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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Dotting the "I" and Crossing the "T" – the Banker's Job
When Considering the Guaranty

You and the borrower are hashing out the loan agreement; you require a guarantor, and the borrower has brought one to the table. Now what? Here's what – our handy-dandy list of items the banker should bear in mind when assessing the guarantor and when drafting the guaranty:

1. Know the relationship between your borrower and the proposed guarantor. Know why the guaranty will be taken from *that* particular person or entity.

2. Examine the guarantor's financial statements!

3. Examine lien, judgment, and bankruptcy searches against the guarantor.

4. If it's an entity, figure out the corporate structure. Evaluate the authorization of the guarantor - this includes an examination of the organizational documents and the resolutions authorizing the guaranty.

5. Does the representative signing on behalf of an entity have authorization to do this? Get an officer's or secretary's certificate.

6. Confirm that the party signing the guaranty has printed his or her name and has used the proper title if signing on behalf of an entity.

7. The guaranty document should state the debt and the amount being guaranteed. This includes a description of the borrower, and reference the related loan documents such as "the promissory note dated _____."

8. Include an acknowledgment of the consideration that the guarantor is receiving.

9. Ensure that your guaranty is clear that it is a guaranty of *payment*, not a guaranty of collection. A guaranty of payment is *absolute* and a guaranty of collection is conditional. The guaranty of payment binds the guarantor to pay the debt at maturity in the event the money has not been paid by the borrower; upon default by the borrower, the obligation of the guarantor becomes fixed. The guaranty of collection is a promise on the part of the guarantor that if the bank cannot collect the claim with due diligence (generally after suing the borrower), the guarantor will pay the money owed to the bank.

10. Characterize the guaranty as revocable or irrevocable, and how and when it can be revoked by the guarantor.

11. Be clear and specific as to conditions to enforcement (if any) and, how the bank can show compliance with those conditions.

12. When there is more than one guarantor, specify that the guarantors' obligations are joint and several.

13. Include typical contract language, such as waiver of jury trial, state of governing law, venue, and payment of attorneys' fees.

14. Although it may be difficult to distinguish a contract of guaranty from that of surety in some cases, North Dakota has not abolished the distinction between a guarantor and a surety and statutes and case law define these undertakings in separate and distinct terms. Consequently, the contract should include wide-ranging suretyship waivers.

15. Provide any required disclosures.

16. Even if you have included waivers, you should suspense your file so that the bank will obtain ratification from the guarantor of its guaranty when amending the terms of the loan to the borrower or if the borrower's identity is significantly altered, as in a merger.