community BANKER

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Welcome to the May/June issue of the COMMUNITY BANKERS' ADVISOR.

The ADVISOR 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.

LEGISLATIVE UPDATE - 2013

The 63rd Legislative Assembly closed May 4, 2013, setting a record for the longest session in modern state history and passing 548(!) Bills and Resolutions. Our state Constitution limits the session to 80 days, and this year nearly every last minute was used by lawmakers working into the wee hours to complete their work. We are plowing through the fruits of their labor, and will provide updates on what will affect bankers. Some highlights:

SB 2136: Beginning August 1, 2013, lenders and borrowers may contract in writing to make the rate of interest higher after default. Also, as of August 1, 2013, a late payment penalty may be imposed if the amount of the late charge or the method of calculation have been agreed to by the parties in the loan documents. The ability to make post-maturity interest rates and late fees subject to the contract is a welcome change.

As you know, right now all contracts must have the same rate of interest after default as before and any agreement to increase the rate is void as to the increase in interest. Also, prior to the amendment, late charges were limited to the lesser of $15 or 15% of the late payment, unless otherwise agreed to in a real estate note or mortgage. The requirement that the late payment penalty must have been "agreed to in any commercial, agricultural, or real estate note or mortgage" has been stricken; we interpret this to mean that the late payment penalty agreement is not limited to real estate transactions. (N.D.C.C. § 47-14-05)

HB 1316: This Bill has made a few minor changes to the "good funds" definitions. With the amendment, good funds include or mean funds in these forms:

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1. A check that has been presented for payment and for which payment has been "collected" (changed from "received").

2. A check drawn on the trust account of a real estate broker or trust account maintained by an attorney for which funds are collected funds by the real estate broker or the attorney's trust account. (Original provision limited the check to not over $3,000)

3. A cashier's check not over $50,000 (originally $10,000)which is received by the closing agent.

4. A check drawn on the escrow account of another closing agent in North Dakota, Minnesota, Montana, or South Dakota (bordering states).

5. Fund transferred to the closing agent's escrow account by the bank, savings and loan association, credit union, or savings bank that is the host institution of the closing agent's escrow account. (N.D.C.C.§ 47-34-01)

HB 1316 also creates a new section to Chapter 47-34 for civil damages that a person may claim against someone that violates § 47-34-02's provisions on disbursements at a closing transaction.

HB 1243: Effective August 1, 2013, the allowable fee for an NSF check goes up from $35 to $40 (N.D.C.C. § 6-08-16) and the allowable fee for issuing a check without an account goes up from $35 to $40. (N.D.C.C.§ 6-08-16.2)

SB 2140: Effective April 11, 2013, the law addressing service of a garnishee summons has been amended to provide as follows:

> Service of a garnishee summons and disclosure statement upon a bank or credit union must be made by delivery of the summons and disclosure statement to a specifically named president or vice president of the bank or credit union or to the registered agent for service of process of the bank or credit union. Delivery of the summons and disclosure statement to the specifically named individual may be in hand as established by the sworn affidavit of the individual who delivered the summons and disclosure statement or by any form of mail or third-party commercial delivery service, if delivery is restricted to the named individual or registered agent, and the sender receives a receipt signed by that individual or registered agent.

This makes clear that banks may no longer comply with garnishee summons generally addressed to XYZ Bank or to the made-up office of the "Bank Garnishment Agent." Failing to *specifically* name the *appropriate* person to whose attention the garnishment is directed is not valid legal process and banks cannot give out customer information. N.D.C.C. § 32-09.1-08(2).

HB 1164: This Bill creates standards of conduct for directors of financial institutions, generally that: **(a)** a director must act in the best interest of the financial institution as a *reasonably prudent person* would do under similar circumstances. Meeting this reasonable standard offers protection to a director from personal liability. (See subsections 1 and 2 of the new law); **(b)** A director's personal liability to the financial institution or its shareholders for monetary damages for breach of fiduciary duty as a director may be eliminated or limited in the articles of the institution; however, the articles may not eliminate or limit the liability of a director for breach of loyalty, for acts or omissions not in good faith, intentional misconduct or a knowing violation of law, for illegal distributions, for any act or omission from which the director derived an improper personal benefit, or for any action that occurred before the date in when the provision in the articles eliminating or limiting liability becomes effective (you can't use the new law to escape liability for something you did prior to your protective article). (See subsection 5 of the new law); **(c)** Note, however, that a director that does not approve of an action must actually vote *no* or be somehow precluded from voting - otherwise, silence during the vote is presumed to be assent. (See subsection 4 of the new law)

HB 1191: The bill created a new section of the Century Code to provide for a security interest in rents. Notably, a document that creates or provides for security interest in real property also creates an assignment of rents arising from the real property *unless* the document specifically provides otherwise. Upon recording an assignment of rents with the recorder for the country in which the real estate lies, the security interest in rents is fully perfected notwithstanding other laws of the state which would preclude or defer enforcement of the security interest. Priority of an assignment of rents as against a competing lien is determined by the first-to-file rule. This new law governs the enforcement of an assignment of rents and the perfection and priority of a security interest in rents even if the document was signed before August 1, 2013.

HB 1136: Social Security numbers: (1) Effective July 1, 2013, social security numbers or tax ID numbers

are once again required on financing statements. (N.D.C.C. § 41-09-87(2)(h)) (HB 1136, section 25); **(2)** Mortgages may not contain social security numbers. (N.D.C.C. § 41-09-73(3)(c)(3)) (HB 1136, section 23) Note that mortgages that are also fixture filings will still have to be filed in the office of the county recorder, and signature and notarization are still required; **(3)** The social security number or taxpayer ID number will not be disclosed to the searcher, so the searcher must know and input both the debtor's name and the debtor's SSN or TIN to filter the results. (N.D.C.C. § 41-09-73(6) (HB 1136, section 23); **(4)** Effective August 1, 2015, lien statements for statutory liens such as agricultural supplier's lien, repairman's lien, etc. may now contain the debtor's social security number, or TIN number, as the case may be. (See generally Title 35, Liens) After that date, Miscellaneous Statutory Lien filings and Amendments (MSL-1, MSL-2) will be searchable by SSN/TIN.

HB 1136: It's five years: There has been disagreement among attorneys as to how long the transition period gives secured creditors to amend financing statements to reflect new debtor name requirements. The way the law was written, there was a good argument that all name-change amendments needed to be filed by July 1, 2014; most lawyers were on that side. Section 28 of HB 1136 clarifies that there is an "up to five-years" transition period (depending on when the financing statement must be continued to maintain its effectiveness) for bringing financing statements into compliance. Under HB 1136, it is clear that filing the amendment must be accomplished by the time a financing statement continuation statement must be filed or a new financing statement is filed. N.D.C.C. § 41-09-135(3) Keep in mind that this doesn't change the **FOUR-MONTH** rule that you need to watch for with a debtor's name *change* if the change makes your filed financing statement "seriously misleading." If the filing name becomes "seriously misleading", it is ineffective to continue perfection in his after-acquired collateral UNLESS you file an Amendment within **FOUR MONTHS** of the name change event. See N.D.C.C. §41-09-78(3) and N.D.C.C. §41-09-36.

HB 1136: Electronic filing of UCC liens: There were a number of amendments to HB 1136. **The effective date for these electronic filing provisions is August 1, 2015, or earlier** if the Secretary of State can certify to legislative management that the information technology components of the system are ready. If certified as ready, it becomes effective 90 days after the certification. (HB 1136, section 50) Relevant provisions: **(a)** The Secretary of State's office will provide an electronic means for filing records - this means any UCC record - financing statements, amendments, continuations, terminations. Any record not filed electronically will be rejected. (N.D.C.C. § 41-09-72(3)); **(b)** for an agister's lien, the statement must be filed electronically in the central indexing system (no longer in the county recorder's office or the Secretary of State's office). (N.D.C.C. § 35-17-04); **(c)** a repairman's lien must be filed electronically in the central indexing system (no longer in the county recorder's office). (N.D.C.C. § 35-13-02); **(d)** for an agricultural processor's lien, the statement must be filed electronically in the central indexing system (no longer in the county recorder's office or the Secretary of State's office). (N.D.C.C. § 35-30-02); **(e)** for an agricultural supplier's lien, the statement must be filed electronically in the central indexing system (no longer in the county recorder's office or the Secretary of State's office). (N.D.C.C. § 35-31-02); **(f)** Mortgages may not include social security or IRS taxpayer ID numbers. (N.D.C.C. § 41-09-73(3)(c)(3)); **(g)** Fee for filing and indexing an original statement - $40. (N.D.C.C. § 41-09-96(1)); **(h)** Fee for filing amendment - $40. (N.D.C.C. § 41-09-96(2)); **(I)** Fee for filing and indexing a continuation - $30. (N.D.C.C. § 41-09-96(3)); **(j)** A fee may not be charged for a central index response to an electronic request for information on whether there is on file any financing statement naming a particular debtor, information on specific filings on a particular debtor, copies of each filing on a particular debtor, and certified copies of filings on a particular debtor. (N.D.C.C. § 41-09-96(4)) **(k)** Fee for a central index response providing information on specific filings submitted by a particular secured party - $500. (N.D.C.C. § 41-09-96(5)).

HB 1162: This Bill amended N.D.C.C. § 47-30.1-01 of North Dakota's unclaimed property act to specifically define "money order", stating that a "money order" is not a cashier's check, bank money order, or any other instrument sold by a financial organization if the seller has obtained the name and address of the payee. This clarifies that an outstanding cashier's check has a 3-year abandonment time for the purposes of unclaimed property under N.D.C.C. § 47-30.1-05 (which applies to checks and other instruments issued by a bank), rather than a 7-year abandonment time for money orders under N.D.C.C. § 47-30.1-04.

HB 1417: This amended N.D.C.C. § 27-08.1-01 to increase the claim limit for small claims court from $10,000 to $15,000. This should unclog the district courts a bit, effective August 1, 2013.

Employment law 101: Five legal lessons supervisors must learn

When it comes to employment law, it's always best for managers to learn from others' mistakes rather than their own. Share these recent court cases—and the lessons learned—with your organization's supervisors:

1. Nix the nicknames

The case: Soon after a 54-year-old employee was demoted, she sued for age discrimination. Her evidence? A new supervisor called her "Grandma" and suggested that she retire to spend time with her grandchildren. The court agreed, saying, "Calling someone 'Grandma' does suggest ageism." (*McDonald v. Best Buy, DC IL*)

The lesson: Avoid nicknames that carry even the perception of being tied to a protected characteristic, such as race, age, gender, religion, national origin or disability.

2. Keep discipline consistent

The case: An employee of Indian descent believed she was criticized far more harshly than her white co-workers. To prove her thesis, she kept a notebook and tracked when she was critiqued compared with her colleagues.

When she was fired, she sued, saying that the real reason was national-origin discrimination. The court sent the case—and her notebook—to a jury trial. (*Reddy v. The Salvation Army, SD NY*)

The lesson: Trouble will come to supervisors who issue oral and written rebukes to certain employees, yet overlook the same actions by co-workers. Such inconsistency will doom you in court.

3. Avoid 'English-only' rules

The case: A department store manager told six Somali workers who sorted clothes in a basement that they'd be fired if they spoke "even one word of Somali" at work.

Luckily for the store, the case didn't make it to court. After some bad publicity and threats of a lawsuit, the store apologized to the workers and disciplined the manager.

The lesson: You must have a clear business reason for requiring employees to speak English only. Valid exceptions: customer service situations (talking to customers in English) or dangerous conditions (when safety depends on workers using a common language).

Make sure any language rules don't carry any hint of discrimination.

4. Never bad-mouth FMLA leave

The case: A railroad employee was in a 26-week training program to become a train engineer. He had to take FMLA leave during the program. His supervisor made comments about his absence, asking whether he was "finally done with FMLA," calling it a "distraction."

When the employee missed the final training day, he was booted from the program. He sued, alleging he'd been punished for taking FMLA leave. The court agreed. (*Erickson v. Canadian Pacific Railway, DC MN*)

The lesson: Never retaliate against employees because they take FMLA leave or are involved in any other "protected" activity, including filing a lawsuit.

5. Web porn is sexual harassment

The case: A female office employee claimed her co-workers exposed her to pornographic images on their computer screens. She sued for sexual harassment, saying the company did nothing to protect her. The court sided with her, saying the images "were severe enough to have altered the terms" of her employment. (*Criswell v. Intellirisk, 11th Cir.*)

The lesson: Don't take a casual attitude toward employees viewing inappropriate web sites on their computers. Courts are clamping down on companies that don't do enough to protect employees from their co-workers' online pornography.

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