

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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YOU ARE ASKING . . .

Q: What is a collateral real estate mortgage, and should I use one?

A: This is a great question, one that requires a more in-depth response than what we usually provide in this space. Everything we need to know about this type of mortgage is contained in one lien statute, N.D.C.C. § 35-03-17.

Collateral real estate mortgages may be used to secure commercial, agricultural, or consumer loans or lines of credit including, but not limited to, revolving notes and credits and overdraft checking plans. We've found that it's most used for lines of credit because the mortgage can continue as a lien even when the debt has been paid down to \$0. It has all the language and protections of a usual and customary mortgage, but it has **four** elements that make it a "collateral real estate mortgage":

(1) The document must have the title "**MORTGAGE—COLLATERAL REAL ESTATE MORTGAGE**" in capital letters.

(2) The mortgage must contain the following capitalized language: "**THE PARTIES AGREE THAT THIS MORTGAGE CONSTITUTES A COLLATERAL REAL ESTATE MORTGAGE PURSUANT TO NORTH DAKOTA CENTURY CODE CHAPTER 35-03.**"

(3) A collateral real estate mortgage is effective for *five* years plus 60 days. The effectiveness of a filed collateral real estate mortgage lapses upon the expiration of the 60-day period unless an addendum to the collateral real estate mortgage extending its effective date is filed prior to the lapse. Be sure to suspense the dates for filing the addendum! The window for filing an addendum continuing the mortgage is as follows:

- (a) Within 6 months before and 60 days after an *identified* maturity date of five years or less; and
- (b) If there is no stated maturity date, within 6 months before and 60 days after the expiration of the five-year effective date period (which commences when it's filed with the Recorder).

For example, suppose there is no stated maturity date, but the mortgage was filed in the Office of the Recorder on March 1, 2020. In that case, option (b) above applies and the window for filing the addendum continuing the mortgage begins on September 1, 2024 (6 months before the five-year expiration) and ends on April 30, 2025 (60 days after expiration). It's then continued for five years after the date the addendum is filed; there is no statutory limit to the number of times an addendum continuing the mortgage may be filed. Fortunately, if an addendum to a collateral real estate mortgage is made for the sole purpose of continuing the effectiveness of its lien, that addendum need be signed only by the mortgagee so there's no need to get your borrower into the bank to sign anything.

(4) The mortgage can continue as a lien even when the debt has been paid down to \$0. If the

borrower/mortgagor wishes to terminate the lending relationship when the debt is \$0, he has to demand in writing that the mortgage be satisfied. The bank/mortgagee then has 10 days to execute and record a satisfaction.

With a collateral real estate mortgage, sums not exceeding the face amount of the mortgage advanced during the term of the mortgage have a lien priority as of the date the mortgage was recorded. The collateral real estate mortgage permits the lender to file a mortgage with a specified face amount but the actual debt owed during the term of the mortgage varies. As to the question of whether you should one, that's a decision to be made at your bank after weighing the pros and cons.

Pro: The collateral real estate mortgage may allow lenders and borrowers more flexibility in their lending relationships because the lender can file a mortgage with a stated face amount but with the actual debt owed during the term of the mortgage fluctuating based on the credit needs of the borrower.

Con: These mortgages were created at a time when future advances were limited under regular mortgage law; now, because regular mortgages can secure future advances *and* have priority to the extent of those advances (if your mortgage has the magic future advances language), the collateral real estate mortgage is not generally a lender's first choice. Lenders should keep the five-year limit in mind when deciding whether to use a collateral real estate mortgage or a simple regular mortgage with provisions for future advances. Remember that succeeding addendums may be filed, much like UCC renewals, every five years. Be aware that the collateral real estate mortgage expiration time is so different from other mortgages that lenders sometimes fail to timely extend and then become unsecured. Lenders also have mistakenly put in a maturity date beyond the five years and don't realize they are secured for *only* five years.

If your bank does use the occasional collateral real estate mortgage, keep on top of it. Suspend your file and double-check it!