

# Insights

## January/February Hoosier Banker: Compliance Connection with Brett Ashton

---

January/February 2017

By: Brett J. Ashton

**Question:** We recently had an elderly customer sign a power of attorney (POA) form allowing her caretaker to help with her finances. Several years ago, the same customer had provided her son with a POA. Last week the customer's caretaker came into the bank and wanted to cash a check made out to "Cash," which she had signed. What do we do if the customer's son asks us to freeze the account or prevent further withdrawals? Does Indiana law provide any protections for the elderly from potential financial fraud? Whose direction do we follow?

**Answer:** In the case of "dueling POAs," Indiana law provides that, unless otherwise stated in the power of attorney itself, if more than one attorney-in-fact is named, each attorney-in-fact may act independently of the other attorney-in-fact in the exercise of a power or duty.<sup>1</sup> It is important to carefully review the POA to ensure that neither provides that it supersedes an earlier instrument.

When presented with a POA, the bank has no duty to investigate the validity of the POA or what the attorney-in-fact does with the assets,<sup>2</sup> and the bank, if acting in good faith reliance on the POA, is immune from liability.<sup>3</sup> In fact Indiana law<sup>4</sup> provides liability for refusing to accept the authority of an attorney-in-fact under a POA.

In the case of dueling POAs, however, and faced with that duel and other evidence of irregularity (such as an attorney-in-fact presenting a check made out to "Cash"), the "good faith reliance" may fall away. In such circumstances, Indiana law provides a procedure for the bank to avoid potential liability by refusing to accept the POA and providing the purported attorney-in-fact with a written statement, not more than 10 business days after the refusal, describing the reason the bank believes the POA is not valid under Indiana law.<sup>5</sup> Presumably the burden then shifts back to the attorney-in-fact to prove otherwise, seek guardianship, or work things out with the other POA.

Indiana law provides both criminal and civil protections against elder financial abuse. The Indiana Senior Consumer Protection Act<sup>6</sup> (ISCPA or the "Act") considers anyone over 60 years of age to be a "senior consumer."<sup>7</sup> Indiana Code § 24-4.6-6-4(a) provides: "A person commits financial exploitation of a senior consumer when the person knowingly and by deception or intimidation obtains control over the property of a senior consumer or illegally uses the assets or resources of a senior consumer."

The illegal use of the assets or resources of a senior consumer includes, but is not limited to, the misappropriation of those assets or resources by undue influence, breach of a fiduciary relationship, fraud, deception, extortion, intimidation, or use of the assets or resources contrary to law.<sup>8</sup> The ISCPA provides a victim of elder financial abuse with a private right of action against a person who had violated Act,<sup>9</sup> and in cases involving a knowing abuse by a person in a position of trust and confidence, damages of as much as three times the actual loss, a \$10,000 civil money penalty and attorney's fees.

The Indiana attorney general may also bring an action to enjoin an alleged commission of financial exploitation of a senior consumer and may petition the court to freeze the assets of the person allegedly committing financial exploitation of a senior consumer in an amount equal to but not greater than the alleged value of lost property or assets for purposes of restoring to the victim the value of the lost property or assets.<sup>10</sup> The court may also order additional civil penalties against a violator of up to \$10,000 per violation.<sup>11</sup>

In addition to these civil remedies, Ind. Code § 35-46-1-12 provides: “A person who recklessly, knowingly, or intentionally exerts unauthorized use of the personal services or the property of: (1) an endangered adult; or (2) a dependent eighteen (18) years of age or older; for the person’s own profit or advantage or for the profit or advantage of another person commits exploitation of a dependent or an endangered adult, a Class A misdemeanor; however, if the endangered adult or dependent is at least sixty (60) years of age then the offense is considered a Level 6 felony.”

<sup>1</sup>Ind. Code § 30-5-4-3(a).

<sup>2</sup>Ind. Code § 30-5-8-4.

<sup>3</sup>Ind. Code § 30-5-8-7.

<sup>4</sup>Ind. Code § 30-5-9-9

<sup>5</sup>Ind. Code § 30-5-9-9.

<sup>6</sup>Ind. Code § 24-4.6-6-3.

<sup>7</sup>Ind. Code § 24-4.6-6-3(5).

<sup>8</sup>Ind. Code § 24-4.6-6-4(b).

<sup>9</sup>Ind. Code § 24-4.6-6-5(a).

<sup>10</sup>Ind. Code § 24-4.6-6-5(f).

<sup>11</sup>Ind. Code § 24-4.6-6-5(f).

*This information is provided for general education purposes and is not intended to be legal advice. Please consult legal counsel for specific guidance as to how this information applies to your institution’s circumstances or situation.*