
ASK KENNEDY

January 3, 2024

Topics Covered:

- Special Guest: Rick Clayburgh will discuss the highs and lows of 2023 and what he sees coming in 2024
- Member Questions
- Electronic Fund Transfer Act and Regulation E
- Federal Corporate Transparency Act and the NEW FinCen Beneficial Ownership Information Technology System – What we know so far.
- NDBA Useful Resources
- Upcoming NDBA Events and Trainings

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.

Member Questions

Question #1: Are there any state requirements for a UCC being terminated within a certain amount of days after a loan payoff if no other debt exists with the bank?

Response: Yes, North Dakota has a unique UCC statute that requires a secured creditor to terminate its financing statement if the obligation is satisfied and the secured creditor does not anticipate extending additional credit. See below:

41-09-84. (9-513) Termination statement - Remedies - Fees.

If a financing statement covering consumer goods is filed after December 31, 1973, then within one month or within ten days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value, the secured party shall file electronically in the central indexing system, a termination statement to the effect that the secured party no longer claims a security interest under the financing statement, which must be identified by file number. In other cases when there is no outstanding secured obligation and no written commitment between the secured party and the debtor to make advances, incur obligations, or otherwise give value, the secured party, unless requested by the debtor in writing to continue the filing, shall file electronically a termination statement to the effect that the secured party no longer claims a security interest under the financing statement nor under the central notice system, which shall be identified by file number. If the affected secured party fails to file a termination statement as required by this subsection within sixty days of when the secured

obligation is fully satisfied, and the debtor has not requested in writing that the filing be continued, then under section 41-09-120 the secured party is liable to the debtor for one hundred dollars and for any loss caused to the debtor by such failure. The debtor's written request for a filing to be continued may be made at any time and be effective under this section. If the affected secured party fails to file a termination statement within ten days after proper written demand by the debtor, then under section 41-09-120 the secured party is liable to the debtor for one hundred dollars and for any loss caused to the debtor by such failure.

Question #2: Should North Dakota mortgages contain a maximum lien amount?

Response: No, North Dakota mortgages should not contain a maximum lien amount because the future advance laws in North Dakota. For example, North Dakota law allows mortgages securing future advances to retain the same priority status for all future advances, regardless of whether or not the bank is obligated to make such future advances.

In Minnesota, you can lose your priority status to intervening liens unless you are obligated to make such future advances. If you make optional advances, your mortgage will still have priority for amounts actually advanced prior to the time that a later lien attaches. However, for any advances made thereafter, your security will be junior to the later lien.

It should also be noted that Minnesota requires lenders to pay a “mortgage registration tax” which is based on the amount debt secured by the mortgage. That is why Minnesota mortgages will include a maximum lien amount, so Minnesota lenders do not increase their tax liability.

Question #3: What are the flood insurance requirements for cross-collateralized loans?

Response: FDIC-supervised institutions are prohibited from making, increasing, extending, or renewing any loans secured by buildings or mobile homes located or to be located in areas identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan.

The amount of the flood insurance required is the lesser of:

1. The outstanding principal balance of the loan; and
2. The maximum amount available under the National Flood Insurance Act of 1968 (NFIA) for the particular type of property serving as collateral.

When a financial institution considers the “outstanding principal balance of the loan” to determine the amount of flood insurance required, an issue may arise if there is a cross-collateralization clause in the mortgage.

Cross-collateralization clauses provide that the real property or personal property securing a particular loan also secures all current and future indebtedness of the borrower. Therefore, the “outstanding principal balance of the loan” may change.

If the indebtedness is increased, and the outstanding balance changes, the lender should technically reevaluate the amount of flood insurance required. Failure to do so could cause the lender to fall out of compliance with the minimum coverage requirement.

Regulators have been dinging banks regarding these types of clauses when it comes to flood insurance requirements, so it is recommended you work with legal counsel to review your loan documentation and structure your cross-collateralization clauses to ensure compliance

Question #4: Should mortgages encumbering farmland contain a homestead exemption?

Response: Yes, mortgages encumbering farmland should contain a homestead exemption. The main rationale for including the homestead exemption is you never know what a court will determine to be the debtor’s homestead. For example, in a Wisconsin bankruptcy the debtor’s estate consisted of 113 acres of agricultural land and wetlands. The bankruptcy court determined that the debtor was entitled to a homestead exemption of three acres. This holding was made even though there was no permanent residential structure on the land. Consequently, having a valid homestead waiver for mortgages encumbering farmland is always best practice, this will ensure that a court cannot decide that a portion of the property is actually a homestead, and is therefore exempt.

Keep in mind, N.D.C.C. § 47-18-05.1 states that for a homestead waiver to be valid it must contain certain language printed in a *conspicuous* manner:

“I understand that homestead property is in many cases protected from the claims of creditors and exempt from judicial sale and that, by signing this contract, I voluntarily give up my right to this protection for this property with respect to claims based upon this contract”

Federal Corporate Transparency Act and the NEW FinCen Beneficial Ownership Information Technology System – What we know so far.

FinCEN published an Interagency Statement for Banks on the Issuance of the Beneficial Ownership Information Access Rule on December 21st, 2023. The agency's statement is regarding a Bank's ability to access the new Beneficial Ownership Information Technology (BO IT) System and clarified that there are no new regulatory requirements that require Banks to access Beneficial Ownership from the BO IT System or a supervisory expectation that Banks do so. However, any access to and use of the BOI obtained from the BO IT System must comply with the Corporate Transparency Act's Access Rule. For more information, click [here](#).

Electronic Fund Transfer Act and Regulation E

In December 2021, the Consumer Financial Protection Bureau updated its Electronic Fund Transfers FAQ that addresses compliance with the Electronic Fund Transfer Act (EFTA) and Regulation. The FAQs provide guidance on Regulation E's coverage and on the error resolution requirements, with a majority of the new questions forcing on person-to-person (P2P) payment providers and P2P transfers. While these FAQs helped to provide more clarity for financial institutions, they were not new obligations or requirements for those institutions, rather the interpretation of the guidelines had shifted from what it was prior to December 2021.

An electronic fund transfer (EFT) means any transfers of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for purposes of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account. Additionally, Regulation E applies to any P2P or mobile payment transaction that meets the definition of EFT, including debit card, ACH, prepaid account, and other electronic transfers to or from a consumer account. A P2P payment occurs when a consumer sends money to another person without needing to write a check, swipe a physical card, or exchange cash (ex. Venmo, Apple Pay, CashApp, etc.). Also, depending on the payment provider, a P2P payment can be from a consumer's bank account portal, prepaid account portal, or mobile application.

Under the EFTA and Regulation E, a financial institution is defined to include banks, savings associations, credit unions, and i) any person that directly or indirectly hold an account belonging to a consumer, or ii) any other person that issues an access device and agrees with a consumer to provide EFT services. Under this definition, financial institutions include providers of P2P

payments and bill payment services, as long as they directly and indirectly hold an account belonging to a consumer to provide EFT services.

Under Regulation E, any entity that is considered a financial institution has error resolution obligations in the even a consumer notifies the institution of an error. An error can include an unauthorized EFT, an incorrect EFT to or from the consumer’s account, along with other instances. When there is an unauthorized EFT, and EFT from a consumer’s account is initiated by a person other than the consumer without authority to do so, the transfer can be by a person who obtained a consumer’s access device through fraud or robbery.

When an EFT is initiated by a fraudster using stolen credentials, that is considered an unauthorized EFT based on the Regulation E definition. An example of this is when a consumer shares their debit card information with a P2P payment provider (such as Venmo or CashApp) in order to use a mobile wallet. A fraudster then hacks into the consumer’s phone and uses the mobile wallet to initiate a debit card transfer out of the consumer’s deposit or prepaid account. In this situation, all of the financial institutions, including any non-bank PCP payment provider or deposit account holding financial institution must comply with the error resolution and the liability protections for unauthorized transfers.

For additional information on Regulation E and the EFTA, please visit this [link](#).

Dangers of Mobile Remote Deposit Capture Fraud

Remote Deposit Capture (“RDC”) allows financial institutions to receive digital information from deposit documents captured at remote locations. RDC can decrease costs for banks and improve customer access to their deposits; however, the utility of RDC comes with additional risks to banks and their customers. Prior to implementing RDC, bank personnel should assess the legal, compliance, and operational risks associated with the RDC systems. For helpful FDIC guidance please visit this [link](#).

NDBA Useful Resources

Undue Influence and Vulnerable Adults | Undue influence is a form of financial abuse of the elderly and has often been referred to as “the crime of the 21st century”. The book, *Undue Influence and Vulnerable Adults* helps the reader understand options and potential consequences of proactive waivers and permissions for release of information as well as the potential importance of being able to contact family or other trusted advisors when concerns of undue influence arise. To access the book, which is available on the American Bar Association’s website, visit this [link](#).

Department of Financial Institutions Monthly Bulletins | To view a list of the North Dakota Department of Financial Institutions monthly bulletins, visit this [link](#).

Upcoming NDBA Events in 2024

NDBA has many exciting and informational events planned for 2024. Below are some special dates to mark on your calendars!

CONFERENCES

- **2024 NDBA Bank Management Conference** | February 16-17, 2024 | Westin Kierland, Scottsdale AZ
- **Washington Summit** | March 18-20, 2024 | Marriott Marquis, Washington, DC
- **2024 Dakota School of Lending** | April 2-5, 2024 | Radisson, Bismarck ND
- **2024 Tri-State Trust Conference** | April 23-25, 2024 | Delta Hotel by Marriott, Fargo ND
- **FDIC Director's College** | May 23, 2024 | National Energy Center of Excellence, Bismarck ND
- **2024 NDBA/SDBA Annual Convention** | June 3-5, 2024 | Delta Hotel by Marriott, Fargo ND

TRAINING

- **Fundamentals of Lending** | February 22, 2024 | Virtual | Register [Here](#)
- **Analyzing Repayment Sources** | March 27, 2024 | Virtual | Register [Here](#)