015, no pet.). A claim "relates to" a contract if it has a significant relationship with or touches matters covered by the contract. *Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 898 (Tex. App.—Austin 2006, no pet.).

Broad arbitration clauses embrace "all disputes between the parties having a significant relationship to the contract, regardless of the label attached to the dispute." *Penzoil*, 139 F.3d at 1067. One court has held that an arbitration clause using a phrase such as "any dispute . . . relating to, arising from, or connected in any manner to this Agreement" is broad and "embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *FD Frontier Drilling (Cyprus), Ltd. v. Didmon*, 438 S.W.3d 688, 695 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). "If the facts alleged 'touch matters,' have a 'significant relationship' to, are 'inextricably enmeshed' with, or are 'factually intertwined' with the contract containing the arbitration agreement, the claim is arbitrable." *Id.; Cotton Commercial USA, Inc. v. Clear Creek ISD*, 387 S.W.3d 99, 108 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Pennzoil Co. v. Arnold Oil Co.*, 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, orig. proceeding).

Additionally, broad language has been construed to extend not only to claims that literally arise under the contract, but to all disputes arising out of the parties' relationship. *Didmon*, 438 S.W.3d at 695

(citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164-65 (5th Cir. 1998) (claims on a promissory note were arbitrable due to a development agreement's arbitration clause); *Hale-Mills Constr. Ltd. v. Willacy County*, No. 13-15-00174-CV, 2016 Tex. App. LEXIS 340 (Tex. App.—Corpus Christi January 14, 2016, no pet.); *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993).

C. Right To Appeal Decision Refusing To Enforce Arbitration

Because the main purpose of arbitration is cost-savings and the avoidance of prolonged delay, in the Texas Arbitration Act, the Texas Legislature provided that a trial court's denial of a motion to arbitrate is immediately appealable: "A party may appeal a judgment or decree entered under this chapter or an order: (1) denying an application to compel arbitration." Tex. Civ. Prac. & Rem. Code § 171.098(a)(1). Similarly, the Texas Legislature enacted Texas Civil Practice and Remedies Code section 51.016 that provides courts of appeals with jurisdiction to decide an appeal from an interlocutory order on a motion to compel arbitration under the Federal Arbitration Act:

> In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 et seq.), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16.

Tex. Civ. Prac. & Rem. C. Ann. § 51.016. This section is effective for any case filed on or after September 1, 2009. *See id*. at cmts.

D. Delegation of Enforcement Issues To Arbitrator

Parties can agree to delegate to the arbitrator the power to resolve gateway issues regarding the validity, enforceability, and scope of an arbitration agreement. *AT&T Technologies, Inc. v. Communications. Workers*, 475 U.S. 643 (1986) (holding parties may agree to arbitrate arbitrability); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1985) (holding question of primary power to decide arbitrability "turns upon what the parties agreed about that matter").

An arbitration provision can state that any dispute shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association. Rule 7(a) of the Commercial Arbitration Rules of the AAA grants an arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the Arbitration Agreement." COMMERCIAL RULES OF THE AMERICAN ARBITRATION ASSOCIATION, Rule 7(a) (http://adr.org/aaa/faces/rules).

Courts have concluded that an arbitration agreement's incorporation of rules empowering an arbitrator to decide arbitrability and scope issues clearly and unmistakably evidences the parties' intent to allow the arbitrator to decide those issues. *See, e.g., Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012) (We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("[W]e conclude that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (concluding that agreement's incorporation of AAA rules clearly and unmistakably showed parties' intent to delegate issue of determining arbitrability to arbitrator); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (holding that by incorporating AAA Rules into arbitration agreement, parties clearly and unmistakably agreed that arbitrator should decide whether arbitration clause was valid); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005) ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 549-52 (S.D. Miss. 2005) (holding that by agreeing to be bound by procedural rules of AAA, including rule giving arbitrator power to rule on his or her own jurisdiction, defendant agreed to arbitrate questions of jurisdiction before arbitrator); *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 200 (D. Me. 2002) (holding arbitration clause stating that arbitration shall proceed according to rules of AAA provides clear and unmistakable delegation of scope-determining authority to arbitrator).

For example, in *T.W. Odom Mgmt. Servs. v. Williford*, the court of appeals reversed a trial court's decision denying a motion to compel arbitration in an employee injury suit where the employment agreement clearly provided that the AAA rules would apply. No. 09-16-00095, 2016 Tex. App. LEXIS 9353 (Tex. App.—Beaumont August 25, 2016, no pet.). The court stated:

> The 2013 agreement states that "[t]he arbitration will be held under the auspices of the American Arbitration Association ("AAA")[,]" and "shall be in accordance with the AAA's then-current employment arbitration procedures." The agreement also references the AAA National Rules for Resolution of Employee Disputes. Under the AAA's Employment Arbitration Rules, Rule 6, the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." … [The parties] agreed that any arbitration would be conducted in accordance with the AAA's employment arbitration procedures, and the agreement references the AAA's National Rules for Resolution of Employee Disputes. The parties agreed to a broad arbitration clause that expressly incorporated rules giving the arbitrator the power to rule on its own jurisdiction and to rule on any objections with respect to the existence, scope, or validity of the agreement.

Id. at *12-13. The court therefore ordered that the trial court should have ruled that the arbitrator could make the decision on the scope and enforceability of the clause. *Id*.

E. Waiver Of Arbitration Rights

The Texas Supreme Court has been reluctant to find that a party waived its right to arbitration by court related conduct. *See, e.g., RSL Funding, LLC v. Pippins,* 2016 Tex. LEXIS 616 (Tex. July 1, 2016); *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.,* 458 S.W.3d 502 (Tex. 2015); *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.,* 455 S.W.3d 573 (Tex. 2014); *Kennedy Hodges, L.L.P. v. Gobellan,* 433 S.W.3d 542 (Tex. 2014).

The person asserting waiver has the burden to establish her waiver defense to the motion to compel arbitration. *Williams Indus., Inc. v. Earth Dev. Sys. Corp*., 110 S.W.3d 131, 134 (Tex. App.—Houston [1st Dist.] 2003, no pet.). There is a strong presumption against waiving a right to arbitration. *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002). A party asserting waiver as a defense has the burden to prove that (1) the other party has "substantially invoked the judicial process," which is conduct inconsistent with a claimed right to compel arbitration, and (2) that the inconsistent conduct has caused it to suffer detriment or prejudice. *Id*. at 174 ("[m]erely taking part in litigation is not enough unless a party 'has substantially invoked the judicial process to its opponent's detriment.'"); *see also Perry Homes v. Cull,* 258 S.W.3d 580, 587—92 (Tex. 2008); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (holding that party who litigated in the trial court for two years did not substantially invoke the judicial process to their opponent's detriment because the party engaged in minimal discovery, and party opposing arbitration failed to demonstrate sufficient prejudice to overcome the strong presumption against waiver).

"Merely taking part in litigation is not enough." *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006). *See also G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502 (Tex. 2015) (holding that movant did not waive arbitration rights by filing counterclaims, filing motions for relief, and participating in pretrial discovery); *Richmont Holdings,* 455 S.W.3d at 576 (holding that movant did not waive arbitration rights by initiating lawsuit, invoking forum-selection clause, moving to transfer venue, propounding request for disclosure, and waiting nineteen months after being sued to move for arbitration); *In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692, 694 (Tex. 2008) (holding that movant did not waive arbitration rights by noticing deposition, serving written discovery, and waiting eight months to move for arbitration); *In re Bruce Terminix, Co*., 988 S.W.2d 702, 703-04 (Tex. 1998) (holding that movant did not waive arbitration rights by propounding requests for production and interrogatories and waiting six months to seek arbitration); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 88-89 (Tex. 1996) (holding that movant did not waive arbitration rights by propounding written discovery, noticing deposition, agreeing to reset trial date, and waiting nearly a year to move for arbitration).

Rather, that conduct must demonstrate that the party "has substantially invoked the judicial process to [its] opponent's detriment." *Id*. The Texas Supreme Court declined to find waiver of the right to arbitrate when a movant filed cross-actions. *D. Wilson Constr*., 196 S.W.3d at 783. Whether a movant sought "disposition on the merits" is a key factor in deciding waiver. *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 575 (Tex. 2014). A "heavy burden of proof" is required to establish waiver of arbitration rights, and the court must resolve all doubt in favor of arbitration. *In re Bruce Terminix Co*., 988 S.W.2d 702, 705 (1998). A party does not substantially invoke the judicial process merely by participating in discovery. *See In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998).

Further, the party asserting waiver must also establish that it has been harmed by the opposing party's conduct. *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002) (quoting *Prudential Securities Inc. v. Marshall*, 909 S.W.2d 898-99 (Tex. 1995) ("[A] party does not waive a right to arbitration merely by delay; instead the party urging waiver must establish that any

delay resulted in prejudice."); *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 368 (Tex. App.—Beaumont 2008, orig. proceeding) (holding party opposing arbitration was not prejudiced when party requesting arbitration waited 14 months to request arbitration after answering the lawsuit, filing counterclaims, and engaging in discovery).

F. Conspicuousness Requirement

In Texas, there is a presumption that parties that sign contracts have read and understood the contracts' provisions. *See Cantella & Co. v. Goodwin*, 924 S.W.2d 943 (Tex. 1996). There is no requirement that the party relying on the arbitration agreement prove that it is conspicuous. For example, an arbitration clause can be incorporated by reference into another contract. *See In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007). In *Bank One*, the Court enforced an arbitration agreement that was contained in a lengthy depository agreement that had been incorporated by reference into an account signature card. *See id.* Certainly, a clause that is not expressly set out in an agreement is not conspicuous.

It should be noted that there are narrow statutory exceptions: the Texas Property Code requires that arbitration clauses in new home contracts be conspicuous, and the Texas Business and Commerce Code requires that an arbitration clause in certain contracts requiring arbitration in another jurisdiction be conspicuous. *See* Tex. Prop. Code Ann. § 420.003; Tex. Bus. & Com. Code Ann. § 35.53(b).

G. Direct-Benefits Estoppel Theory

The Texas Supreme Court held that the direct-benefits estoppel theory may apply to allow a non-signatory to enforce an arbitration clause or to enforce an arbitration clause against a non-signatory. "[A] litigant who sues based on a contract subjects him or herself to the contract's terms." *In re FirstMerit Bank*, 52 S.W.3d 749, 755 (Tex. 2001) (emphasis added). Therefore, a party is estopped from suing "based on the contract" and at the same time ignoring an arbitration clause contained in that contract.

In *FirstMerit Bank*, the non-signatory plaintiffs sued the signatory defendant for, among other things, breach of contract, revocation of acceptance, and breach of warranty. *See id.* at 752-53, 755. By bringing the breach-of-contract and breach-of-warranty claims, the plaintiffs sought benefits that stemmed directly from the contract's terms. The Texas Supreme Court concluded that, by seeking to enforce the contract, the non-signatory plaintiffs "subjected themselves to the contract's terms, including the Arbitration Addendum." *Id.* at 756.

The Court has subsequently repeatedly used direct-benefits estoppel in the context of arbitration clauses. *See Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013); *Meyer v. WMCO-GP LLC*, 211 S.W.3d 302 (Tex. 2006) (applying direct benefits estoppel to allow a non-signatory defendant to enforce arbitration clause against a signatory plaintiff); *In re Vesta Insurance Group, Inc.*, 192 S.W.3d 759 (Tex. 2006). *But see In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005) (holding that estoppel did not apply to facts of case).

H. Parties Can Draft A Clause To Allow For Appellate Review

One of the main concerns that litigants have about arbitration is that there is very little appellate review. The fear of a "run-away" arbitrator with no real judicial review of an award has resulted in parties taking out arbitration clauses and inserting jury waiver clauses in their contracts.

As background, the United States Supreme Court held that the Federal Arbitration Act's grounds for vacatur and modification "are exclusive" and cannot be "supplemented by contract." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008). Under that decision, parties' attempts to contract for expanded judicial review of an arbitrator's award are unenforceable.

The Texas Supreme Court held the opposite regarding the Texas General Arbitration Act ("TAA"). *See Nafta Traders, Inc., v. Quinn*, 339 S.W.3d 84 (Tex. 2011). In *Nafta Traders*, an employee sued her employer for sex discrimination in violation of state law. The dispute was sent to arbitration, where the employee prevailed. The employer challenged the award in court, arguing that it contained damages that were either not allowed or unsupported by the evidence. The arbitration agreement stated that "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." *Id.* The employer alleged that the arbitrator exceeded his authority in making the award. The trial court confirmed the award, and the court of appeals held that the employer could not assert its complaints citing the *Hall Street* opinion.

The Texas Supreme Court held that under the TAA, parties can expand judicial review of an arbitrator's award. If the parties limit an arbitrator's authority to render awards, e.g., to exclude meeting awards that contain errors of law or fact, then the parties can provide for further and more detailed judicial review of the award. The Texas Supreme Court stated: "We must, of course, follow *Hall Street* in applying the FAA, but in construing the TAA, we are obliged to examine *Hall Street's* reasoning and reach our own judgment." *Id.* The Court then concluded:

> Under the TAA (and the FAA), an arbitration award must be vacated if the arbitrator exceeds his powers. Generally, an arbitrator's powers are determined by agreement of the parties. Can the parties agree that the arbitrator has no more power than a judge, so that his decision is subject to review, the same as a judicial decision? Hall Street answers no, based on an analysis of the FAA's text that ignores the provision that raises the problem, and a policy that may be at odds with the national policy favoring arbitration. With great respect, we are unable to conclude that Hall Street's analysis of the FAA provides a persuasive basis for construing the TAA the same way.… Accordingly, we hold that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error.

Id. The Court then held that the FAA would not preempt the TAA's allowance of expanded judicial review for an arbitration award enforceable under both the FAA and the TAA. The Court then remanded the case to the court of appeals for further review of the employer's grounds.

There are several practice tips that arise from this decision. First, parties are the masters of their own arbitration agreements and the judicial review that may result. The parties should take time to carefully consider the type of language to use. Second, parties can select the law that will control an arbitration agreement. So, parties that want to enlarge judicial review of an award should expressly state that the arbitration clause will be construed under the TAA. If that is done, there will be little argument that the arbitration clause should not be construed under the TAA and solely under the FAA. Third, arbitration proceedings are often informal, where the parties have no record of the hearing and where the rules of evidence and procedure are relaxed. If a party desires to seek judicial review of an arbitration award, it will need to be able to show a court a record that establishes a reversible error. So, parties should make a record of all proceedings and should invoke rules of evidence and procedure as appropriate to preserve error. Otherwise, as in state court, an arbitrator will be presumed to have made the correct ruling.

I. Recently, A Court Refused To Enforce An Arbitration Clause Due To Lack Of Mental Capacity

In *Oak Crest Manor Nursing Home, LLC v. Barba*, a plaintiff sued a nursing home for negligently allowing a patient with mental disorders to leave the facility and jump from a bridge in an attempt to commit suicide. No. 03-16-00514-CV, 2016 Tex. App. LEXIS 12710 (Tex. App.—Austin December 1, 2016). The nursing home filed a motion to compel arbitration based on a facility admission agreement that the patient signed. The plaintiff's response contended that due to the patient's psychological and mental disorders, he lacked capacity to enter into an enforceable contract and, therefore, the agreement and its arbitration provision were unenforceable and void. The court denied the motion to compel, and the defendant sought an interlocutory appeal.

The court of appeals noted that it was the plaintiff's burden to prove that the patient did not have the requisite mental capacity. The court held that "[t]o establish mental capacity to execute a contract, a party 'must have had sufficient mind and memory at the time of execution to understand the nature and effect of [his] act.'" The court reviewed evidence that the patient was mentally incompetent around the time of his admission to the home. It also reviewed the defendant's evidence that he was competent on the day he signed the agreement. The court held that "While the time of execution of a contract is indeed the relevant time for ascertaining competency to contract, evidence of competency from other periods is probative to establish competency at the time of execution if there is evidence that the later mental condition had some probability of being the same condition at the time of execution." The court concluded:

> Dr. McRoberts's report, issued only 49 days after the Agreement's execution, is probative of Frank's mental condition on the date of execution in light of the other evidence in the record indicating that Frank's psychiatric diagnoses were already present and were the same as when Dr. McRoberts examined him. We conclude that the record contains legally sufficient evidence to support the probate court's implied determination that Frank did not possess the requisite capacity to contract when he signed the Agreement.

The court also held that the patient's mental incompetency made the agreement void: "the supreme court has held that when the issue of mental capacity to contract is raised, 'the very existence of a contract is at issue,' as with other contract-formation issues, and therefore the court's determination that a party lacked the capacity to contract would render that contract non-existent and void rather than merely voidable." Finally, the court determined that because there was no contract to begin with, the defendant could not rely on other theories such as direct-benefits estoppel to enforce the arbitration clause. The court affirmed the order denying the motion to compel arbitration.

This case raises an important issue for financial institutions. Financial institutions routinely have arbitration and other dispute resolution clauses in its contracts with customers. It is also common for a customer to be an elderly person or person with some mental disability. When disputes arise, the customer or his or her representative may challenge the invocation of arbitration or other dispute resolution clause due to mental incompetence. Financial institutions should be very careful that when they enter into these types of contracts that the other contracting party has mental competence. Alternatively, the financial institution should rely on a guardian or power of attorney holder to execute the contract for the customer.

J. Conclusion On Arbitration Clauses

Texas courts liberally enforce arbitration clauses. There is a strong presumption in favor of enforcing arbitration clauses, and a party fighting arbitration has the burden to raise contractual defenses. An arbitration clause can be enforced against or against a non-signatory. Absent narrow statutory exceptions, there is no conspicuousness requirement, and parties can even enter into enforceable arbitration agreements by incorporation. Courts seem to treat arbitration clauses like any other contractual clause.

VI. USE OF COMPANY POLICIES TO ESTABLISH THE VIOLATION OF A FIDUCIARY DUTY

A. Introduction

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.

There is a very good argument against allowing this type of argument and admitting this type of evidence. Policies and procedures benefit the institution, the representative, the beneficiary or customer, and society in general. If financial institutions are reluctant to implement policies because they fear those policies being used against them, everyone will lose. Without policies to encourage representatives to do better, there may be worse service and performance.

Moreover, a fact finder should not judge an institution's performance by its policies. Institutions may want to not only comply with the law and industry standards but exceed them. So, an institution's policies and legal requirements are not necessarily the same, and one does not necessarily evidence the other. *See Grassie v. Roswell Hosp. Corp*., 150 N.M. 283 (N.M. Ct. App. 2010) ("The Agreement is evidence of a standard the Hospital set for itself. But a failure to follow it may or may not be negligent when viewed in the context of the entire screening process actually undertaken.").

To supplant an objective standard with a defendant's internal rule would create "perverse incentive[s]." *Briggs v. Wash. Metro. Area Transit Auth.*, 481 F.3d 839, 848 (D.C. Cir. 2004). Some companies, faced with potential liability for breaches of internal policies, might abandon all internal rules or edit their "operating procedures in such a manner as to impose minimal duties." *Id*. Meanwhile, businesses that "strive for excellence" and adopt internal rules and bylaws "exceed[ing] the prevailing standard" would be "unfairly penalize[d]." *Titchnell v. United States*, 681 F.2d 165, 173 (3d Cir. 1982). The more carefully the employer "regulate[d] the conduct of his employees," the "more subject he [would] be to liability." *Longacre v. Yonkers Ft. Co.*, 236 N.Y. 119, 124 (1923).

B. Texas Courts Hold That Policies Do Not Evidence The Standard Of Care

In Texas, it is clear that a company's policies do not evidence the standard of care. In *FFE Transportation Services, Inc. v. Fulgham*, the Texas Supreme Court held that internal policies and procedures do not set the standard of care:

> [Defendant's] self-imposed policy with regard to inspection of its trailers, taken alone, does not establish the standard of care that a reasonably prudent operator would follow. As a Texas court of appeals explained, a company's internal policies "alone do not determine the governing standard of care." *Fenley v. Hospice in the Pines*, 4 S.W.3d 476, 481 (Tex. App.—Beaumont 1999, pet. denied). A federal court of appeals has also held that a defendant's internal policies do not, taken alone, establish the applicable standard of care. In *Titchnell v. United States*, 681 F.2d 165, 173 (3d Cir.1982), the court stated:
>
> > [I]f a health care facility, in striving to provide optimum care, promulgates guidelines for its own operations which exceed the prevailing standard, it is possible that care rendered at that facility by an individual practitioner on a given occasion may deviate from and fall below the facility's own standard yet exceed the recognized standard of care of the medical profession at the time. A facility's efforts to provide the best care possible should not result in

> liability because the care provided a patient falls below the facility's usual degree of care, if the care provided nonetheless exceeds the standard of care required of the medical profession at the time. Such a result would unfairly penalize health care providers who strive for excellence in the delivery of health care and benefit those who choose to set their own standard of care no higher than that found as a norm in the same or similar localities at the time.

154 S.W.3d 84, 92-93 (Tex. 2006). In *Fulgham*, the Court determined that evidence of a company's policies did not constitute any evidence of the standard of care. *Id*.

Another example is *Wal-Mart Stores, Inc. v. Wright*, in which the company manual established a policy of mopping up spills within a set period of time. 774 N.E.2d 891,894-95 (Ind. 2002). The Indiana Supreme Court held that the manual containing internal policies, practices, and rules represents the defendant company's "subjective view of the standard of care" and therefore could not form the basis of a jury instruction on the objective duty of care mandated by law. *Id*. The court explained, "[r]ules and policies in the [Wal-Mart] Manual may have been established for any number of reasons having nothing to do with safety and ordinary care, including a desire to appear more clean and neat to attract customers, or a concern that spills may contaminate merchandise." *Id*. *See also Branham v. Loews Orpheum Cinemas, Inc*., 31 A.D.3d 319,323,819 N.Y.S.2d 250, 255 (N.Y.A.D. 2006) (theater's policy to check aisles every 15-20 minutes for obstructions or other impediments to movie-goers' enjoyment of the film imposed a higher duty of care than is required under the law and patron who tripped over a child sitting in the aisle could not state a claim based on alleged violation of the policy).

A company's policies are irrelevant where they contradict a legal duty and impose more strenuous standards. *Espalin v. Children's Med. Ctr*., 27 S.W.3d 675 (Tex. App.—Dallas 2000, no pet) (hospital's policy regarding informed consent did not preclude summary judgment where doctors, and not hospitals, owed a duty to provide informed consent).

Further, in Texas, a company's internal policies or procedures will not create a negligence duty where none otherwise exists. *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C.*, 323 S.W.3d 322 (Tex. App.—Beaumont 2010, pet. denied); *Houston Cab Co. v. Fields*, 249 S.W.3d 741, 747-48 (Tex. App.—Beaumont 2008, no pet.) (violation of independent contractor hiring policy does not show negligent entrustment); *Owens v. Comerica Bank*, 229 S.W.3d 544, 547 (Tex. App.—Dallas 2007, no pet.) ("The Texas Supreme Court has refused to create a standard of care or duty based upon internal policies, and the failure to follow such policies does not give rise to a cause of action in favor of customers or others."); *Entex, A Div. of Noram Energy Corp. v. Gonzalez*, 94 S.W.3d 1, 10 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Rocha v. Faltys*, 69 S.W.3d 315, 324 (Tex. App.—Austin 2002, no pet.) (fraternity policy did not create legal duty); *Espalin v. Children's Med. Ctr*., 27 S.W.3d 675 (Tex. App.—Dallas 2000, no pet); *Fenley v. Hospice in the Pines*, 4 S.W.3d 476, 481 (Tex. App.—Beaumont 1999, pet. denied); *Jacobs-Cathey Co. v. Cockrum*, 947 S.W.2d 288, 291-92 (Tex. App.—Waco 1997, writ denied); *Estate of Catlin v. Gen. Motors Corp.*, 936 S.W.2d 447, 451 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Williford Energy Co. v. Submergible Cable Servs., Inc*., 895 S.W.2d 379, 386-87 (Tex. App.—Amarillo 1994, no writ).

For example, in *Cox v. City of Fort Worth*, the plaintiff alleged that the defendant hospital breached a duty by failing to follow its own internal policies. 762 F.Supp.2d 926 (N.D. Tex. 2010). Plaintiffs specifically claimed that the defendant allegedly failed to exercise reasonable care in implementing and enforcing its policy concerning limitations on the number of visitors each emergency-room patient was allowed, and that it particularly failed to exercise reasonable care in communicating that information to plaintiffs prior to the decedent's arrival at the hospital. The court rejected this claim, holding: "Plaintiffs' negligence claim, grounded on Texas Health's alleged negligent implementation of its internal policies, thus cannot pass the first hurdle: it fails to allege a legal duty. Having alleged no duty outside of the implementation of Texas Health's own internal policies, plaintiffs' negligence claim fails." *Id*. at 941.

Importantly, internal policies adopted by financial institutions do not create a duty toward customers. In *Texas Southwestern Med. Supply v. Texas Commerce Bank—Dallas, N.A.*, a plaintiff asserted that a bank breached a duty of care by not following its own internal procedures and allowing a representative to endorse checks. No. 05-93-00001-CV, 1994 Tex. App. LEXIS 3747 (Tex. App.—Dallas June 2, 1994, no writ) (not designated for publication). The court held that the policies did not impact the bank's statutory duty: "TCB's teller procedures could not impose a legal requirement for endorsements on bearer instruments or checks payable to TCB when the code does not require it." *Id*. at *10. Also, in *Guerra v. Regions Bank*, a party sued a bank for negligence in the bank's opening of a joint account under his name and the name of another. 188 S.W.3d 744 (Tex. App.—Tyler 2006, no pet.). The plaintiff argued that "the risk, foreseeability, and likelihood of his injuries could have

been 'guarded against' if Regions had followed its own banking procedures." *Id*. at 747. The court of appeals disagreed, stating: "A bank's internal policies do not determine a standard of care or duty." *Id*. *see also Owens v. Comerica Bank*, 229 SW.3d 544 (Tex. App.—Dallas 2007, no pet.) (industry customs, like internal policies, do not create duties).

Further, in *Ebenhoh v. Production Credit Ass'n of Southeast Minnesota*, the plaintiffs were farmers on whom the defendant credit association foreclosed. 426 N.W.2d 490,491 (Minn. Ct. App. 1988). The farmers sued on the grounds that the association violated its own policies and standards for making sound operating loans. *Id*. Distinguishing the internal policies from legislatively enacted statutes and regulations, the court rejected the plaintiffs' claim, flatly holding that internal policies create no such standard of care. *Id*. *See also AmSouth Bank v. Tice*, 923 So.2d 1060, 1067 (Ala. 2005) (Under Florida law, employee manual guidelines for tellers with respect to handling of checks were insufficient to establish any duty of care running from bank to customer separate and distinct from duty of care created under Florida's version of Uniform Commercial Code.).

C. Are Internal Policies Discoverable?

A fiduciary may want to fight the discovery and production of its internal policies and procedures. In Texas, discovery is permitted of any unprivileged information that is relevant to the subject of the lawsuit, including inadmissible evidence, so long as the request is reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3(a); *In Re American Optical Corp.*, 988 S.W.2d 711, 713 (Tex 1998). Information is relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the information. Tex. R. Evid. 401; *R. K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994). As the Texas Supreme Court stated:

> The ultimate purpose of discovery is to seek the truth, so disputes may be decided by what the facts reveal, not by what facts are concealed. For this reason, discovery is not limited to information that will be admissible at trial. To increase the likelihood that all relevant evidence will be disclosed and brought before the trier of fact, the law circumscribes a significantly larger class of discoverable evidence to include anything reasonably calculated to lead to the discovery of material evidence.

Janpole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984) (internal citation omitted), *overruled on other grounds*, *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

A fiduciary that is faced with a request for its internal policies and procedures may file a motion for protection and seek protection from a court from the request for information. Conversely, the fiduciary may simply object, and wait for the requesting party to file a motion to compel. Tex. R. Civ. P. 215.1(b), 215.2.

The main issue will be whether the policies and procedures are relevant or will lead to the discovery of admissible evidence. Of course, the issue of admissibility is different from the issue of whether certain evidence will lead to the discovery of other evidence. *Damgaard v. Avera Health*, 108 F.Supp.3d 689 (D.C. Minn. June 3, 2015). Even if a court were to allow discovery into policies and procedures, that does not mean that that evidence will necessarily be admitted at trial. *Id.* ("Judge Mayeron opined only that the policies were discoverable, and discoverability and admissibility, of course, are entirely separate issues, with the former far broader than the latter.").

In any event, many cases have held that policies are not relevant to the pleaded claims and should not be discovered. In one case, a plaintiff alleged conflict-of-interest allegations and wanted to see the defendant's policies on ethical walls for separating its investment banking and analyst divisions. *Xpedior Credit Trust v. Credit Suisse First Boston (USA), Inc*., 309 F.Supp. 459, 464-65 S.D. N.Y. 2003). The court held that these policies were not relevant because they would not indicate if an actual conflict of interest actually arose and denied a motion to compel:

> Xpedior has failed to articulate a basis upon which to conclude that this information is relevant to its claims. Even supposing that Xpedior's damages theory is correct, DLJ's Chinese Wall policy is in no way probative of actual conflicts of interest. If the policy strictly separates DLJ's analyst and investment banking divisions, that says nothing about whether anyone adhered to the policy. Given that this lawsuit does not present allegations of analyst conflicts, that Xpedior admits that analyst reports are only "one avenue" for valuing the issuers, … and that the Chinese Wall policies themselves are of limited use, these documents are simply not relevant. Accordingly, CSFB is not required to produce these policies.

Id. (internal citation omitted).

In a case dealing with a medical malpractice claim, a court denied a motion to compel the production of protocols and policies because they would not likely lead to the discovery of admissible evidence. *Hurdle v. Oceana Urgent Care*, 49 Va. Cir.

328, 1999 Va. Cir. LEXIS 333 (Va. Cir. Ct. July 15, 1999). The court stated:

> The standard of care in medical malpractice actions is established by statute, not by the private rules of a particular hospital. The plaintiff claims it is premature to decide this, citing cases allowing a custom or usage of a trade as evidence of the duty owed. Assuming, without deciding, that a breach of a custom or usage of the medical profession could be evidence of negligence in a medical malpractice action, it does not follow that the policies of a single hospital are likely to prove the custom and usage of the entire profession. Trade and professional organizations are legion in this country. They would likely be better sources of such information.

Id.

In *Jones v. Bank of Am., N.A.*, a plaintiff sued a lender for alleged improper servicing of a home mortgage loan. No. 3:14-cv-11531, 2015 U.S. Dist. LEXIS 52214 (D.C. W.V. April 21, 2015). The district court denied the plaintiff's motion to compel the production of policies and procedures where they were not relevant to the claims asserted:

> BANA objects to producing internal guidelines, policies, and procedures based on their lack of relevancy. Plaintiffs have requested policies, procedures, and guidelines pertaining to the Escalation Management Program, loss mitigation, provision of settlement agreements, and audits of loss mitigation. Plaintiffs argue that the requests are limited in scope and relate to topics that are central to the case. Furthermore, they will show whether BANA complied with its own policies and whether it acted in good faith, or alternatively, acted unconscionably. However, the causes of action in Plaintiffs' complaint are well-defined and unrelated to BANA's policies, procedures, and guidelines. Plaintiffs' breach of contract claim will depend upon the terms of the contract, and the unconscionability claims are based upon specific contacts BANA allegedly had with Plaintiffs. Neither Plaintiffs, nor BANA, argue that BANA relies on any policy, procedure, or guideline as a defense. Therefore, the undersigned agrees with BANA that the policies, procedures, and guidelines are not relevant.

Id.

Other courts allow the discovery of policies and procedures where there is an argument that such may be admissible or may lead to admissible evidence. In *Swenson v. Oxford Bank & Trust*, a beneficiary sued a bank for breach of fiduciary duty and sought actual and punitive damages. No. 03-C-336, 2004 U.S. Dist. LEXIS 1126 (N.D. Ill January 27, 2004). The plaintiff sought "All Trust Investment Committee minutes or other notes (unredacted), including but not limited to those involving the review and approval of the bank's investment policies and practices…" *Id*. The court granted this request, stating: "The Trust Investment Committees's actions and communications regarding the management of the bank's IRA accounts are relevant. They may demonstrate whether Oxford knew or should have known that the stocks contained in Swenson's and in other customer's IRAs contained poor investments and whether Oxford knew or should have known the accounts managed by Carl Rudolph were under diversified." *Id*. *See also Wells Fargo v. Militello*, No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, no pet. history) (court cited to expert's opinion that mentioned the defendant's policies to sustain punitive damages award).

Confidentiality can also be a legitimate concern that can justify a court denying a motion to compel policies. *See, e.g., Huertas v. Beard*, No. 1:10-cv-10-SJM-SPB, 2012 U.S. Dist. LEXIS 105631 (W.D. Penn. July 30, 2012) (district court denied motion to compel defendant's policies where they were confidential and would not be probative of what events actually occurred). Moreover, some courts refuse a motion to compel on policies where a witness has already testified about same in a deposition. *See, e.g., Wiand v. Wells Fargo Bank, N.A.*, No. 8:12-CV0557-T-27EAJ, 2013 U.S. Dist. LEXIS 189999 (M.D. Fla. June 10, 2013). Even where courts may allow some discovery, the discovery must be narrow and not overly broad. *See, e.g., Wiand v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS at 189999; *Cahaly v. Benistar Prop. Exch. Trust Co.*, 885 N.E.2d 800, n. 36 (Mass. S. Ct. 2008); *Wright v. Suntrust Bank*, No. 1:04-CV-2258-CC, 2006 U.S. Dist. LEXIS 57111 (N.D. Ga. July 21, 2006) (only policies relevant are those in year of loan).

D. Are Policies Admissible In Evidence?

Admissibility is determined by the reason(s) behind why the evidence is being offered. As stated above, there is a good argument that policies should not be admissible regarding what the standard of care is or what fiduciary duties are owed. Texas courts have affirmed trial courts' decisions to exclude evidence of defendants' policies. For example, in *G4 Trading v.*

Nationsbank of Texas, N.A., a plaintiff asserted that a bank wrongfully sent a wire transfer. 937 S.W.2d 137, (Tex. App.—Houston 1996, no writ). The trial court excluded evidence concerning the bank's procedures to authorize and amend wire transfer orders that would have required a signed form before a transfer could be executed. The court of appeals affirmed the trial court's decision because the jury instructions at issue in the case did not require a signed form. The court held: "once the jury's inquiry was reduced to the narrow question recited in the charge, the excluded evidence of NationsBank's policies was irrelevant. Therefore, the trial court did not err in excluding it." *Id*. Furthermore, in *Gardena Mem. Hosp. v. Parashar*, a trial court excluded evidence concerning a hospital's policies, and the plaintiff challenged this ruling on appeal. No. 14-94-01024-CV, 1996 Tex. App. LEXIS 3851 *10-13 (Tex. App.—Houston [14th Dist.] August 29, 1996, writ denied) (not designated for publication). The court of appeals affirmed, holding that the evidence concerning current policies were not necessarily relevant regarding the policies in place at the time of the incident. *Id*. *But see Jo Ann Howard & Assocs., P.C. v. Cassity*, No. 4:09CV01252, 2015 U.S. Dist. LEXIS 10035 (D.C. Mo. January 29, 2015) (Under Missouri law, the court held that "Once Plaintiffs establish the standard of care, the guidelines, policies, procedures or rules of a defendant may be introduced to support negligent conduct.").

Texas courts have similarly also held that violations of industry standards or regulations do not create legal duties and are not admissible. *B-R Dredgin Co. v. Rodriguez*, 564 S.W.2d 693, 697 (Tex. 1978) (Corp of Engineers Safety Manual does not set standard of care and is inadmissible); *Pate v. Texline Feed Mills, Inc.*, 689 S.W.2d 238, 245-46 (Tex. App.—Amarillo 1985, no writ) (National Electric Safety Code does not set standard of care and is inadmissible). *See also Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir. 1982); *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928 (5th Cir. 1934).

However, there may be other potentially valid reasons that a plaintiff would want to admit evidence of a policy. For example, in *Seay v. Travelers Indem. Co*., in a summary judgment appeal, a court of appeals reviewed a manual drafted, printed, and issued by the insurer for its authorized inspectors, which required that code violations be brought to the attention of its insured when discovered. 730 S.W.2d 774, (Tex. App.—Dallas 1987, no writ). The issue was whether an insurance company had a duty because it inspected a boiler, and the manual's directive was not asserted as the source of the insurer's duty, but rather as evidence of the purpose behind the insurer's undertaking of the inspections. *Id*. at 778-79.

Additionally, another court has held that even if internal policies and procedures do not create the standard of care and do not create a negligence duty, they may still be admissible and may be considered by an expert who may opine on the standard of care and causation. *See Dana Corp. v. Microtherm, Inc.*, No. 13-05000281-CV, 2010 Tex. App. LEXIS 408 (Tex. App.—Corpus Christi January 21, 2010, pet. granted, vacated in part by agr.). That court held:

> Dana argues that Microtherm's causation case cannot rest on Dana's own reports and internal evaluations and policies to substitute for the needed expert testimony. However, the cases relied upon by Dana, *FFE Transportation Services, Inc. v. Fulgham* and *Fenely v. Hospice in the Pines*, do not support this proposition. They provide only that a company's self-imposed policies do not establish the standard of care and cannot be substituted as the industry's standard of care in determining a breach. In this case, Trillo did not use Dana's self-imposed policies, reports, and internal evaluations to establish the standard of care. She did not substitute Dana's quality control reports for the industry's standard. Trillo provided expert testimony on causation. She reviewed Dana's own reports on quality control and its internal evaluations and used information from the reports to provide support for her opinion on causation. Neither case relied upon by Dana addresses the application of internal reports, evaluations, and policies to a determination of causation. Neither case supports a conclusion that Microtherm's expert cannot consider Dana's 8-D correction report or the April quality control report in arriving at an opinion on causation. Whether or not corrective actions were taken at Dana's assembly plant pursuant to a company policy which did or did not exceed the existing standard of care, the evidence established there was contamination in the assembly of the thermistors, which according to Trillo, was a producing cause of the failure of the thermistor.

Id. at *35-36. *See also Flowers v. Torrence Memorial Hosp. Med. Ctr*., (1994) 8 Cal.4th 992, 45; *Jutzi v. County of Los Angeles*, (1988) 196 Cal.App.3d 637; *In re Irrevocable Inter Vivos Trust*, 305 N.W.2d 755 (Minn. 1981) (expert testimony about another bank's investment policies was admitted to prove that trustee did not breach duty).

In *Wells Fargo v. Militello*, a trustee appealed a judgment from a bench trial regarding a beneficiary's

claims for breach of fiduciary duty, negligence, and fraud. No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, no pet. history). The case does not discuss the admissibility of policy evidence per se, i.e., there appears to have not been a fight over whether that evidence was admissible. One aspect of the case dealt with the fact that the trustee had not prepared mineral deeds in a timely fashion after the sale of same, which created tax issues for the beneficiary. The plaintiff's expert testified that "deeds should have been prepared and recorded and notification should have been given to the oil companies in question so that they knew to distribute future proceeds to the new owner." Id. The expert explained that under trustee's "own internal policy, these steps should have been completed within 120 days of the sales, but instead, [the trustee] was still working on the deeds three years after the initial sale." *Id*. The trustee's employee conceded that she did not timely handle the preparation and filing of the deeds, in violation of the trustee's policy. One of the issues on appeal concerned whether there was sufficient evidence to support a finding of gross negligence to support an award of punitive damages. The court of appeals held that the evidence in the case supported the trial court's findings, including:

> The third period covered the execution of the sale, and included Wells Fargo's adherence to its own internal policies and carrying out its duties to Militello in distribution of the properties after the sale. Wallace testified in detail regarding the duties that Wells Fargo, as Militello's fiduciary, should have carried out in each of the three periods. . . Under our heightened standard of review, we conclude the trial court could have formed a firm belief or conviction that Wells Fargo's conduct involved an extreme degree of risk, and Wells Fargo was consciously indifferent to that risk. We also conclude that Militello offered clear and convincing evidence to support the trial court's finding that Wells Fargo was grossly negligent, and therefore met her burden to prove the required predicate under section 41.003(a).

Id. Once again, this case does not directly address the admissibility of policy evidence, but it would tend to support the use of a violation of company policy to show that a defendant was consciously indifferent to support an award of punitive damages.

For further example, evidence of a habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Tex. R. Evid. 406. However, "proof of custom will not be admitted to contradict a fact plainly proved by positive testimony, nor is evidence of the custom of individuals engaged in business in one locality relevant on the question of usage in another locality." TEX. JUR. EVIDENCE § 190. Also, "evidence of a custom is not admissible where it violates a rule of law." *Id*.

It should also be noted that Texas Rule of Evidence 403 (similar to Federal Rule 403) states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Tex. R. Evid. 403. Courts are careful to differentiate between using internal rules as evidence and using them as standards of conduct. But this distinction may not be apparent to a lay jury, and the evidence may be confusing to them and unfairly prejudicial to the defendant.

It is important to note that evidence may be competent for one purpose, but not for another. When evidence that is admissible as to one purpose but not admissible as to another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. Tex. R. Evid. 105(a). Courts have routinely held that a trial court should instruct a jury on the limited purpose of policies and that such policies may not be used as evidence of the standard of care. *Therrien v. Target Corp*., 617 F.3d 1242, 1256 (10th Cir. 2010); *Wal-Mart Stores v. Wright*, 774 N.E.2d 891 (Ind. 2002) (internal rules "can be received into evidence with an express caution that they are merely evidentiary and not to serve as a legal standard"); *Mayo v. Publix Super Mkts., Inc.*, 686 So. 2d 801, 802 (Fla. Dist. Ct. App. 1997) ("a party's own internal rule does not itself fix the legal standard of care in a negligence action," and the party "is entitled to appropriate jury instructions to that effect"); *Clarke v. N.Y.C. Transit Auth.*, 174 A.D.2d 268, 276 (N.Y. App. Div. 1992) ("prejudicial error" to admit "the internal rules, without limiting instructions"). But where a party fails to object or request such an instruction, the court's action in admitting the evidence without limitation shall not be a ground for complaint on appeal.

Company policies may or may not be admissible in litigation depending on the jurisdiction and the issue. In any event, they should not be admissible for the purpose of establishing the legal duty or the standard of care that a defendant owed a plaintiff.

VII. CONCLUSION

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

Appendix A

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until:

(1) you die or revoke the power of attorney;

(2) your agent resigns or is unable to act for you; or your agent resigns or is unable to act for you; or

(3) a guardian is appointed for your estate.

I, _____ (insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent to act for me in any lawful way with respect to all of the following powers that I have initialed below.(YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (M).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

_____ (A) Real property transactions;

_____ (B) Tangible personal property transactions;

_____ (C) Stock and bond transactions;

_____ (D) Commodity and option transactions;

_____ (E) Banking and other financial institution transactions;

_____ (F) Business operating transactions;

_____ (G) Insurance and annuity transactions;

_____ (H) Estate, trust, and other beneficiary transactions;

_____ (I) Claims and litigation;

_____ (J) Personal and family maintenance;

_____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

_____ (L) Retirement plan transactions;

_____ (M) Tax matters;

_____ (N) ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.

My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

_____ Each of my co-agents may act independently for me.

_____ My co-agents may act for me only if the co-agents act jointly.

_____ My co-agents may act for me only if a majority of the co-agents act jointly.

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

_____ I grant my agent the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____

_____

_____

_____

_____

_____

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_____

UNLESS YOU DIRECT OTHERWISE BELOW, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Termination of this durable power of attorney is not effective as to a third party until the third party has actual knowledge of the termination. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated, resigns, or refuses to act, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent 's authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: _____.

Signed this_____day of _____, _____.

_____

(your signature)

State of _____

County of _____

This document was acknowledged before me on _____(date) by _____ (name of principal)

_____
(signature of notarial officer)

(Seal, if any, of notary) _____ (printed name)

My commission expires: _____

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

(1) act in good faith;

(2) do nothing beyond the authority granted in this power of attorney;

(3) act loyally for the principal's benefit;

(4) avoid conflicts that would impair your ability to act in the principal's best interest; and

(5) disclose your identity as an agent when you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner: (Principal's Name) by (Your Signature) as Agent

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

(1) maintain records of each action taken or decision made on behalf of the principal;

(2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and

(3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:

(A) the property belonging to the principal that has come to your knowledge or into your possession;

(B) each action taken or decision made by you as agent;

(C) a complete account of receipts, disbursements, and other actions of you as agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately

(D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;

(E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;

(F) each known liability;

(G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and

(H) all documentation regarding the principal's property.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. An event that terminates this power of attorney or your authority to act under this power of attorney includes:

(1) the principal's death;

(2) the principal's revocation of this power of attorney or your authority;

(3) the occurrence of a termination event stated in this power of attorney;

(4) if you are married to the principal, the dissolution of your marriage by a court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;

(5) the appointment and qualification of a permanent guardian of the principal's estate; or

(6) if ordered by a court, the suspension of this power of attorney on the appointment and qualification of a temporary guardian until the date the term of the temporary guardian expires. Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Appendix B

Agreement Regarding Presentment Of Power Of Attorney Document

On the ___ day of _____, 2017, [Agent] delivered a durable power of attorney form signed by [principal] to the Bank. This agreement is to clarify whether the Agent has "presented" the durable power of attorney for acceptance by the Bank pursuant to Texas Estates Code Section 751.201(a). The Agent hereby requests that the Bank

____ does or

____ does not

accept a purported power of attorney document at this time. If the Agent desires that the Bank accept the durable power of attorney in the future, the Agent will provide notice to the Bank in writing of such request.

_____
Agent

_____
Bank

Appendix C

Agreement Regarding Date To Accept Or Reject Power Of Attorney Document

On the ___ day of _____, 2017, [Agent] requested that the Bank accept a purported power of attorney document signed by [principal] in relation to a requested transaction. [select one of the following options as applicable]

The Parties hereby agree that the Bank shall either accept or reject that power of attorney by the ____ day of _____, 2017.

[or]

The Parties hereby agree that the Bank shall have until the ____ day of _____, 2017, to request an English translation, and that the period to either accept or reject the power of attorney document or to request an agent's certification or opinion of counsel shall start on that agreed upon date or the date that the English translation is provided if a translation is requested.

[or]

The Parties hereby agree that the Bank shall have until the ____ day of _____, 2017, to request an agent's certification, and that the period to either accept or reject the power of attorney document shall start on that agreed upon date or the date that the certification is provided if a certification is requested.

[or]

The Parties hereby agree that the Bank shall have until the ____ day of _____, 2017, to request an opinion of counsel, and that the period to either accept or reject the power of attorney document shall start on that agreed upon date or the date that the opinion is provided if an opinion is requested.

[or]

The Parties hereby agree that the Bank shall have until the _____ day after receipt of an agent's certification or an opinion of counsel to either accept or reject the power of attorney document.

Executed this ___ day of _____, 2017.

_____ _____

Bank Agent

Appendix D

CERTIFICATION OF DURABLE POWER OF ATTORNEY BY AGENT

I, _____ (agent), certify under penalty of perjury that:

1. I am the agent named in the power of attorney validly executed by _____ (principal) ("principal") on _____ (date), and the power of attorney is now in full force and effect.

2. The principal is not deceased and is presently domiciled in _____ (city and state/territory or foreign country).

3. To the best of my knowledge after diligent search and inquiry:

a. The power of attorney has not been revoked by the principal or suspended or terminated by the occurrence of any event, whether or not referenced in the power of attorney;

b. At the time the power of attorney was executed, the principal was mentally competent to transact legal matters and was not acting under the undue influence of any other person;

c. A permanent guardian of the estate of the principal has not qualified to serve in that capacity;

d. My powers under the power of attorney have not been suspended by a court in a temporary guardianship or other proceeding;

e. If I am (or was) the principal's spouse, my marriage to the principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the power of attorney provides specifically that my appointment as the agent for the principal does not terminate if my marriage to the principal has been dissolved by court decree of divorce or annulment or declared void by a court;

f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both, of the principal; and

g. The exercise of my authority is not prohibited by another agreement or instrument.

4. If under its terms the power of attorney becomes effective on the disability or incapacity of the principal or at a future time or on the occurrence of a contingency, the principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the power of attorney, and my authority has not been altered or terminated.

6. If applicable, I am the successor to _____ (predecessor agent), who has resigned, died, or become incapacitated, is not qualified to serve or has declined to serve as agent, or is otherwise unable to act. There are no unsatisfied conditions remaining under the power of attorney that preclude my acting as successor agent.

7. I agree not to:

a. Exercise any powers granted by the power of attorney if I attain knowledge that the power of attorney has been revoked, suspended, or terminated; or

b. Exercise any specific powers that have been revoked, suspended, or terminated.

8. A true and correct copy of the power of attorney is attached to this document.

9. If used in connection with an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of _____.

10. [Any other factual matter concerning the principal, agent, or power of attorney]
_____
_____.

Date: _____ , 20___.

_____
(signature of agent)

State of _____

County of _____

This document was acknowledged before me on _____(date) by _____ (name of principal)

_____
(signature of notarial officer)

(Seal, if any, of notary) _____ (printed name)

My commission expires: _____

Appendix E

Written Statement From Physician

I, _____ (physician), certify that:

1. I am a medical doctor and am a physician for _____ (principal) ("principal") on _____ (date), and have personal knowledge of the condition of the principal.

2. [If the power of attorney document has a definition, then use this provision.] The power of attorney document defines incapacity or disability as: _____.

3. [If the power of attorney document does not have a definition, then use this provision.] I have been informed that under Texas Estates Code Section 751.00201, a person is considered disabled or incapacitated for the purposes of the durable power of attorney if the person is mentally incapable of managing the person's financial affairs.

4. Based on my medical examination of the principal and my experience, training, and education, I have determined that the principal is [has met the definition for incapacity as set forth in the power of attorney document] [or] [mentally incapable of managing his or her financial affairs based on a reasonable medical probability as of the date of this statement].

Signed this ____ day of _____, 20__.

_____
Physician for Principal

Appendix F

_____ ___, 2017

POA Agent's Name
Address

Re: Power of Attorney Document Signed By _____ And Dated _____

Dear _____:

The Bank received a request by you on _____ to make a transaction on behalf of _____ using a power of attorney document.

_____ A. At this time, the Bank will not accept the power of attorney document (but may in the future), and requests that You:

_____ provide an English translation of the power of attorney document, or any portion thereof not in English, under Section 751.205 of the Texas Estate's Code;

_____ provide an agent's certification under Section 751.203 of the Texas Estate's Code, that is in the form and contains all of the factual material in Section 751.203(b) of the Texas Estate's Code; and/or

_____ provide an opinion of counsel under Section 751.204 of the Texas Estate's Code regarding the following matter of law concerning the power of attorney document _____ _____ and the following is the reason for the request: _____ _____.

_____ B. At this time, the Bank will not accept the power of attorney document and provides the following reason for its refusal:

_____ The Bank would not otherwise be required to engage in a transaction with the principal under the same circumstances, including a circumstance in which You seek to:

_____ establish a customer relationship when the principal is not already a customer of the Bank or expand an existing customer relationship with the Bank under the power of attorney; or

_____ acquire a product or service under the power of attorney that the Bank does not offer;

_____ The Bank has actual knowledge of the termination of Your authority or of the power of attorney document;

_____ You refused to comply with a request for a certification, opinion of counsel, or translation under Section 751.201 or the Bank in good faith is unable to determine the validity of the power of attorney or Your authority to act under the power of attorney because the certification, opinion, or translation is incorrect, incomplete, unclear, limited, qualified, or otherwise deficient in a manner that makes the certification, opinion, or translation ineffective for its intended purpose;

_____ The Bank believes in good faith that:

_____ the power of attorney is not valid;

_____ You do not have the authority to act as attempted; or

_____ the performance of the requested act would violate the terms of: (i) a business entity's governing documents; or (ii) an agreement affecting a business entity, including how the entity's business is conducted;

_____ The Bank commenced, or has actual knowledge that another person commenced, a judicial proceeding to construe the power of attorney or review Your conduct and that proceeding is pending;

_____ The Bank commenced, or has actual knowledge that another person commenced, a judicial proceeding for which a final determination was made that found: (A) the power of attorney invalid with respect to a purpose for which the power of attorney is being presented for acceptance; or (B) You lacked the authority to act in the same manner in which You are attempting to act under the power of attorney;

_____ The Bank makes, has made, or has actual knowledge that another person has made a report to a law enforcement agency or other federal or state agency stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by You or a person acting with or on behalf of You;

_____ The Bank has received conflicting instructions or communications from co-agents acting under the same power of attorney or from agents acting under different powers of attorney signed by the same principal or another adult acting for the principal; or

_____ The Bank is not required to accept the durable power of attorney by the law of the jurisdiction that applies in determining the power of attorney's meaning and effect, or the powers conferred under the durable power of attorney that You attempt to exercise are not included within the scope of activities to which the law of that jurisdiction applies.

_____ C. At this time, the Bank will not accept the power of attorney document and the reason for its refusal is found in Texas Estate's Code Section 751.206(2) or (3). The Bank makes this statement under penalty of perjury as evidenced by the verification affixed below.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

_____
Agent For the Bank

Verification Applicable to Section C:

STATE OF_____ §
§
_____ COUNTY §

BEFORE ME, the undersigned authority, appeared _____, Agent for the Bank, and being by me duly sworn, upon oath stated that the facts stated above are based on her/his own personal knowledge based on the documents and information provided to the Bank by its agents and employees in the ordinary course of business and upon the Bank's investigation of the facts relevant to this matter and they are true and correct.

_____
_____, Agent For Bank

Subscribed and sworn to before me on this _____ day of _____, 2017, to certify which witness my hand and seal of office.

NOTARY PUBLIC,
STATE OF _____

Appendix G

The statutory durable power of attorney may be modified to allow the principal to grant the agent the specific authority described by Section 751.031(b) by including the following language: “GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below: (CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. If you DO NOT want to grant your agent one or more of the following powers, you may also CROSS OUT a power you DO NOT want to grant.)

____ Create, amend, revoke, or terminate an inter vivos trust

____ Make a gift, subject to the limitations of Section 751.032 of the Durable Power of Attorney Act (Section 751.032, Estates Code) and any special instructions in this power of attorney

____ Create or change rights of survivorship

____ Create or change a beneficiary designation

____ Authorize another person to exercise the authority granted under this power of attorney”.