
ASK KENNEDY

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Topics Covered:

- Member Questions
- What is a Motion for Use of Cash Collateral and why is it Important to Banks?
- CFPB Overdraft Proposal Exempts Small Banks
- Community Reinvestment Act Litigation
- President Biden’s Veto of CFPB’s Section 1071 Final Rule
- New Minnesota Earned Sick and Safe Time Law
- 2024 Washington Summit
- NDBA Useful Resources
- Upcoming NDBA Events and Trainings

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Member Questions

Question #1: Could you provide the definition for North Dakota state law regarding refinancing?

Response: North Dakota Statutes don’t address the difference between modifications and renewals. However, there is a general concept under the laws of the State of North Dakota called “Novation”. Novation is the replacement of one contract for another and that is where the terms of loan documentation come into play. It is important to correctly identify within your document system if the note is modifying or renewing, or if it is refinancing the indebtedness. Minnesota, by contrast, statutorily identifies the difference between renewals and modifications in its mortgage registration tax statutes.

Question #2: We have a commercial customer who was incorporated when we made the loan, thus all our documents were initiated as such. Subsequent to origination and prior to paying off the loan, the owners changes their legal structure from a corporation to an LLC. Are we still protected under our original loan and security agreement/mortgage? Do we need to take action to refinance the loan and perfect into the new entity?

Response: When a debtor changes its name or entity, a creditor runs a risk of losing its priority for future advances and collateral acquired four months after the name change if the change in name makes the creditor's UCC Filing seriously misleading. A creditor's UCC Filing becomes seriously misleading if a third-party search of the Secretary of State's filing system, under the debtor's correct legal name, will not show the initial creditor's filing. Mortgages on the other hand attached to the real estate and should generally maintain their priority from the date of filing regardless of the change in name or ownership structure of the mortgagor. Note, however that future debt modifications or extensions to a borrower with a different ownership structure might affect the mortgage's ability to properly collateralize the indebtedness.

It might be most prudent to do a search of the Secretary of State's filing system for the new debtor's name to make sure that there are no other filings and to file not just an amendment to your original filing but to also file a new financing statement if the name change happened more than 4 months ago.

If the borrower is a whole new entity you may need to have the new entity assume the indebtedness of the old entity, with an assumption agreement and you may need to modify your current loan documents to change the name of your borrower/grantor/mortgagor and adjust any guaranties as necessary to reflect the new borrower's indebtedness.

What is a Motion for use of Cash Collateral and why is it Important to Banks?

We are fast approaching another planting season and if your bank has any troubled agricultural loans, bankruptcy may be on the horizon. When filing for bankruptcy, agricultural borrowers typically utilize Chapter 12 of the Bankruptcy Code specifically designed for family farmers.

If your agricultural borrower is contemplating filing a Chapter 12 Bankruptcy, they will likely also file an "emergency motion for the use of cash collateral" in conjunction with their petition. These motions are common in agricultural bankruptcies because agricultural borrowers will need to utilize cash collateral to plant crops for the upcoming season. If you are anticipating that a chapter 12 bankruptcy may be filed prior to this upcoming season, we suggest that your bank review and prepare the following:

1. Prepare a cashflow analysis.
2. Evaluate collateral values and get updated appraisals.
3. Request a budget from the borrower; and

4. Determine whether your bank is over or under secured, and if under secured determine how under secured your bank is.

Accomplishing the above-listed actions is critical for any troubled agricultural loans because motions for use of cash collateral are heard quickly, sometimes within 14 days after they are served. Before approving a cash collateral motion, the debtor will have to prove that your bank is adequately protected, meaning their use of the cash collateral will not impair your collateral position. If your collateral evaluations clearly show that the use of the cash collateral will impair your likelihood of recovery, the bankruptcy court can require adequate protection payments which consists of the following:

1. Requiring the trustee to make a cash payment or periodic cash payments to your bank;
2. Providing your bank with an additional or replacement lien on unencumbered assets to the extent that the use of your cash collateral will result in a decrease in value of the property;
3. Such other relief deemed equitable by the Bankruptcy Court.

The Bankruptcy Code provides these adequate protection incentives to secured parties so that the debtor can continue to operate its business, without which it would likely cease to operate and be forced to liquidate all of its assets. That is why a in depth understanding of these principles and the leverage your bank has at the outset, is critical to negotiate a favorable agreement relating to the use of cash collateral, which may prove advantageous throughout the pendency of the bankruptcy proceeding.

CFPB Overdraft Proposal Exempts Small Businesses

On January 17, 2024, the Consumer Financial Protection Bureau (“CFPB”) proposed a rule to rein in excessive overdraft fees, charged by financial institutions with over \$10 billion in assets. The proposed rule will close the Truth and Lending Act loophole which exempts overdraft lending services from the disclosure requirements found in the Truth and Lending Act and other consumer protection laws.

The CFPB states the Truth and Lending Act loophole must be closed because when it was created by the Federal Reserve Board in 1969, overdraft fees were used infrequently and were not the “major profit driver” that they are today. The proposed rule would require financial institutions, with more than \$10 billion in assets under management, to treat overdraft loans like credit cards and require them to provide clear disclosures and other protections.

Finally, the proposed rule would allow financial institutions to charge a fee in line with their costs or in accordance with an established benchmark. The CFPB has proposed benchmarks of \$3, \$6, \$7, or \$14, but is still seeking comment on what the appropriate amount should be.

For more information please see the attached [link](#)

Community Reinvestment Act Litigation

On February 5, 2024, various trade associations, including the American Bankers Association, and the Taxes Bankers Association, filed a lawsuit against the Federal Reserve, FDIC, and OCC for allegedly exceeding their authority in respect to their recent amendments to the Community Reinvestment Act (“CRA”) rules. The lawsuit seeks to vacate the Final Rule and seeks a preliminary injunction pausing implementation and enforcement of the new rules while the case is pending.

The Plaintiffs in this suit agree that the CRA needs to be modernized but argue that the vast changes to the CRA promulgated by the Final Rule will have unintended consequences, which directly contradict the purpose of the CRA. For example, the new retail lending tests and the new retail lending assessment areas could create disincentives for banks to continue serving certain communities.

The entire complaint can be found at the following: [link](#).

President Biden’s Veto of CFPB’s Section 1071 Final Rule

This summer, Congress introduced joint resolutions disapproving the CFPB’s implementation of the small business data collection and reporting final rule under section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Among several banking and credit union trade associations, the ABA expressed support for the joint resolution to overturn the CFPB’s Final Rule by stating privacy concerns along with compliance burden which would result from the rule.

In December 2023, President Biden vetoed the joint resolution, and on January 10, 2024, the Senate voted on whether to override the President’s veto but did not reach the two-thirds majority vote.

Despite being unable to overturn the President’s veto, the Final Rule is still tied up in litigation. On October 26, 2023, a federal district court in *Texas Bankers Association v. CFPB* extended the injunction issued by the lower court, which prohibited the enforcement of the Final Rule. The United States Supreme Court is also deciding a similar case in *Community Financial Services Association v. CFPB*, which the Supreme Court is expected to rule on in the coming months.

New Minnesota Earned Sick and Safe Time Law

For our member banks with branches in Minnesota, please be aware that beginning January 1, 2024, Minnesota’s Earned Sick and Safe Time (“ESST”) law will change. “Sick and Safe Time” leave is paid leave employers must provide to employees in Minnesota that can be used for the following circumstances: (1) when an employee is sick, (2) to care for a sick family member, or (3) to seek assistance if an employee or their family member has experienced domestic abuse.

All Minnesota bank employees are eligible for sick and safe time leave as long as the employee works at least 80 hours a year and are not independent contractors. Under the new law, Minnesota employees will earn one hour of sick and safe time for every 30 hours worked, in an amount not to exceed 48 hours per year, unless otherwise agreed to by the employer.

The new law also requires Minnesota employers to:

1. include the total number of earned sick and safe time hours accrued and available for use, as well as the total number of hours used, on earning statements provided to employees at the end of each pay period;
2. provide employees with notice prior to January 1, 2024, or the start of employment, whichever is later, in English or the employee’s primary language, informing them about earned sick and safe time; and
3. include a sick and safe time notice in the employee handbook if the employer has an employee handbook.

For more information on Minnesota’s new ESST law, please visit this [link](#)

2024 Washington Summit

Hosted by the American Bankers Association, the 2024 Washington Summit in Washington, D.C. on March 18-20, gives our members the opportunity to meet with members of Congress and regulators. North Dakota congressional leaders, Senator John Hoeven, Senator Kevin Cramer, and Representative Kelly Armstrong will be available to meet and answer questions our members have.

At this year’s summit, we will discuss the following critical items with our representatives:

Credit Union Taxation: Credit Union taxation has recently garnered the attention of many legislators, including Maxine Waters, the ranking member of House Financial Services Committee. The recent attention is a direct result of alleged discriminatory lending practices of Navy Federal Credit Union, the largest credit union in the United States. The NDBA will take this opportunity to discuss the merits and need for credit union taxation during the 2024 Washington Summit.

Central Bank Digital Currency: Central Banks around the world are testing and even piloting Central Bank Digital Currency (“CBDC”) technology. The NDBA strongly opposes the

implementation of a CBDC here in the United States and will continue to raise our concerns with our representatives and detail the negative impacts a CBDC could have on our member banks while attending the Washington Summit.

The SAFER Bank Act: The Secure and Fair Enforcement Regulation Banking Act (“SAFER”) this legislation would provide banks with a safe harbor that provide financial services to state sanctioned cannabis businesses, allowing them to shift away from cash only sales, which promotes public safety for the communities in which these businesses operate.

ACRE Tax Credit: The Access to Credit for our Rural Economy Act (“ACRE”) is designed to make it easier for farmers, ranchers, and rural homeowners to access low-cost credit. Specifically, ACRE grants community banks the same tax-exempt status on certain earned interest that already applies to farm credit institutions, which will give agricultural borrowers and rural homeowners access to lower interest rates. The American Bankers Association estimates that passing this bill would expand access to affordable agricultural and home loans to over 4,000 rural communities and save family farmers well over \$400 million in annual interest expenses.

Credit Card Competition Act of 2023: The NDBA and every other state banking association strongly opposes this bill which, if passed, will result in fewer credit card options for consumers, greater threats to consumer data and privacy, weakened community banks, and the disappearance of card rewards programs.

Regulatory Overreach: The NDBA will also take this opportunity to discuss with our representatives the vast and far-reaching regulatory overreach which has become prevalent under the current administration.

Additional Items: Please feel free to email Tracy Kennedy at Tracy@NDBA.com or Rick Clayburgh at rick@ndba.com if you have any other items you want us to discuss with our representatives at the upcoming Washington Summit.

We encourage all members to attend the Washington Summit. For more information on the conference or how to register, 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
- **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
- **2024 Ag Credit Conference** | October 2-3, 2024 | Hilton Garden Inn, Fargo ND

TRAINING

- **Fundamentals of Commercial Lending** | February 22, 2024 | Virtual | Register [Here](#)
- **Analyzing Repayment Sources** | March 27, 2024 | Virtual | Register [Here](#)
- **Dakota School of Lending Principals** | April 2-5, 2024 | Bismarck, ND | Register [Here](#)
- **Learn the Language of Self-Leadership** | April 9 – May 14, 2024 | Virtual | Register [Here](#)
- **2024 New Account Documentation and Compliance** | April 24-25, 2024 | Fargo/Bismarck, ND | Register [Here](#)
- **2024 FDIC Directors' College** | May 22, 2024 | Bismarck, ND | Register [Here](#)
- **2024 Dakota School of Banking** | June 9-14, 2024 | Jamestown, ND | Register [Here](#)
- **2024 Effective Leadership** | October 15-16, 2024 | Bismarck, ND | Register [Here](#)