

community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

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LEGISLATIVE UPDATE – 2021

The 67th Legislative Session ended on April 30 after nearly four months of work and sending more than 500 laws to the governor for his signature. We have summarized those bills that may be of interest to North Dakota bankers:

HB 1026

In large response to 22-year-old “roving grain buyer” con-man Hunter Hanson’s recent Ponzi scheme defrauding farmers and elevators, tighter grain regulation is coming to North Dakota. (A roving grain buyer is someone who buys grain but doesn’t operate an elevator or other facility where grain is received.) This 17-page bill relates to financial criteria for grain buyer, grain broker, grain processor, and warehousemen licenses, and licensing and bonding for grain brokers and grain processors; to definitions of grain brokers and processors, the duties and powers of the commissioner, confidentiality records, scale ticket contents, credit-sale contracts, reports, annual licenses, fees, and bonds for grain buyers, grain brokers, grain processors, and warehousemen.

The background that led to this bill is troubling. Hanson operated as Midwest Grain Trading Company of Devils Lake, and was offering large protein premiums. As you may recall, in 2019 Hanson was sentenced on charges of wire fraud and money laundering, and ordered to serve eight years in prison, serve a 3-year period of supervised release, and pay **\$11,103,309.19** in restitution. He was also ordered to forfeit property purchased with proceeds of his crime and has a \$1,265,679.29 money judgment against him.

The charges and Hanson’s guilty plea stem from his roving grain buyer business from January 2018 to December 2018, during which time he managed to swindle approximately sixty farmers and elevators in North Dakota and Canada. He fraudulently contracted with farmers and grain elevators in an effort to deceitfully obtain grain or other agricultural commodities; once Hanson fraudulently got these commodities, he either failed to pay the farmers and elevators, or in some cases, sent farmers and elevators checks for which he did not have sufficient funds to cover.

AND WHY WE NEED TO BE EVER VIGILANT: When farmers or elevators would question where the money was, Hanson sent explanatory, lying emails to lull farmers, elevators, or brokers into a false sense of security, to postpone inquiries, or to make his transactions between the farmers, elevators, or brokers look less shady. As part of his fraudulent scheme, Hanson maintained multiple bank accounts, engaged in check kiting to cover his deposits and withdrawals, illegally laundered money between his bank accounts and other businesses, and usually didn’t have sufficient funds in his bank accounts when he remitted payments to farmers and elevators for money owed on the commodities purchasing contracts.

HB 1077

Applicable to the will of a decedent who dies after July 31, 2021, this bill adopts and enacts a new section in the Century Code, ch. 30.1-07, the Uniform Electronic Wills Act. The law will allow North Dakotans to draft and execute wills online; until July 31, a will is only recognized as valid if it’s written on paper, signed by the testator or testatrix, and signed by two witnesses (since 2009, a will is also recognized as validly executed if it is acknowledged by a licensed notary public instead of two witnesses).

Under the new law, the person can create a will using a computer, and store it as a digital file; he or she must still sign the document electronically, and it still must be acknowledged by two witnesses or a notary.

This works well with our 2019 remote notarization law that permits a notary to acknowledge documents online using electronic procedures to authenticate the signor's identity and videoconferencing software to create an audio-visual record of the execution. Notaries who act remotely can create secure, tamper-evident files that can't be altered after execution – compared to a will drafted on paper that can be forged or its pages deceitfully replaced.

The new law also provides for self-proving electronic wills, which include sworn affidavits by the witnesses or notary confirming that the testator intended the document to be his or her last will and testament, that he or she was of sound mind when the will was signed, and that he or she signed voluntarily.

HB 1175

HB 1175 created liability protections to shield health care providers, businesses, and other facilities from civil liability for any act in response to COVID-19 that causes or contributes to the death or injury of a person. It also protects an individual who designs, manufactures, labels, sells, and distributes disinfecting or cleaning supplies that are to protect from COVID-19, from civil liability for personal injury, death or property damage.

The bill does not protect against actions that constitute willful and wanton misconduct, or reckless or intentional infliction of harm. The legislation applies retroactively to Jan. 1, 2020, meaning that it covers the entire COVID-19 pandemic.

HB 1251

Effective August 1, 2021, any judgment docketed after that date that directs in whole or in part the payment of money expires at the end of **twenty years** (changed from ten years) from the date it was first docketed. The amendment removes the provision that judgment creditors may renew a judgment for another ten years by filing an affidavit of renewal within ninety days before the expiration of the judgment.

The bad news is that there is no provision under North Dakota law to extend the lien of a money judgment *beyond* twenty years. The good news is that for judgments docketed *after* August 1, the bill simplifies things for judgment creditors by removing the requirement that they suspense the file and timely file a verified affidavit in order to get another ten years of life for the judgment.

HB 1366

A bill that was opposed by North Dakota banks, credit union, and Farm Credit agencies was passed with a couple of amendments to make it more palatable to the financial services industry. The purpose of the bill was to set up a process for a repairman to sell a vehicle or equipment left on his property after repairs were done and the customer doesn't pay for the repairs or pick up the item.

As you know, a repairman's lien already has first priority over other security interests or liens on the property. HB 1366 allows a non-judicial foreclosure through Article 9 of the UCC, and allows for a repairman's lien to add storage fees and transportation cost on top of repair costs (though storage fees may not begin to accrue until fifteen days after the owner is asked to come and get the property).

Other changes include increasing the priority lien threshold from \$4,000 to \$6,000 or 30% of the repaired value, whichever is greater, for titled vehicles and increasing the threshold from \$9,000 to \$15,000 or 30%

of the repaired value of farm machinery or construction equipment, whichever is greater. Effective August 1, 2021, the dollar amount of these increases are significant and will no doubt have a detrimental effect on lenders.

SB 2048

SB 2048 is North Dakota's version of the Revised Uniform Unclaimed Property Act (RUUPA) and is effective August 1, 2021. The bill is 38 pages long and we won't summarize it in its entirety, though it does affect banks. A new chapter was created and enacted, N.D.C.C. ch. 47-30.2, and we have reproduced below three sections that are of particular interest to banks.

A. N.D.C.C. § 47-30.2-04 (RUUPA 201) When property presumed abandoned.

Subject to section 47 - 30.2 - 12, the following property is presumed abandoned if it is unclaimed by the apparent owner during the period specified below:

1. Except as provided in this section, checks held, issued, or owing in the ordinary course of the holder's business which remain uncashed by the owner two years after becoming payable;
2. A traveler's check, fifteen years after issuance;
3. A money order, seven years after issuance;
4. A state or municipal bond, bearer bond, or original-issue-discount bond, three years after the earliest of the date:
 - a. The bond matures;
 - b. The bond is called; or
 - c. The obligation to pay the principal of the bond arises;
5. A debt of a business association, three years after the obligation to pay arises;
6. A payroll card or a demand, savings, or time deposit, including a time deposit that is automatically renewable, five years after the date of maturity of the time deposit or the date of the last indication of interest in the property by the apparent owner, whichever is earlier, provided a time deposit that is automatically renewable is deemed matured on its initial date of maturity unless the apparent owner has consented in a record on file with the holder to renewal at or about the time of the renewal. If an apparent owner has another established account with the financial institution and has demonstrated interest in any account under section 47 - 30.2 - 12, then all accounts must be considered active;
7. A cashier's check or certified check, two years after issuance;
8. Money or a credit owed to a customer as a result of a retail business transaction, other than in-store credit for returned merchandise, three years after the obligation arose;
9. An amount owed by an insurance company on a life or endowment insurance policy or an annuity contract that has matured or terminated, three years after the obligation to pay arose under the terms of the policy or contract or, if a policy or contract for which an amount is owed on proof of death has not matured by proof of the death of the insured or annuitant, as follows:
 - a. With respect to an amount owed on a life or endowment insurance policy, three years after the earlier of the date:
 - (1) The insurance company has knowledge of the death of the insured; or
 - (2) The insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve for the policy is based; and
 - b. With respect to an amount owed on an annuity contract, three years after the date the insurance company has knowledge of the death of the annuitant.

10. Property distributable by a business association in the course of dissolution, one year after the property becomes distributable;

11. Property held by a court, including property received as proceeds of a class action, three years after the property becomes distributable;

12. Property held by a government or political subdivision, agency, or instrumentality, including municipal bond interest and unredeemed principal under the administration of a paying agent or indenture trustee, three years after the property becomes distributable;

13. Wages, commissions, bonuses, or reimbursements to which an employee is entitled, or other compensation for personal services, one year after the amount becomes payable;

14. A deposit or refund owed to a subscriber by a utility, one year after the deposit or refund becomes payable;

15. A security deposit, including interest on the security deposit, made in advance by a person to secure an agreement for rights of services, less any lawsuit deductions, which remains unclaimed by the owner for more than one year after termination of the agreement for which the deposit or advance payment was made;

16. A sum payable as mineral proceeds which has remained unclaimed by the owner for more than three years after it became payable or distributable and the owner's underlying right to receive those mineral proceeds are deemed abandoned. At the time an owner's underlying right to receive mineral proceeds is deemed abandoned, any mineral proceeds then owing to the owner and any proceeds accruing after that time are deemed abandoned;

17. Property not specified in this section or sections 47 - 30.2 - 05 through 47 - 30.2 - 10, the earlier of three years after the owner first has a right to demand the property or the obligation to pay or distribute the property arises.

B. N.D.C.C. § 47-30.2-07 (RUUPA 204) When custodial account for minor presumed abandoned.

1. Subject to section 47 - 30.2 - 12, property held in an account established under a state's Uniform Gifts to Minors Act or Uniform Transfers to Minors Act is presumed abandoned if it is unclaimed by or on behalf of the minor on whose behalf the account was opened three years after the later of:

a. Except as in subdivision b, the date a second consecutive communication sent by the holder by first-class United States mail to the custodian of the minor on whose behalf the account was opened is returned undelivered to the holder by the United States postal service;

b. If the second communication is sent later than thirty days after the date the first communication is returned undelivered, the date the first communication was returned undelivered; or

c. The date on which the custodian of the minor, as defined under section 47 - 24.1 - 01, is required to transfer the property to the minor or the minor's estate in accordance with the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of the state in which the account was opened.

2. If the holder does not send communications to the custodian of the minor on whose behalf an account described in subsection 1 was opened by first-class United States mail, the holder shall attempt to confirm the custodian of the minor's interest in the property by sending the custodian of the minor an electronic-mail communication not later than two years after the custodian of the minor's last indication of interest in the property. However, the holder promptly shall attempt to contact the custodian of the minor by first-class United States mail if:

a. The holder does not have information needed to send the custodian of the minor an electronic - mail communication or the holder believes that the custodian of the minor's electronic-mail address in the holder's records is not valid;

b. The holder receives notification that the electronic-mail communication was not received; or

c. The custodian of the minor does not respond to the electronic-mail communication not later than thirty days after the communication was sent.

3. If first-class United States mail sent under subsection 2 is returned undelivered to the holder by the United States postal service, the property is presumed abandoned three years after the later of:

a. The date a second consecutive communication to contact the custodian of the minor by first-class United States mail is returned to the holder undelivered by the United States postal service; or

b. The date established by subdivision c of subsection 1.

4. The property in the account described in subsection 1 ceases to be subject to this section on the date the property is transferred to the minor or to the minor's estate.

C. N.D.C.C. § 47-30.2-08. (RUUPA 205) When contents of safe deposit box presumed abandoned.

Tangible property held in a safe deposit box is presumed abandoned if the property remains unclaimed by the apparent owner three years after the earlier of the:

1. Expiration of the lease or rental period for the box; or

2. Earliest date when the lessor of the box is authorized by law of this state other than this chapter to enter the box and remove or dispose of the contents without consent or authorization of the lessee.

SB 2102

SB 2102 makes changes to the North Dakota Century Code relating to dissolution, insolvency, suspension, emergency receivership, and liquidation of institutions under the supervision of the Department of Financial Institutions; other changes relating to financial institutions cross references, cease and desist orders, and prompt corrective action; and to repeal N.D.C.C. chapter 6-07 of relating to dissolution, insolvency, suspension, emergency receivership, and liquidation of institutions under the supervision of the Department of Financial Institutions.

The Commissioner now has the authority for the decision to take possession of an institution, with the knowledge of the State Banking Board, and the authority of the Board to make that decision has been removed.

As Commissioner Kruse testified, it's been over 30 years since a North Dakota bank failed, but the law and administrative proceedings must be updated to mirror federal requirements for failure of a bank. Passage of this bill brings the DFI into the 21st Century. The law is effective August 1, 2021.

SB 2191

Effective August 1, 2021, SB 2191 amends N.D.C.C. § 32-19-41 and makes simpler the disposal of abandoned personal property left behind in abandoned real property. If real property is adjudicated to be

abandoned, the grantee in a sheriff's deed that has been recorded (or after recording a deed in lieu of foreclosure) may keep or dispose of any personal property left on the real property.

If the real property is *not* adjudicated to be abandoned, the grantee may keep or dispose of any personal property left on the real property thirty days after the issuance of a sheriff's deed. In this case, if the total value of the personal property is \$500 or more, the record title owner must make reasonable efforts to notify the mortgagor before disposing of the personal property. Notification is to be made by certified mail at least fifteen days before disposing of the personal property.

The record title owner is entitled to the proceeds from the sale of the personal property after all costs have been deducted. Note that N.D.C.C. § 32-19-41 applies only to tracts of land not exceeding forty acres.

SB 2197

Effective August 1, 2021, this bill makes changes to the North Dakota Century Code, relating to confidentiality of facts and information obtained or created by the Commissioner and the Department of Financial Institutions.

More specifically, it expands the definition of "confidential information" obtained or created by the DFI to include a complaint or comment from the public regarding a financial institution, credit union, or other entity under the supervision of the DFI, unless the Commissioner is providing "aggregate, nonspecific" information. SB 2197 also restricts bank information available to the State Auditor.

SB 2261

The purpose of this legislation was to make clear how a bank creates an irrevocable deposit account so that the irrevocable itemized funeral service contract is recognized as an allowable asset exclusion for Medicaid purposes.

Effective April 16, 2021, as an emergency measure, the bill defined "irrevocable itemized funeral contracts" and provides specific direction as to what must be done when payments made under an irrevocable itemized funeral contract are deposited with a bank.

If payments have been made under an irrevocable itemized funeral contract, the money must be carried in a separate account or separate certificate of deposit with the names of the depositor or transferor, cemetery association, or licensed funeral establishment, and the person making payment on behalf of the individual for whose benefit payment is made.

SB 2292

SB 2292 clearly provides that mortgage modifications may operate to extend the lien created by a mortgage on North Dakota real estate, thereby delaying the expiration date of a mortgage. It also creates a new

statute, N.D.C.C. § 35-03-15.1, that specifies certain information that must be included in a modification of mortgage instrument.

Until N.D.C.C. § 35-03-15.1 was enacted, the law did not address any specific form of document, disclosure, or procedure with regard to modification of a mortgage. Effective August 1, 2021, the new statute provides that a “mortgage modification” means a written instrument amending at least one term of an original mortgage which **a)** references the original mortgage **by recording date and document number**, and **b)** is signed by the mortgagor (or his successor in interest) and the owner of the mortgage. N.D.C.C. § 35-03-15.1(2).

Please ensure that your North Dakota mortgage modification forms **(1)** reference the original document (legal description, recording date, document number, and parties to the modification); **(2)** indicate that the parties should clearly state the manner in which the original is being modified, and **(3)** have language for the execution and acknowledgement before a duly-authorized notary public.