

February 23, 2014

Hi Suzy and Naomi—

The two of us (John Gregory and Chris Kunz) conducted a discussion of the Nov. draft of FADA at a recent ABA meeting (the Winter Working Meeting of the Cyberspace Law Committee). The attendees—all seasoned internet lawyers—had some good suggestions that we wanted to forward to you, hopefully before the next draft is sent out.

Sec. 6. Powers of attorney: It's fair to say that everyone in attendance was surprised that the draft makes control over digital assets a "hot power." Neither of us was at the FADA meeting where this was discussed and decided, so we couldn't offer a rationale for the decision, but Chris theorized that it might be because the represented person should be put on express notice that digital assets could be covered by the POA, rather than being ambushed by that result. We agree with the ABA attendees that the opposite result is a far better solution, and we offer three rationales why:

- Generally in technology law, a media-neutral approach is the better approach unless the covered technology poses a new problem not adequately handled by the media-neutral law. This approach has been used in UETA and ESIGN, as well as in hundreds of other state and federal statutes since those two key pieces of legislation. *In fact, FADA itself is all about leveling the playing field among media, so that the FADA fiduciaries can deal with all assets, whether they're digital or not.* The opposite approach generates threshold battles over which body of law applies, especially when the communications and assets are mixed (both digital and paper-based, both electronic and bricks/mortar). The opposite approach also poses a danger of having an isolated technology rule that doesn't adequately connect with other existing bodies of law.
- Digital assets are involved in many aspects of POAs, and limiting them to a separate "hot power" may generate additional disputes about whether a particular email or blog or website is part of a general power under the POA or solely within the hot power. Even something as straightforward as a bank account might be covered by an online account as well as the initial paperwork and contracts creating the account. In that instance, is the bank account covered by the POA if the represented person didn't assent to the "hot power"?
- As digital assets and communications become common for everyone and as technology users become more the norm, persons granting POAs will increasingly assume that their digital assets are covered by the POA and will regard the hot power as redundant with the general powers under the POA. (In other words, the "ambush" would work in the other direction, if coverage of digital assets were a 'hot power'.) When members of the FADA drafting committee think about their past and present clients, they may think of a person who lacks technological savvy, but that person won't be the typical person covered by FADA. Instead, the usual person covered by FADA will be a person whose life is a seamless mix of technology, paper, and bricks and mortar.

In short, the law would come as more of a surprise to makers of POAs (and probably the other kinds of relationship covered by FADA) if it did NOT extend to all digital assets not expressly excluded by the maker of the document. The point of FADA is to remove uncertainty, not to perpetuate it or create new sources of it.

Sec. 8(b). FADA's relationship to TOS: Our ABA discussion group was concerned about TOS provisions saying that "the account terminates upon the account holder's death." This provision is meant to protect the custodian's bandwidth and to prevent the account from passing on to the account holder's heirs, but it probably isn't meant to stand in the way of the personal representative doing his or her duty. The ABA discussion group noted that Yahoo, for instance, did not create the digital assets; it just provided a means for the creation and storage of the digital assets. That mere convenience doesn't justify a custodian's interference with the fiduciary's legal duties to wind up the decedent's affairs.

Chris's meeting notes on the Nov. 2013 draft of FADA show a proposed new term saying, "A TOS term that bars a fiduciary from access to a digital asset is void as against public policy." Chris's notes also show an edit to section 8(b) so that it now reads, "The rights of the fiduciary . . . are subject to copyright and other law and the TOS agreement if consistent with this Act." If these edits make the next draft, they will solve this problem by barring a service provider from saying, "We are not denying access to anything. The digital assets no longer exist, as of the death of the owner."

(If the above edits are rejected, a more complicated solution could be to respect the custodian's choice by (1) delaying the custodian's right to destroy or omit the assets for a sufficient period for a fiduciary to call them in or receive a usable copy, and (2) providing that the custodian's furnishing of a usable copy (concept to be defined) discharges the custodian's duties, so that the custodian can now destroy the digital asset according to the TOS.)

Extent of fiduciary powers: It would probably be a good idea to state expressly that fiduciaries' powers under this Act are those given by usual state law governing their activities and are subject to the accompanying limits on purpose and method. With that said up front in the Act, it becomes obvious that the fiduciary doesn't get to use the decedent's golf club membership or use the beneficiary's gmail or letterhead to send out personal communications as if from the decedent. Under state law, the fiduciary would have to identify his or her capacity.

Sec. 14. Applicability: The ABA attendees were astonished at this provision. Everyone thought that FADA ought to give personal representatives access to digital assets *immediately* upon enactment, rather than only for new wills (under section 14(1)). Otherwise, FADA won't apply to many wills for decades, and the Act won't much of the problem at hand. That probably will lead to states "going it alone" again or enacting non-uniform versions. This is in a way a restatement of the principle of media neutrality mentioned in the first point above. The purpose of the Act is to ensure that "assets" include digital assets, for any kind of fiduciary covered by the Act, whenever the fiduciary relationship arose, and whenever the document governing it was made. By comparison, UETA applies to all writing requirements that might apply once the Act was enacted, rather than just the writing requirements *imposed* after the Act was enacted.

A different concern arises under section 14(2), which says that the Act applies only once there's litigation on an issue covered by the Act. (This provision doesn't exclude wills, so it seems to apply to all four kinds of fiduciaries.) In a transactional area of practice like estates and trusts, as well as POAs, it seems

very odd to have litigation be the trigger of the Act's applicability. An attorney counseling a client about a future fiduciary relationship will need to know whether the Act will apply to that relationship. The same is true of anyone drafting a will, trust, or POA. Neither of us recall the drafting committee's discussion on this section, so perhaps there is a reason we simply can't remember. But it seems like an unusual provision, in our experience.

A side note: Several of the ABA attendees suggested that Suzy reach out to the National Conference of Bankruptcy Judges (who have enormous power over changes in bankruptcy law) to flag the issue of whether assets like future rights to NFL tickets (which are increasingly digital) are inheritable or survive bankruptcy. Our ABA colleague Warren Agin is our go-to guy on issues of technology issues in bankruptcy, and Prof. Juliet Moringiello at Widener is also adept at these issues.

Others mentioned consulting with Congressional staff, particularly Sen. Leahy's, so they react properly rather than defensively to the uniform act when it is adopted, or when the service providers try to avoid its consequences by putting (misleading) bugs in congressional ears about the "assault" on the principles of SCA or CFAA.

A UK development that John just located:

Is it a digital asset?

One way in which governments might regulate bitcoin is to treat it as simply a digital asset, in the same way that laws are enacted to protect and regulate other digital items such as mp3s, e-books and games.

The UK is in the process of passing a new Consumer Rights (CR) Bill into law. It defines 'digital content' as 'data which are produced and supplied in digital form'. While digital content is distinguished from goods and services by the CR Bill, it is also given a similar status in the sense that specific rules apply to the supply of it in a commercial context.

Bitcoins fit the description of 'data which are produced and supplied in digital form' as they are 'mined' digitally and have commercial relevance only in the context of a supply that takes place at least in part digitally. They therefore fit the description of a digital asset, even if this is not what is being intended by the UK Parliament in the context of the CR Bill.

Viewing bitcoins as digital assets may also be in line with The People's Bank of China's (PBC) views on bitcoins. According to [reports](#), The PBC has referred to bitcoins as 'virtual goods'.

John wonders if that definition of digital asset in the Consumer Rights Act would be useful for the FADA project. There was certainly some debate at the November meeting on the definition, but not a final resolution of it, as we recall. (The definition might have to extend to assets converted to digital form as well, e.g., paper contracts that are scanned and retained in that form, where they have value in and of themselves, not just as records of underlying assets.)

Cheers,

Chris Kunz & John Gregory