

Date: August 30, 2017
To: All Texas Agents
From: FNTI Underwriting Staff
RE: Significant Legislation – 85th Legislative Session

Major Over-Haul of the Statutory Durable Power of Attorney Act (HB 1974)

This is a lengthy bill with many convoluted twists and turns. It makes many changes to Chapters 751 and 752 of the Texas Estates Code, adding statutes, while amending and repealing others. It will necessitate that we establish new procedures in many important respects. The new requirements imposed by this legislation are somewhat mind-numbing when viewed in the context of our business due to the large volume of POAs utilized in real estate transactions and the rigid timetables imposed on accepting the POA. There is no way to make the new statutory requirements simple. Note that the statutes now refer to the attorney in fact as the “agent.” When that term is used in this bulletin, it is referring to the agent under the POA, not the title agent.

New §751.201 provides that a person who is presented with and asked to accept a durable POA by an agent must accept the POA or request an agent’s certification (new statutory certification form was also adopted) or an opinion of counsel no later than the 10th business day after the POA is presented. If the POA becomes effective upon the disability or incapacity of the principal, the person being asked to accept the POA may request the certification include a written statement from a physician stating the principal is incapacitated. The person requesting the agent certification must accept the POA for use no later than the 7th business day after the certification is received.

The good news is that a certification made by the agent in compliance with §751.202 is conclusive proof of the factual matters stated in the certification.

In new §751.206, the allowable grounds for refusing to accept a POA are spelled out. One of the grounds is the refusal of the agent to provide the certification as requested, or if the certification provided is incomplete, unclear, or deficient. Many other grounds for refusal are set out in the laundry list. A title company can still decline to accept a POA if they have valid concerns about whether the POA is genuine, valid and still in effect, whether the agent’s authority is still in effect, whether the agent has exceeded his/her authority and if they have actual knowledge that the POA has been revoked.

The reason the allowable grounds for refusing to accept a POA have become so important is because new §751.207 requires that a person who refuses to accept a Durable POA shall provide the agent with a written statement advising the agent of the reason for the refusal to accept the POA by the date the person was otherwise required to accept the POA. The statute prescribes the content of the written statement if the grounds for refusal are related to certain events; otherwise, the statement should include an explanation.

§751.212 creates a cause of action against the person refusing to accept a durable POA for use in a transaction and authorizes a court to order the person to accept the POA and awarding the agent/principal their attorney’s fees and court costs.

The statutory durable POA form has also been amended in various respects and the new form becomes effective Sept 1, 2017. The form now contains new provisions that the principal can initial that relate to co-agents and certain actions of the agent to make a gift, change rights of survivorship or beneficiary designations, change an inter vivos trust, etc.

Some of the other changes implemented by the new law include authority for a principal to designate two or more persons to act as co-agents with each having authority to act independently of the other(s). ***For insuring purposes, FNTI will require that a written consent from the other co-agents be obtained and furnished to the title agent.*** Also, the statute and the statutory durable POA form now incorporate provisions for use of a POA in home equity loan and reverse mortgage transactions. *Note – the POA must still be executed at the office of the title company or lender for home equity loans.*

§752.102 is amended to expand the list of real estate transaction powers conferred on an agent to include the power to handle mineral transactions, the power to designate a principal's homestead, and the power to mortgage and encumber real property and execute documents necessary to create a lien against the principal's homestead as provided by the HEL constitutional amendment. It also consents to the creation of a lien against property owned by the principal's spouse in which the principal has a homestead interest.

Underwriting Requirement: *FNTI will require that the agent presenting the POA provide the title agent with a satisfactory certification for any POAs to be accepted for use in an insured real estate transaction. The certification from the agent should be recorded with the POA (or separately, if the POA was previously recorded). The insuring requirement for an agent certification will apply to POAs executed prior to and after September 1, 2017.*

We advise that all escrow personnel be notified of the new insuring requirement and that a Schedule C requirement be included on Commitments to require an agent presenting a POA for use to provide a certification to the title agent. Since the Commitment is not always issued within 10 business days of receipt of the POA, escrow personnel should specifically make the request upon receipt of a POA.

Adverse Possession Among Co-Tenant Heirs. (SB1249)

This legislation adds §16.0265 to the Civil Practice & Remedies Code, effective September 1, 2017, creating a mechanism to allow an intestate heir (or their successor) to perfect limitation title by adverse possession against the other intestate heirs who simultaneously acquired identical interests in the property by continuous, uninterrupted possession for the 10 prior years, provided the possessory co-tenant heir held the property in peaceful and exclusive possession, cultivated, used or enjoyed the property and paid all ad valorem taxes.

The new statute goes on to list several restrictions on the ability of the possessory co-tenant heir to claim title by adverse possession, such as zero contributions to taxes or maintenance by another co-tenant heir, no written agreements among any of the co-tenant heirs relating to possession or rental, no challenges asserted against the exclusive possession, and no notices filed in the deed records by other co-tenant heirs.

The statute additionally provides the method to perfect the adverse possession title, by recording both an Affidavit of Heirship and Affidavit of Adverse Possession, or a combination thereof, publish notice in a newspaper for four consecutive weeks, and provide notice by certified mail to the other co-tenant heirs. The requirements for the content of the Adverse Possession Affidavit are also set out.

Once the affidavits are filed, one of the other co-tenant heirs can file a controverting affidavit or file suit to recover their interest no later than the 5th anniversary from the date the Adverse Possession Affidavit was recorded.

Without a title instrument, the adverse possession allowed under the statute is limited to 160 acres unless a larger space was enclosed.

Lis Pendens Expungement (SB 1955/HB 4086)

This legislation strengthened the expungement process found in §12.0071(f) of the Property Code to make clear that recordation of a certified copy of an order expunging a notice of lis pendens is recorded, the notice and any information derived from the notice does not constitute actual or constructive notice of any matter contained in the notice or of any matter relating to the underlying lawsuit.

The statute as amended now specifically provides that an interest in the real property may be transferred or encumbered free of all matters asserted or disclosed in the notice and all claims or other matters asserted or disclosed in the action in connection with which the notice was filed.

This statutory amendment becomes effective on September 1, 2017, but applies only to a certified copy of an expungement order of a lis pendens that is recorded on or after the effective date.

Notarization Procedures

(SB 1098 – **Notary’s Record Book**) – This bill amended §406.014 of the Government Code and §121.012 of the Civil Practice & Remedies Code to require that a notary’s record book show the signer’s, grantor’s, or maker’s “mailing address” rather than their residence or alleged residence. The same change was made with respect to the witness information and information on a party introducing the signer to the notary that is maintained in the notary record book.

This change in the law is effective September 1, 2017, and applies to notarizations made on or after that date. ***Notaries should make appropriate revision to their record book.***

(HB 1217 – **E-Notarization**) This bill adopted new subsections to the Civil Practice & Remedies Code and Government Code to implement remote e-notarization procedures for Texas (person appears before the notary by an interactive two-way audio and video communication that qualifies as an online notarization). The acknowledgment will include a space for an online notarization appearance and the notary must be licensed as an online notary.

This bill is not effective until July 1, 2018, and the Secretary of State’s (SOS) office will be developing standards and imposing rules for the new online notarization procedures, including rules for credential analysis (third party service affirms the validity of government-issued ID) and identity proofing. Once the SOS issues the rules, a separate bulletin will be issued addressing the specifics.

Proposed Constitutional Amendment Relating to Home Equity Loans (SJR 60)

This change, if approved by the voters, will take effect on January 1, 2018, and will make the following changes:

- **Authorizes the creation of home equity loans on homestead property designated for agricultural use.**
- Lowers the fee limit from 3 percent to 2 percent.
- Excludes three fees from the fee cap limit, including title insurance.
- Permits the refinance of a home equity loan with a non-HEL rate and term refi if certain specified criteria are satisfied.
- Revises the Notice Concerning Extensions of Credit.

This Underwriting Bulletin becomes a part of the principles and practices with which you are to comply under the terms of your Underwriting Agreement with First National Title Insurance Company. Should the content of this bulletin address the closing and escrow function, this information should be considered a directive and part of the principles and practices if non-compliance would result in liability to FNTI under either the insured closing service letter or policy of title insurance notwithstanding that the Underwriting Agreement does not include the closing and escrow functions of your agency.