community BANKER

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Welcome to the March/ April 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.

YOU ARE ASKING . . . .

Q: XYZ, LLC wants to open an account with two signatures required on all of its checks. If we do so, is it up to the bank to watch their checks to make sure both signatures are on them? Or is it XYZ's responsibility to enforce the two-signature requirement?

A: N.D.C.C. § 41-03-40(2) (U.C.C. § 3-403) provides:

> If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is missing.

In plain English, if your bank pays a check that has only one signature when two signatures are required, you have just paid an unauthorized item. It's a good internal control for a business, but the good news is that your bank doesn't have to take on the responsibility and effort of riding herd on a customer's checks. Some banks simply don't allow accounts to be opened with two signatures required. Other banks clearly and specifically state in their deposit agreement that a two-signature requirement will not be monitored by the bank, the bank is not agreeing to the "two signatures required", and that it's up to the customer to keep an eye on the checks. A third party at the business who balances the checkbook can more easily do this than a bank that processes thousands every week.

Q: Suppose a customer brings a check into the bank, in person, to a teller, and requests payment but the check is NSF? Should the teller stamp the check NSF and then return it to the customer? Was this check considered "presented"?

A: Yes. Over-the-counter presentment can be made for cash or acceptance by the person entitled to enforce the instrument, or presentment can be made through normal methods by a collecting bank on behalf of the person entitled to enforce the instrument.

If Millie, the payee, or someone whom Millie has endorsed the item over to, brings the check in to your bank, upon which it is drawn, to cash it and (a) there are not sufficient funds in the account at that time, or (b) there is a stop payment, or (c) for whatever reason the check is not payable, the nonpayment and reason why should be noted on the check. The check should then be handed back to the customer. See N.D.C.C. § 41-03-58(2)(c) (U.C.C. § 3-501).

Q: I know that a bank is not obliged to pay check more than six months old, but please clarify just how a bank may handle stale dated checks.

A: To pay or not to pay, that is the question and N.D.C.C. § 41-04-35 (U.C.C. § 4-404) gives the payor bank decision-making power. This statute is one sentence long and states that

> A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

This UCC provision is meant to protect the payor bank because the date is not in the MICR line and often isn't noticed prior to payment of the check. So, your bank may either (a) pay the check and be protected by N.D.C.C. § 41-04-35, or (b) decline to pay the check and be protected by N.D.C.C. § 41-04-35. Regarding option (a), remember the requirement that the payment be "in good faith." Generally, that means the bank can't have any reason to know its customer does not want the check paid.

Remember the General Intangible!

As slogans go, "Remember the General Intangible!" isn't as energizing or memorable as "Remember the Alamo!", but it's more practical for today's lender. You may have noticed that the usual commercial security agreement form generated by your software package includes a number of boxes for the creditor to mark in order to describe the collateral in which the debtor is granting your bank a security interest. The boxes normally include broad, easy-to-understand types of collateral such as "inventory," "farm products," crops and proceeds of crops," "equipment," and "accounts." We know what falls into those categories; personal property like tires held in inventory or equipment like a forklift are easily understood.

The boxes also include a class called "general intangibles" and that's probably less ordinary and familiar. There are other, valuable items that are "intangible" and may seem obscure or ambiguous. These assets are generally defined by the UCC as "general intangibles" and include *any* form of personal property, including rights (meaning money) recoverable in legal claims, except

> "accounts, certificates of deposit, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software."

N.D.C.C. § 41-09-02(1)(rr). Article 9 of the UCC no longer includes a separate category for "contract rights," which are now primarily incorporated into the secured intangibles category. In other words, the

class of assets considered a general intangible is really a residual category of collateral including types of personal property not covered by the other more easily-recognizable categories. General intangibles can be valuable but overlooked: Valuable because partnership and limited liability company interests, various forms of licenses, including liquor licenses, publication rights, and copyrights and trade names have all been held to be general intangibles. They're often overlooked because the category is defined negatively: a general intangible is the remainder of all personal property not otherwise excluded. Because of that, many lenders have gotten the shaft because they either misclassified a type of property or did not recognize the full spectrum of security interests created by a grant of a security interest in general intangibles. Those lenders didn't assert a claim to the liquor license or the partnership interest that they were entitled to and thereby lost security.

Lenders should be aware of the many different forms of personal property falling under the blanket of "general intangibles." Some of the more potentially valuable types of personal property assets included as general intangibles and recognized by courts are:

* An assignment of rights to tax refunds or anticipated tax returns
* Liquor licenses
* Patents and copyrights
* Rights of a franchisee under a franchise agreement, such as trademarks, the trade name, and the goodwill it represented
* Literary rights
* Proceeds of an impending or future lawsuit (except for commercial torts) or a legal settlement
* Commercial fishing licenses
* Partnership interests in a general or limited partnership and limited liability company membership interests
* Contract rights and rights of performance, including the rights to receive funds held in an escrow account
* Rights to collect under an annuity contract

Clearly, the category "general intangibles" casts a wide net over kinds of personal property. If you are faced with a type of personal property that cannot easily be classified, consider whether the property may be a general intangible under Article 9 for security purposes. In order to properly perfect a security interest in general intangible, you *must* file a financing statement. Be aware that, as always, there is a caveat. Other laws or statutes under Article 9 *may* render certain kinds of intangible property outside the governance of the UCC. Because of that, if your bank wants to acquire a perfected security interest in a very specific and perhaps atypical type of property, it may want to seek competent counsel to determine whether or not the grant of a security interest in general intangibles alone will be sufficient to include the property in question. That said, simply checking the box by the general intangibles description in a security agreement might very well provide a valuable and perhaps overlooked asset to secure repayment of a loan. So the next time you're sitting down with a borrower, "Remember the General Intangible!"

Bankers should know about:

Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 190 L. Ed. 2d 650 (U.S. 2015) (Issued January 13, 2015)

On February 23, 2007, Larry and Cheryle Jesinoski refinanced their home in Eagan, Minnesota, by borrowing $611,000 from Countrywide Home Loans, Inc.; they used the loan proceeds to pay off multiple consumers debts. Among the stack of papers that borrowers sign at the closing is a document in which the borrowers acknowledge that the lender has provided the disclosures required by the Truth in Lending Act (TILA). At the loan closing, Larry and Cheryle each signed disclosures acknowledging full lender compliance with the pertinent TILA requirements: "'receipt of two copies of NOTICE OF RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement."

Fast forward *exactly* three years to the day, on February 23, 2010, Countrywide receives a letter

from the Jesinoskis stating that they intend to rescind the loan At the time, the Jesinoskis were in default. Within 20 days after the notice of rescission, the lender replied to the Jesinoski's notice and denied that they had a right to rescind. Fast forward one year - on February 24, 2011, four years and one day after the loan closed, the Jesinoskis filed their "Complaint for Rescission, Damages & Jury Trial", asserting that while Countrywide had given them the required disclosures at closing, it had failed to provide the required *number* of copies of the disclosures.

The specific dates set out above matter because the right of rescission that TILA creates expires three years after the date of completion of the transaction. The District Court entered judgment on the pleadings for Countrywide, concluding that a borrower can exercise the Truth in Lending Act's right to rescind a loan only by filing a lawsuit within three years of the date the loan was consummated. The Eighth Circuit agreed, holding that the suit was untimely because it was not filed within three years after the date of the loan transaction. The Jesinoskis appealed to the U.S. Supreme Court.

The dispute heard by the U.S. Supreme Court was whether the Jesinoski's lawsuit was timely: does the borrower have to file suit within the three years or is it enough simply to send the letter? The Court unanimously held that a borrower exercising his right to rescind under the Truth in Lending Act need only provide written notice to his lender within the 3-year period, *not* file suit within that period. The judgment was reversed and the case remanded back to the Eighth Circuit.

Apart from being infuriating in its facts, the Jesinoski decision is important to lenders who provide residential loans to consumers, and is a significant change in law for North Dakota lenders. Prior to this decision, the Eighth Circuit had held that the TILA *did* require borrowers to file a lawsuit, not just notice of rescission, within three years of consummation of the loan.
