
ASK KENNEDY

November 1, 2023

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Member Questions

Question #1: What are the implications of the USDA CCC Lien Waiver (CCC-679) as it relates to the lien being waived? Are you subordinating your interest or are you relinquishing your security interest in the commodities all together?

Response: This situation occurs when a farmer obtains a Marketing Assistance Loan, commonly referred to as a sealed grain loan. The forms intended function is to get a lien waiver from anyone holding a UCC on the farmer, thereby allowing CCC to have a first lien position on the grain.

The pertinent language in the lien wavier form states the following:

8. The undersigned is the holder of a lien on the commodity identified above. In order for the producer identified above to pledge such commodity as collateral for a Commodity Credit Corporation ("CCC") loan, with respect to CCC only, the undersigned waives all interest in, and title to, such commodity. The undersigned agrees that the proceeds of the loan shall be disbursed (lienholder must check one of the following):

(1) To the producer.

(2) Jointly to the producer and the undersigned lienholder.

(3) Jointly to the producer and the undersigned lienholder, less \$ (a) _____ administrative offset as of (b) _____ and charges due (c) _____ (DATE)

Please see the complete form at the following [link](#).

There is limited caselaw on the subject, but in Wilton Sav. Bank v. Shuger (In re Shuger), Nos. 87-2184-D H, 87-0255, 1990 (Bankr. S.D. Iowa June 15, 1990)

the court held that the waiver relinquished and surrendered all right, title and interest in the commodity despite the bank intending for the waiver to only operate as a subordination.

However, in the years following the case referenced above the lien waiver form was modified and older versions did not contain the following limiting language: **“with respect to CCC only.”** Ag banks across the nation are also struggling with this issue. Banks should be sure to select box 8(2) as shown above, to ensure that any loan proceeds are disbursed to your bank as the lienholder and to the producer jointly.

Talk with your legal counsel about the potential benefits and protections of having your borrower sign a new security agreement and potentially filing a new financing statement if needed.

Question #2: What are your Thoughts on North Dakota Mortgages and Maximum Lien Amounts.

Response: For the most part you don’t want to use a North Dakota mortgage containing a maximum lien amount because of 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 mortgage priority 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: WARNING on Cross Collateralization Clauses see Below!

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 and the statement must be immediately followed by the date and the signature of the person to indicate that the person is specifically and knowingly waiving the exemption, which must be a separate signature:

“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”

Banking Regulators Release CRA Final Rule

On October 24, the FDIC, Federal Reserve, and Office of the Comptroller of the Currency released the final rule which modernizes how they assess compliance with the Community Investment Act (CRA). The final rule uses a new metrics-based approach to evaluate bank retail lending and community development financing.

The finalized rule would implement a new retail lending evaluation for banks with between \$600 million and \$2 billion in total assets and give them the option of evaluation under a new test for community development financing. For banks over \$2 billion in total assets, they would be evaluated under four tests: a retail lending test, a retail services and products test, a community development and financing test, and a community development services test. Also, retail services and product evaluations for banks with over \$10 billion in total assets would include digital delivery systems.

Additionally, the final rule creates new “retail lending assessment areas” for banks with more than \$2 billion in assets where the bank makes more than 150 closed-end home mortgage loans or 400 small business loans during each calendar year for the past two years. Banks that conduct 80% or more of specified retail lending activity inside of their facility-based assessment areas are exempt from the retail lending assessment area requirement.

For more information on the proposal modifications and the final rule, visit this [link](#). Also, the American Bankers Association is hosting a webinar this Friday November 3, 2023, titled “What You Need to Know about the CRA Final Rule.” To register for the webinar, please visit this [link](#).

Farm Bill Update

Every five years, Congress is tasked with drafting legislation referred to as the “Farm Bill” which addresses a wide variety of subjects including rural development, commodity programs, funding for food and nutrition assistance, trade and more. The most recent version of the Farm Bill was passed in 2018. This version of the Farm Bill contained two expiration dates: (1) the end of the fiscal year September 30, 2023; and (2) the end of the crop year December 31, 2023. Since the fiscal year expiration date has passed there will likely be a short-term extension of the 2018 Farm Bill.

What effects will an extension have on our member banks? Well, that depends on the length of the extension. If the 2018 Farm Bill is extended until the end of the year and Congress is able to get an updated Farm Bill passed by December 31, 2023, not much will change. However, further

extensions past the end of the year will make it difficult for farmers and ranchers to utilize USDA commodity programs including Price Loss Coverage and Agricultural Risk Coverage programs. Congress will likely start addressing the expiration of the 2018 Farm Bill in the coming weeks now that a new Speaker of the House has been elected. However, it is likely that the 2023 Farm Bill will not be completed until December of this year at the earliest.

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

ABA Check Fraud Claim Directory | This directory provides contact information to banks needing to file a check warranty breach claim with another financial institution. To access the directory, your bank must participate by providing its fraud contacts. To submit contacts for your bank, visit this [link](#).

CFPB and New Data Sharing Rule

On October 19, 2023, the Consumer Financial Protection Bureau (“CFPB”) released a Notice of Proposed Rulemaking. The proposed rule deals with personal financial data rights, which could potentially change the way financial institutions hold and distribute customer-generated data. Broadly speaking, the proposed rule would require financial institutions to:

- make data related to transactions and accounts available to consumers and authorized third parties;
- establish conditions for third parties when accessing a consumer’s data, including privacy requirements; and
- provide standards for data access.

For more information about the new data sharing rule and information regarding the comment period please see the following [link](#). Also, the ABA hosted a podcast titled “Digging into the CFPB’s Section 1033 data-sharing proposal” you can listen to the podcast by following this [link](#).

Report on NDBA & NDBA Services Board Meeting

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!

CONFERENCES

- **Bank Management Conference** | February 16-17, 2024 | Westin Kierland, Scottsdale AZ
- **2024 Tri-State Trust Conference** | Delta Hotel by Marriott, Fargo ND
- **Washington Summit** | March 18-20, 2024 | Marriott Marquis, Washington, DC
- **2024 NDBA/SDBA Annual Convention** | June 3-5, 2024 | Delta Hotel by Marriott, Fargo ND

TRAINING

- **2023 Effective Leadership** | November 28-29, 2023 | Bismarck, ND | Register [here](#)