
ASK KENNEDY

August 9, 2023

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DISCLAIMER: THESE MATERIALS PROVIDE GENERAL INFORMATION AND ARE INTENDED FOR EDUCATIONAL PURPOSES ONLY. THESE MATERIALS DO NOT PROVIDE, NOR ARE THEY INTENDED TO SUBSTITUTE FOR, LEGAL ADVICE.

Special Guest: NDBA Chair, Pete Jahner

Elected in June as the NDBA Chair-Elect, Peter Jahner serves as the newest member of the NDBA Board of Directors. For the last 30 years, Pete has been the president of Kirkwood Bank and Trust located in Bismarck. Pete joins the Board of Directors with many years of experience in the banking industry and we look forward to his contribution to NDBA in the future. Welcome, Peter!

Member Questions

Question #1: What are the consequences of failing to register a business that is not organized in the State of North Dakota, but who conducts business in the state, as a foreign entity?

Response: Foreign corporations are prohibited from transacting business in North Dakota until a certificate of authority has been procured from the Secretary of State. N.D.C.C. § 10-19.1-134(1).

Section 10-19.1-142 of the North Dakota Century Code articulates the particular rights of foreign corporations transacting or “doing business” in the state without a certificate of authority:

1. A foreign corporation transacting business in this state **may not maintain** any claim, action, suit, or proceeding in any court of this state until it possesses a certificate of authority.
 2. The failure of a foreign corporation to obtain a certificate of authority **does not...prevent the foreign corporation from defending** any claim, action, suit, or proceeding in any court of this state.
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Question #2: What is the procedure for a Sheriff's Levy when serving a garnishment to a bank and are there any specific rules for the delivery of this kind of levy?

Response: Below is a section of the North Dakota Century Code dealing the service of a Notice of Levy which states that it must be served in the same manner as a summons is served, and below that is a portion of Rule 4 of the North Dakota Rules of Civil Procedure which lays out how a summons may be served on a corporation. Service of a Notice of Levy is not the same as service of a Garnishment Summons, because the Garnishment Statutes actually require a different way of service which is much more restrictive than a regular summons.

NDCC Service of Notice of Levy

28-21-12. Notice of levy - Service - Contents. In all cases of levy upon personal property, the sheriff or other officer must serve the notice of levy in the same manner as a summons is served in accordance with the North Dakota Rules of Civil Procedure. Such notice must have written or printed upon its face the further notice to the debtor, that if exemptions are claimed or demanded, such claim must be made within ten days after service of notice.

Rule 4 of the North Dakota Rules of Civil Procedure – Personal Service on a Corporation.

(2) How Service Made Within the State. Personal service of process within the state must be made as follows:

(D) Serving a Corporation, Partnership, or Association. Service must be made on a domestic or foreign corporation or on a partnership or other unincorporated association, by:

(i) delivering a copy of the summons to an officer, director, superintendent or managing or general agent, or partner, or associate, or to an agent authorized by appointment or by law to receive service of process on its behalf, or to one who acted as an agent for the defendant with respect to the matter on which the plaintiff's claim is based and who was an agent of the defendant at the time of service;

(ii) if the sheriff's return indicates no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons at any office of the domestic or foreign corporation, partnership, or unincorporated association within this state with the person in charge of the office; or

(iii) any form of mail or third-party commercial delivery addressed to any of the foregoing persons and requiring a signed receipt and resulting in delivery to that person.

Question #3: When implementing dormant account fees on deposit accounts, does sending a change in terms (new disclosure) to customers satisfy the “if contracted for” requirement that N.D.C.C 47-30-2.31 outlines?

Response: North Dakota has adopted the Revised Uniform Unclaimed Property Act as Chapter 47-30.2, N.D.C.C. The Act permits a “holder” (defined as a person obligated to hold for the account of, or to deliver or pay to, the owner, property subject to Ch. 47-30.2) to deduct a dormancy charge from property required to be paid or delivered to the administrator if (a) an enforceable written contract between the holder and the apparent owner authorizes imposition of the charge for the apparent owner’s failure to claim the property within a specified time; and (b) the holder regularly imposes the charge and regularly does not reverse or otherwise cancel the charge. See N.D.C.C. §§ 47-30.2-01(16) and 47-30.2-31(1). The dormancy charge may only be charged until the respective property is deemed abandoned. N.D.C.C. § 47-30.2-31(2).

Regulation DD requires disclosure of account fees and contains specific requirements for changes-in-terms. See 12 C.F.R. § 1030.4(b)(4) and 12 C.F.R. § 1030.5(a). However, banks are not required to disclose incidental fees, such as fees associated with state escheat laws, under section 1030.4 of Regulation DD. See Comment 2 to 12 C.F.R. § 1030.4(b)(4).

Therefore, whether the bank can send out a change-in-terms to implement a new dormancy fee will be dependent upon the terms and conditions of the bank’s existing deposit account (i.e., provisions regarding amendments/modifications/changes-in-terms).

Question #4: What perfects a bank’s interest when taking hopper bins as collateral? Is the UCC farm blanket enough or do banks need to be taking a fixture filing as well?

Response: The question of whether bins are equipment or fixtures is often asked and the answer comes down to the definition of a fixture which is the following:

Section 47-01-05 - Fixtures defined

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

With that said, I think the most prudent thing is to treat the bins as both equipment and fixtures but filing your UCC-1 Financing statement naming the bins specifically and filing a fixture financing statement in the real estate records, which will require the name of the debtor, the name of the real property owner and a legal description along with the description of the bins. Lastly, if the bins are on land owned by someone else you will want to make sure that you get a severance agreement from the land-owner too.

Question #5(A): Regarding UTMA accounts savings accounts, are we allowed to close these accounts upon request – without requiring specific verbiage on the check (meaning no responsibility is held by the bank to ensure these funds are transferred over properly to another UTMA internally or externally.)

Response: The Custodian will have the power to open and close accounts. Sections 47-24.1-12 and 47-24.1-13 outline both the powers of a custodian and responsibility of the custodian.

Question #5(B): Regarding transacting individuals, both before and after age of 21 (Custodian vs. minor):

- a. **What are the requirements of the appropriate individual allowed to transact prior to age 21 (Custodian only)?**
- b. **What is the ability to transact on UTMA accounts after age 21 is reached by “minor” (Minor only)?**

Response: Be cautious with this question! Section 74-24.1-20 determines when the custodianship terminates and that can be either 18 or even 21 depending on how the property was transferred to the custodian on behalf of the minor. See Sections 47-24-05, 47-24-06, and 47-24-07.

Question #6: What, if any, is a bank’s responsibility or obligation to pay a Cashier’s Check if the check becomes lost, stolen, or destroyed?

Response: 41-03-37.1. (3-312) Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

1. In this section:

- a. "Check" means a cashier's check, teller's check, or certified check.
- b. "Claimant" means a person who claims the right to receive the amount of a check that was lost, destroyed, or stolen.
- c. "Declaration of loss" means a written statement, made under penalty of perjury, to the effect that:
 - (1) The declarer lost possession of a check;
 - (2) The declarer is the drawer or payee of the check in the case of a certified check, or the remitter or payee of the check in the case of a cashier's check or teller's check;
 - (3) The loss of possession was not the result of a transfer by the declarer or a lawful seizure; and
 - (4) The declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
- d. "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

2. A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. If a claim is asserted in compliance with this subsection, the following rules apply:

a. The claim becomes enforceable at the later of the time the claim is asserted, the ninetieth day following the date of the check in the case of a cashier's check or teller's check, or the ninetieth day following the date of the acceptance in the case of a certified check.

b. Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.

c. If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.

d. When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to subdivision a of subsection 1 of section 41-04-30, payment to the claimant discharges all liability of the obligated bank with respect to the check.

3. If the obligated bank pays the amount of a check to a claimant under subdivision d of subsection 2 and the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to refund the payment to the obligated bank if the check is paid, or to pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

4. If a claimant has the right to assert a claim under subsection 2 and is also a person entitled to enforce a check that is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or section 41-03-35.

FedNow Service, A New System for Instant Payments

The Federal Reserve recently announced that its new system for instant payments, FedNow Service, is live. Banks and credit unions can sign up and use this tool to instantly transfer money to their customers at any time. These instant payments will allow consumers and businesses to receive rapid access to their funds, receive their paychecks and use them the same day, or manage cash flows without processing delays.

For more information on this new service, visit this [website](#).

FDIC Issues List of Banks Examined for CRA Compliance

The FDIC issues a list of state nonmember banks recently evaluated for compliance with the Community Reinvestment Act (CRA), the list covers evaluation ratings assigned to institutions in April 2023. The CRA is a law intended to encourage insured banks to meet local credit needs. Mandated by Congress, the public disclosure of an evaluation and rating for each bank that undergoes a CRA examination is part of the Financial Institutions Reform, Recover, and Enforcement Act of 1989 (FIRREA).

For more information, including a list of all state nonmember banks, visit this [link](#).

FDIC Estimated Uninsured Deposits Reporting Expectations

Recently, the FDIC has noticed that some insured depository institutions (IDIs) are not reporting estimated uninsured deposits in accordance with the guidelines to the Consolidated Reports of Condition and Income. In reporting uninsured deposits, if an IDI has deposit accounts with balances in excess of the federal deposit insurance limit that it has collateralized by pledging assets, such as deposits of the U.S. Government and of states and political subdivisions in the U.S., the IDI should make a reasonable estimate of the portion of these deposits that is uninsured using the data available from its information systems.

For more details on the reporting guidelines, please visit this [link](#).

NDBA Opposition to Stablecoin Legislation

On Friday, July 21, NDBA joined the ABA and the other 50 state banking associations in submitting testimony to the Congressional Committee on Financial Services opposing a draft stablecoin bill that is expected to be voted on by the Committee in the coming days. The letter notes the NDBA’s concern that the legislation, as currently drafted, “would create a significant charter arbitrage opportunity that puts consumers at risk, disadvantages banks, and undermines financial stability.”

A copy of the letter can be found by visiting this [link](#).

Upcoming NDBA Events in 2023

NDBA has many exciting and informational events planned for 2023. Below are some special dates to mark on your calendars!

SCHOOLS

- **2023 Breaking into Banking 201: Analyzing Repayment Sources** | September 7, 2023 | Virtual Training

CONFERENCES

- **2023 Group Meetings** | September 11-14, 2023
 - **2023 Ag Credit Conference** | September 27-28, 2023 | Bismarck, ND
 - **Bank Management Conference** | February 16-17, 2024 | Scottsdale, AZ
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