

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2005

H

3

HOUSE BILL 510  
Committee Substitute Favorable 4/4/05  
Senate Judiciary I Committee Substitute Adopted 6/15/05

Short Title: Enforcement of Power of Attorney.

(Public)

Sponsors:

Referred to:

March 7, 2005

1 A BILL TO BE ENTITLED  
2 AN ACT TO ENCOURAGE PERSONS TO ACCEPT THE AUTHORITY GRANTED  
3 UNDER POWERS OF ATTORNEY.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Chapter 32A of the General Statutes is amended by adding a  
6 new Article to read:

7 "Article 5.

8 "Enforcement of Power of Attorney.

9 "§ 32A-35. Reliance on power of attorney.

10 (a) Unless (i) a person has actual knowledge that a writing is not a valid power of  
11 attorney, or (ii) the action taken or to be taken by a person named as attorney-in-fact in a  
12 writing that purports to confer a power of attorney is beyond the apparent power or  
13 authority of that named attorney-in-fact as granted in that writing, a person who in good  
14 faith relies on a writing that on its face is duly signed, acknowledged, and otherwise  
15 appears regular, and that purports to confer a power of attorney, durable or otherwise,  
16 shall be protected to the full extent of the powers and authority that reasonably appear to  
17 be granted to the attorney-in-fact designated in that writing, and no person so dealing in  
18 good faith with that named attorney-in-fact shall be held responsible for any breach of  
19 fiduciary duty by that attorney-in-fact, including any breach of loyalty, any act of  
20 self-dealing, or any misapplication of money or other property paid or transferred as  
21 directed by that attorney-in-fact. This subsection applies without regard to whether or  
22 not the person dealing with the attorney-in-fact demands or receives an affidavit under  
23 subsection (b) of this section. A person who conducts activities through employees or  
24 other agents has actual knowledge of a fact involving a power of attorney only from the  
25 time the information was received by an employee or agent having the authority to  
26 approve the power of attorney presented.

27 (b) A person may, prior to acceptance of the authority of the attorney-in-fact or at  
28 any other time, request an affidavit executed by the attorney-in-fact to the effect that the

1 attorney-in-fact did not have, at the time of the presentation to the person of the writing  
2 purporting to confer a power of attorney, actual knowledge of either (i) the revocation  
3 of the power of attorney, or (ii) facts that would cause the attorney-in-fact to question  
4 the authenticity or validity of the power of attorney. An affidavit meeting the  
5 requirements of this subsection shall be sufficient proof to the requesting person, as of  
6 the date of the affidavit, of (i) the nonrevocation of the power of attorney, and (ii) the  
7 authenticity and validity of the power of attorney. If the exercise of the power of  
8 attorney requires execution and delivery of an instrument that is recordable, the affidavit  
9 shall be prepared so as to be recordable. An affidavit prepared under this subsection  
10 may also be used as an affidavit under G.S. 32A-13(c). An affidavit in the form  
11 described in subsection (d) of this section shall be deemed to meet the requirements of  
12 this subsection but shall not be the sole means of meeting those requirements.

13 (c) This section does not affect any provision in a power of attorney for its  
14 termination by expiration of time or occurrence of an event other than an express  
15 revocation or a change in the principal's capacity.

16 (d) Example of Affidavit of Attorney-in-Fact.

17 STATE OF \_\_\_\_\_

18 COUNTY OF \_\_\_\_\_

19 The undersigned does hereby state and affirm the following:

- 20 (1) The undersigned is the person named as Attorney-in-Fact in the Power  
21 of Attorney executed by \_\_\_\_\_ ("Principal") on  
22 [date] \_\_\_\_\_, \_\_\_\_\_ (the "Power of Attorney").
- 23 (2) The Power of Attorney is currently exercisable by the undersigned.
- 24 (3) The undersigned has no actual knowledge of any of the following:
  - 25 a. The Principal is deceased.
  - 26 b. The Power of Attorney has been revoked or terminated,  
27 partially or otherwise.
  - 28 c. The Principal lacked the understanding and capacity to make  
29 and communicate decisions regarding his estate and person at  
30 the time the Power of Attorney was executed.
  - 31 d. The Power of Attorney was not properly executed and is not a  
32 legal, valid power of attorney.
- 33 (4) The undersigned agrees not to exercise any powers granted under the  
34 Power of Attorney if the undersigned becomes aware that the Principal  
35 is deceased or has revoked such powers.

36  
37 This is the \_\_\_ day of \_\_\_\_.

38 \_\_\_\_\_  
39 [Signature]

40 [Acknowledgement]

41 **§ 32A-36. Penalty for unreasonable refusal to recognize power.**

42 (a) A person dealing with an attorney-in-fact who unreasonably refuses to accept  
43 a power of attorney shall be subject to all of the following:

1           (1) Liability for reasonable attorneys' fees and costs incurred in any action  
2           or proceeding necessary to confirm the validity of a power of attorney  
3           or to implement a power of attorney.

4           (2) An order of the court requiring acceptance of the valid power of  
5           attorney.

6           (3) Any other remedy available under applicable law.

7           (b) Acceptance of a power of attorney shall mean (i) acknowledging the validity  
8           and authenticity of the document, and (ii) allowing the attorney-in-fact to conduct  
9           business in accordance with the powers that reasonably appear to be granted in the  
10          document.

11          **"§ 32A-37. Protection for third parties.**

12          (a) A person is not required to honor the attorney-in-fact's authority or to conduct  
13          business with the attorney-in-fact if the person is not otherwise required to conduct  
14          business with the principal in the same circumstances.

15          (b) Without limiting the generality of subsection (a) of this section, nothing in  
16          this Article requires a person to do any of the following:

17               (1) Engage in any transaction with an attorney-in-fact if the  
18               attorney-in-fact has previously breached any agreement with the  
19               person, whether in an individual or fiduciary capacity.

20               (2) Open an account for a principal at the request of an attorney-in-fact if  
21               the principal is not currently a customer of the person.

22               (3) Make a loan to the principal at the request of the attorney-in-fact.

23          (c) A person who is presented with a power of attorney shall not be deemed to  
24          have unreasonably refused to accept the power of attorney solely on the basis of failure  
25          to accept the power of attorney within seven business days.

26          (d) A person who has reasonable cause to question the authenticity or validity of  
27          a power of attorney may refuse to accept the authority granted by that document.

28          (e) A person who promptly requests, and does not within a reasonable time  
29          receive, an affidavit as described in G.S. 32A-35(b), is not deemed under G.S. 32A-36  
30          to have unreasonably refused to accept a power of attorney.

31          (f) The principal, the attorney-in-fact, or a person presented with a power of  
32          attorney may initiate a special proceeding in accordance with the procedures of Article  
33          33 of Chapter 1 of the General Statutes to request a determination of the validity of the  
34          power of attorney. If the decision in that special proceeding is that reasonable cause to  
35          refuse to accept the power of attorney existed, and that the attorney-in-fact willfully  
36          misrepresented the authenticity or validity of the power of attorney, the attorney-in-fact,  
37          and not the principal, is liable for reasonable attorneys' fees and costs incurred in that  
38          action.

39          (g) Nothing in this Article requires a person who accepts a power of attorney to  
40          permit an attorney-in-fact to conduct business not authorized by the terms of the power  
41          of attorney.

42          (h) Nothing in this Article amends or modifies the rights of banks and other  
43          depository institutions to terminate any deposit account in accordance with applicable  
44          law.

1 **"§ 32A-38. Scope of Article.**

2 This Article shall apply to all or any portion of a document executed under Article 1,  
3 Article 2, or Article 2A of this Chapter."

4 **SECTION 2.** This act becomes effective October 1, 2005, and applies to  
5 powers of attorney created before, on, or after that date.