The Docket: Federal Court Permits Local Practice to Control Recording of Military Powers of Attorney

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The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee that reviews significant court rulings and other legal developments, and explains the relevance to the title insurance industry.

Today's review of a recent U.S. Court of Appeals case interpreting the federal statute concerning military powers of attorney was provided by Lance Pomerantz, a sole practitioner whose practice focuses exclusively on land title issues. He can be reached at lance@landtitlelaw.com.

***Bartholomew v. Bevins**, No. 10-6352 (6th Cir., May 17, 2012)*

Facts: Latonya Bartholomew serves in the United States Air Force. She executed a military power of attorney designating her husband, Lyndon, as her attorney-in-fact during her deployment overseas. In March 2010, Mr. Bartholomew presented a photocopy of this instrument to the Fayette County, Ky., clerk's office for purposes of recording an original deed and mortgage in the real property records. The clerk's office rejected the copy as inauthentic and refused to record the deed and mortgage. Mr. Bartholomew explained that it wasn't possible to obtain the original power due to his wife's deployment and referred the clerk to the U.S. Code for military powers of attorney *(10 U.S.C. §1044b)*, which sets the minimal requirements for executing a military power of attorney and prohibits states from imposing additional requirements. The Bartholomews then sued the county and members of the clerk's office in the U.S. District Court for the Eastern District of Kentucky, under 42 U.S.C. § 1983.

Holding: The Federal District Court upheld the county clerk's determination and a divided court of appeals panel affirmed. The statute provides that a military power of attorney "is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State." Despite holding that this statute "expressly preempts state laws concerning the proper form for powers of attorney" based on the Supremacy Clause of the U.S. Constitution, the Sixth Circuit distinguished "a copy of a notarized instrument from an original notarized instrument." Thus, the "unnotarized copy lacks an essential element of a military power of attorney and does not qualify for [the statute's] protections." Even though the clerk's office claimed it was following "a general state policy of requiring original instruments," the Sixth Circuit panel found that "the state entity did not *add* requirements of form, substance, formality, or recording" [emphasis in original].

The dissenting judge argues that the language of the statute impels the opposite result. He points out that for a member of the armed forces in a war zone, "it is hardly feasible to mail the original home. The more likely scenario is that the power of attorney would be sent as an attachment to an email."

Relevance to the Title Industry: This appears to be the first reported case construing this statute anywhere in the nation. With large numbers of service members deployed around the world on extended tours of duty, this scenario might arise in any county in the United States. While the holding is only binding within the 6th Circuit, it would be prudent for title company personnel to always obtain an original military power of attorney when recordation will be necessary. Given the reasonableness of the dissent's position in *Bartholomew*, it will be interesting to see if other any another circuits adopt it in the future.

You can read the full court ruling here.