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

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Suits against POA agents for breach of fiduciary duty and other claims are growing more common. Here’s an in-depth review of the causes of action available against an agent under the revised Illinois Power of Attorney Act and how lawyers on either side can serve their clients.
A n unintended consequence of modern medicine is that most older adults will live with some level of mental incapacity or cognitive impairment for years, not months. Illinois law generally allows an incapacitated individual’s health care and finances to be managed either through powers of attorney or guardianship. Ideally, the older adult will execute powers of attorney for health care and finance while he or she has capacity because doing so allows the older adult to select who manages his or her affairs and set the scope of the agent’s authority. It is also private.

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

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

Only “interested persons” can file an action under the agency-court relationship section of the Act. Note that the definition of “interested person” under this section is different than that of “interested person” under the Probate Act. Interested persons under the agency-court relationship section of the Act include:

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

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

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

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

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

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

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

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

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

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

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

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

The threshold question in any lawsuit against an agent is whether the principal lacks the capacity to control or revoke his or her agency. Before the court will hear an action under this section, the court must first find “that the principal lacks either the capacity to control or the capacity to revoke the agency.” For purposes of determining whether
a principal is “incapacitated,” and therefore cannot control or revoke his or her agency, the court must find either:
i. that the principal has been adjudicated a disabled person under the Probate Act; or
ii. (a) licensed physician has examined the principal and has determined that the principal lacks decision making capacity; (b) that physician has made a written record of his or her determination within 90 days after examining the principal; and
(c) the written record has been delivered to the agent.8

Typically, courts require a hearing on

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

director of a health care facility extends to directors and executive officer of an operator that is a corporate entity but not other employees of the operator;

Failure to comply with formalities. For a power of attorney for property or health care (only as to the document in which he or she is named).

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

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

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

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

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

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

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

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

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

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

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

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8. 755 ILCS 45/2-3(c-5)
10. 755 ILCS 45/4-5.1.
11. 755 ILCS 45/3-3.6; 755 ILCS 45/4-5.1.
12. See Halladay v. Underwood, 90 Ill.App. 130 (1st Dist. 1899) (“authority of an agent must find its source in some work or conduct of the principal, indicative of his intention”).
13. 755 ILCS 45/4-3.
17. In re Estate of Roeseler, 287 Ill.App.3d 1003, 1018, 679 N.E.2d 393, 404 (1st Dist. 1997) (note, because the appellate court has not yet applied these elements to a principal-agent relationship, the case cited is in the context of a will contest.)
An interested party’s allegations should center around the date upon which the powers of attorney were executed and should include as much detail as possible in light of case law which requires a specific recital as to how the principal’s free will was impaired.24

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

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

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

i. the principal, a guardian, another fiduciary acting on behalf of the principal, and, after the death of the principal, the personal representative or successors in interest of the principal’s estate;
ii. a provider agency as defined in Section 2 of the Elder Abuse and Neglect Act (i.e., an Elder Abuse Investigator);27
iii. a representative of the Office of the State Long Term Care Ombudsman;28 and
iv. a representative of the Office of Inspector General for the Department of Human Services, acting in the course of an assessment of a complaint of financial exploitation of an adult with disabilities pursuant to Section 35 of the Abuse of Adults with Disabilities Intervent ion Act.29

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

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

i. the principal’s spouse, parent, or descendant;
ii. A person who is a presumptive heir-at-law of the principal; and
iii. A person named as a beneficiary to receive any property, benefit, or contractual right upon the principal’s death, or as a beneficiary of a trust created by or for the principal.31

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

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

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

**Breach of fiduciary duty.** The final
cause of action that can be brought
against an agent pursuant to section
2-7(c) is for breach of fiduciary duty. Here
is a summary of initial considerations
every interested person and their counsel
should consider before filing a breach of
fiduciary duty action against an agent.

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

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

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

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

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

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

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

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

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

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

**Holding an agent accountable
after the principal’s death**

After the death of the principal, the
Act authorizes the personal representa-
tive or successors in interest of the prin-
cipal’s estate to request “a record of all
receipts, disbursements, and significant

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32. See 755 ILCS 45/2-7(c).
33. 755 ILCS 45/2-10(b).
34. 755 ILCS 45/2-7(a).
35. 755 ILCS 45/2-10(b).
36. 755 ILCS 45/2-10(d).
37. 755 ILCS 45/2-10(e).
If questions regarding the agent’s management of the principal/decedent’s assets remain, the executor can petition the court for issuance of a citation to discover pursuant to 755 ILCS 5/16-1, and depose the agent. If the executor finds that funds were misappropriated, the executor can petition for the issuance of a citation to recover assets. If the executor was the former agent against whom an accounting is sought, an interested person can file a petition for issuance of citation to discover to the executor/former agent under 755 ILCS 5/16-1 and the court may appoint a special administrator to represent the estate if necessary.

**Conclusion**

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

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