community BANKER

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Welcome to the November/ December 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:

Community Bankers' Advisor
c/o Olson & Burns P.C.
P.O. Box 1180
Minot, ND 58702-1180

olsonpc@minotlaw.com

Also, visit our web site at:
www.minotlaw.com

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.

YOU ARE ASKING . . . . .

Q: Mrs. Jones came in with a check payable to Doris and Charles Jones - it had an "and" for the payees, but he is deployed. We let Doris alone endorse the check by having her write "for deposit only to the named payees" and then the check was deposited into Doris and Charles's joint account. Is this appropriate?
A: We know that we harp and harp about getting *both* payee signatures with an item that has joint payees with an "and." We still want you to follow that rule; however, there *is* an exception to that rule and that is where a check payable with an "and" is to payees (A) who have a joint account and, (B) the check is *deposited* into that joint account. Under N.D.C.C. § 41-04-17 (U.C.C. § 4-205), if the check is payable jointly ("and") rather than in the alternative ("or") and is to be deposited to a joint account in the name of the check payees, neither or the payees would have to endorse the check. Your bank could accept it for deposit without endorsement and still be protected with charge-back rights and the rights of a holder in due course. *See also* N.D.C.C. § 41-04-26 (U.C.C. § 4-214). Also, check the wording of the deposit agreement covering the Jones account. Some newer deposit agreements include reciprocal or shared powers of attorney between the joint owners permitting *either* of the owners to endorse checks for the other joint owner for the purpose of depositing jointly-payable checks.

Q: We know to file a Suspicious Activity Report when there's forgery or fraud or things like that. What about when things happen with a safe deposit box that make us suspicious? We don't actually know what box renters keep in their boxes, but we have one customer who seems to have a lot of cash every time he visits his safe deposit box.

O&B ATTORNEYS

OLSON & BURNS P.C.
17 FIRST AVENUE S.E. • P.O. BOX 1180 • MINOT, NORTH DAKOTA 58702-1180
TELEPHONE (701) 839-1740 • FACSIMILE (701) 838-5315 • E-MAIL: olsonpc@minotlaw.com

A: That's a good question because customers don't tell banks what they keep in their safe deposit boxes, and banks don't ask. However, sometimes there is something that rouses the suspicion of the bank. We are aware of Suspicious Activity Report filings where the owner of the safe deposit box brings in a big-dollar amount of one, five, and ten dollar bills, exchanges them for fifty or one hundred dollar bills, and then goes to his safe deposit box. We have read of Suspicious Activity Report filings where box owners carrying briefcases have made *frequent* visits to a large safe deposit box when there is no apparent business reasons for such frequent trips. Generally, we understand that Suspicious Activity Report filings connected with safe deposit boxes typically, but not always, involve cash that turns up in another part of the bank (your customer visits the box and then comes to the teller with a lot of cash, or vice versa) and usually involve frequent visits to the safe deposit box.

ARTICLES 3 & 4 OF THE UCC A QUICK REVIEW OF EVERYDAY ISSUES

Q1: The authorized signature of XYZ Corporation on a check is the signature of Pete Smith, Treasurer, and John Jones, Secretary. If a check comes through with only Pete Smith's name on it, is this properly payable?

A. Yes, because Pete Smith's signature is not a forgery.

B. No, because the check also needs to be signed by John Jones.

C. Yes, because Pete Smith's signature is neither a forgery nor is it unauthorized.

A: The correct answer is B. If the signature of more than one person is *required* to constitute the authorized signature of an organization, the signature of the organization is deemed to be "unauthorized" if one of the required signatures is missing. N.D.C.C. § 41-03-40 (U.C.C. § 3-403).

Q2: One reason a customer may be held liable for a forgery on his account is if the customer "ratifies" the transaction. "Ratification" is a retroactive acceptance or approval of the unauthorized signature by the person whose name is forged. Ratification may be found from:

A. The customer's behavior, such as a decision not to report the forgery to the police.

B. The customer's statements, such as "The forger is my granddaughter and so I don't intend to make a claim against the bank."

C. Neither A nor B.

D. Both A and B.

A: The correct answer is D. The last sentence of N.D.C.C. § 41-03-40(1) (U.C.C. § 3-403(a)) allows an unauthorized signature to be ratified. Ratification is a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements.

Q3: If a payor bank, the bank upon which a check is drawn, settles for an item (other than a documentary draft) that is presented other than for immediate payment over the counter before midnight of the banking day of receipt, it may revoke the settlement and recover the settlement if, before it has made "final payment" and before its "midnight deadline," it either: (1) returns the check or (2) sends written notice of dishonor or nonpayment if the item is unavailable for return. A payor bank's "midnight deadline" is:

A. Midnight of the banking day following the banking day that it is presented with a check for payment. For example, if the bank receives a check for payment on Wednesday morning – the first "banking day" – it has until midnight on Thursday – the next "banking day" – to return the check.

B. Midnight of the banking day three banking days after it is presented with a check for payment. This gives the bank time to review and catch suspicious items. For example, if the bank receives a check for payment on Wednesday morning – the first "banking day" – it has until midnight on Monday – the third "banking day" – to return the check.

A: The correct answer is A. The "midnight deadline" is defined as "midnight on its next banking

day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later." N.D.C.C. § 41-04-04(1)(j) (U.C.C. § 4-104). "Banking day" is defined as "the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions." N.D.C.C. § 41-04-04(1)(c). Note that under this definition, Saturday is not considered a banking day if the bank is open for only limited services, like receiving deposits and cashing checks, but with the loan, bookkeeping, trust, and other departments closed. For those banks that *are* open for substantially all business activities on Saturday, Reg. CC § 229.30(c)(2) contains an exception to the midnight deadline so they are not required to return checks by midnight on Saturday. It's recognized that very few, if any, banks process checks on Saturday evening.

Q4: Generally, a customer may stop payment on an item drawn on his account by describing the item with reasonable certainty and in a time and manner that gives the bank a reasonable opportunity to act on it. The stop payment order is effective for:

A. One year, but is wholly ineffective for any time period unless the stop order is made in writing.

B. Six months, but the stop order lapses after fourteen days if the original order was oral and was not confirmed in writing within that fourteen-day time period.

C. Two weeks, whether the stop order was oral or written.

A: The correct answer is B. Under N.D.C.C. § 41-04-34(2) (U.C.C. § 4-403), a stop-payment order is effective after the order, whether written or oral, is received by the bank and it has a reasonable opportunity to act on it. If the order is written it remains in effect for six months from that time. If the order is oral it lapses after 14 days *unless* there is written confirmation. If there is written confirmation within the 14-day period, the six-month period dates from the giving of the oral order. A stop-payment order may be renewed any number of times by written notice given during a six-month period while a stop order is in effect. A new stop-payment order may be given after a six-month period expires, but that notice takes effect from the date given. When a stop-payment order expires, it is as if the order had *never* been given, and the payor bank may pay the item in good faith under N.D.C.C. § 41-04-35 even though a stop-payment order had once been given.

Q5: Generally, a bank may pay or certify checks drawn by its deceased customer for ten days after the date of the customer's death, unless it receives an order to stop payment from a person claiming an interest in the account. True or False?

A. True, even if the bank knows about the death, and even if the bank is the check payee.

B. False, because upon the death of the customer, the check is immediately no longer properly payable.

A: The correct answer is A. Under N.D.C.C. § 41-04-36(2) (U.C.C. § 4-405), there is a ten-day window after death during which a bank may continue to pay checks (as distinguished from other items) *even though* it has notice of the death. The purpose of this provision is to permit holders of checks drawn and issued shortly before death to cash them without having to file a claim in probate. The justification is that these checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the holder, the executor, the court and the bank. This section doesn't prevent a personal representative from recovering the payment from the holder of the check. It is not intended to affect the validity of any "deathbed gifts" or other transfers made in anticipation of impending death, but merely to relieve the *bank* of liability for the payment. Any surviving relative, creditor or other person who claims an interest in the account may give a direction to the bank not to pay checks, or not to pay a particular check. Such notice has the same effect as a direction to stop payment. The bank has no responsibility to determine the validity of the claim, but anyone who has an interest in the estate,

including the person named as personal representative in a will, even if the will has not yet been admitted to probate, is entitled to claim an interest in the account.

EMPLOYMENT LAW TRYING TO STAY OUT OF COURT

The good news is that North Dakota's economy is booming, people are pouring in, and banks are hiring. The bad news is that some of those hires won't work out, problems might erupt, and you may get sued. If your bank follows a few sensible guidelines with all employees, it may avoid some common employment-related lawsuits or at least increase its likelihood of winning them.

1. Do background checks. Has your applicant recently been convicted of crimes involving fraud, dishonesty or violence? Your business is handling money and dealing with people, so fraud, dishonesty, or violence should be disqualifying.

2. Give accurate and adequate references for former employees. As a general rule, provide "neutral" references for former employees, such as confirmation of the time of employment and her final pay rate. There's an exception to the neutrality rule, such as an employee fired for violently attacking a co-worker. That person may be a future risk somewhere else, and withholding that information from another business can expose your bank to liability. Ideally, if you do intend to provide a more detailed response to a request for references, get a release from the former employee in advance.

3. Follow progressive discipline policies. The most common employment law claim is that the boss treated someone differently – based on sex, race, age or other "protected" distinctions – than someone else for the *same* conduct. Avoid or reduce these kind of claims by consistently applying progressive discipline throughout the bank.

4. Keep personnel policies and manuals up to date. The law changes. Don't base your decisions on a policy written for year-2000 laws. Ideally, review your policies and update your manual every three years. If the law changes in a way that affects a particular policy, such as the way the Family Medical Leave Act changed a couple of years ago, update your employee handbook.

5. Coordinate responses. An employee can make a claim with the EEOC, the Department of Labor, and who knows what other agency. Coordinate your responses to different entities – don't have various versions to different places, which can equal inconsistencies that you can't explain to a jury.

6. Don't accidentally make an oral contracts. A casual comment like "Oh, don't worry, you'll have this job as long as you want it," may create a claim that takes the employee out of North Dakota's "at-will" employment. Make sure supervisors know not to make comments that offer terms and conditions of employment that they shouldn't.

7. Take harassment complaints seriously. The best defense in a harassment case that winds up in court is a policy that forbids harassment of any type. But, having a good policy isn't enough. It must be followed and enforced consistently. Harassment complaints should be quickly investigated and appropriate discipline should be imposed.

8. Comply with record-keeping requirements. Know which employment documents you must keep, and make sure you can easily get hold of them, whether that's in paper or in electronic format.

9. Don't ignore red flags. A disciplined employee's repeated requests to view her disciplinary or personnel file, his angry objections to annual evaluations, and her lawyer-like notes to her supervisor are signs that an unhappy employee may be thinking of legal action. Seek legal advice and take steps to prepare for a possible claim. You have rights, too.