

community BANKER

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Welcome to the May/June 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.

LEGISLATIVE SUMMARY

The North Dakota Legislature was busy once again, introducing 939 bills and resolutions and passing 534. We took one for the team and waded in; below are some that may be of interest to banks.

House Bill 1189 - Relating to methods to confirm or renew an oral stop payment order; effective August 1, 2015.

- The amendment provides that an oral stop payment order may be confirmed by a "record" rather than a "writing," which would include an e-mail or faxed order. In the past, the use of the word "writing" has suggested to bankers that a customer must come in and fill out a form at the bank; the amendment clarifies that *electronic* communications of stop payments are permissible.

House Bill 1220 - Enacts new a provision relating to "good funds"; effective August 1, 2013.

- This is a fine-tuning of the good funds law that passed in 2013; as amended, a closing agent may accept as "good funds" a cashier's check for loan funds if the check is issued by a local bank, savings and loan institution, or credit union located in the same county or a contiguous county as the closing agent. The closing agent must deposit the check into the agent's escrow account with a local financial institution that makes the funds available for immediate withdrawal.



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House Bill 1148 - Relating to fees charged by abstracters; effective August 1, 2015.

- HB 1148 makes several changes to N.D.C.C. § 43-01-15.1 and 43-01-18 regarding the fees of abstracters. In a nutshell, the cost of doing business has just gone up. For example, for each instrument searched and listed, but not included in the surface abstract, the fee that may be charged rose from \$1.50 to \$3, for each entry on an abstract or continuation of an entry on an abstract the permitted fee rose from \$10 to \$15, for a complete certification covering the records of the several county offices, the permissible fee rose from \$100 to \$150, etc.

House Bill 1346 - Relating to the requirements of retail installment sales contracts and enforcement; effective August 1, 2015.

- HB 1346 amends the North Dakota Retail Installment Sales Act. Under the old law, if the retail installment sale for which the contract is made is not subject to the Truth in Lending Act, North Dakota's retail installment sales contract provisions applied. This has been amended to include not only those contracts that *were*n't subject to the TILA, but also to those retail installment sales that *are* subject to the TILA but the seller doesn't comply with all of the requirements of that law. In sum, the law clarifies that *all* consumer protection enforcement options apply where Ch. 51-13 is not followed. The amendment also grants enforcement authority to a state attorney or to the North Dakota Attorney General; under the new law, the attorney general has all powers provided under the TILA, in addition to powers provided under the state's Unlawful Sales or Advertising Practices law.

House Bill 1221 - Relating to a trustee's allocation of receipts from interest in minerals and other natural resources.

-HB 1221 amends N.D.C.C. § 59-04.2-19. Existing law required a trustee to allocate to principal 90% of an amount received as a royalty, shut-in well payment, take-or-pay payment, bonus, or delay rental. HB 1221 amends the percentage allocated to principal by reducing the allocation amount from 90% down to 15%; the reduction from 90% to 15% also applies if the amount is received from a working interest or other interest not specified elsewhere in N.D.C.C. § 59-04.2-19. The bill also amends the law with regard to how a trustee allocates the receipts from interests in minerals, water, or other natural resources depending on whether the trust acquired the interest before or after August 1, 1999, and before August 1, 2015, the effective date of HB 1221.

Also, recognizing that there are a number of factors that affect the value of natural resource interests that can be held by a trust, the bill provides that the trustee may petition the court to permanently modify the manner used to allocate receipts from mineral interests, etc. The court should consider the following non-exhaustive relevant factors: (1) The nature, purpose, and expected duration of the trust; (2) The intention of the settlor; (3) The identity and circumstances of the beneficiaries; (4) The need for the liquidity, regularity of income, and preservation and appreciation of capital; (5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property or real property, etc. (6) The net amount allocated to income under the other sections of N.D.C.C. § 59-04.2-19; (7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or prohibit the trustee from invading principal; (8) The actual and anticipated effect of economic conditions on principal and income; (9) The anticipated tax consequences of a modification.

Trust departments that deal with mineral and other natural resources should review the changes to N.D.C.C. § 59-04.2-19, located at <http://sos.nd.gov/files/legislation/1221.pdf>.

House Bill 1134 - Relating to funds transfers under the U.C.C; effective date March 24, 2015.

- HB 1134 amends N.D.C.C. § 41-04.1-08; N.D.C.C. § 41-04.1-08 applies to any remittance transfer that isn't an electronic funds transfer under the Electronic Funds Transfer Act. HB 1134 also specifically provides that the Electronic Funds Transfer Act preempts any inconsistent state law provision. The purpose of the amendment was to close a loophole opened when Congress added remittance transfers to the Electronic Funds Transfer Act, which took remittance transfers out of UCC 4A and state law. With this amendment, North Dakota has a statute to address problems occurring after a transfer is initiated.

Senate Bill 2214 - Relates to notification of security breach; effective date August 1, 2015.

- This Bill removed the requirement of N.D.C.C. § 51-30-02 that any person that conducts business in the state shall disclose a data security breach to the consumers involved. Now, any person that owns or licenses computerized data that includes personal information must disclose the data security breach to the individual whose personal information was breached. Additionally, where the breach involves the information of more than 250 people, the state attorney general *must* be notified by mail or e-mail of the breach. All notifications must be made without delay. Check with your compliance people to determine whether your bank owns or licenses computerized data (you probably do); if so, you are required to notify the attorney general in the event of a security breach affecting more than 250 people.

Senate Bill 2351 - Creates a new section permitting dairy farm corporations and swine production corporations to own or lease farm and ranch land; effective date August 1, 2015.

- For the first time, North Dakota permits ownership of farm or ranch land by corporations. Generally, the limitations are that the domestic corporation or limited liability company must be owning or leasing the land in the operation of a dairy farm or a swine production facility, and the land owned or leased for the authorized purpose may not exceed 640 acres. Loan officers should be aware when lending to dairy or swine producers that they should determine whether they are incorporated or organized as an LLC. At the time of this writing there are underway efforts to refer this law to the voters for repeal.

House Bill 1330 - Delayed contingent effective date for implementation of the UCC electronic filing system; effective date August 1, 2016, or perhaps earlier for electronic filing, depending on readiness of office of Secretary of State.

- Two years ago we advised you that HB 1136 required the electronic filing of UCC financing statements effective August 1, 2015. Apparently, that date was overly-optimistic. HB 1330 amends section 50 of HB 1136 by delaying the target date from August 1, 2015 to **August 1, 2016, or earlier** if the Secretary of State can certify to legislative management that the information technology components of the system are ready. If certified as ready, it becomes effective 90 days after the certification. Significant provision effective August 1, 2016: The Secretary of State's office will provide an electronic means for filing records as of August 1, 2016. At that time, any UCC record - financing statements, amendments, continuations, and terminations must be filed electronically. Any record not filed electronically will be rejected. (N.D.C.C. § 41-09-72(3)) (section 22, HB 1136).

House Bill 1169 - Recordation of Transfer on Death Deed without Statement of Full Consideration; effective date August 1, 2015.

- HB 1169 allows a Transfer on Death real estate deed to be recorded *without* the filing of a statement of full consideration normally required for most deeds and permits their recording *without* regard to payment of real estate taxes. The deleted requirements weren't feasible because a Transfer on Death deed doesn't take effect until the death of the grantor. These deeds are an alternative to a reserved life estate in real estate, but to our knowledge they haven't been used much yet.

House Bill 1086 – Relating to Absolute Exemptions from Process or Sale; effective date August 1, 2015.

- This bill clarifies that a bankruptcy debtor doesn't get a mobile home exemption under N.D.C.C. § 28-22-02(1) *and* the alternate exemption in lieu of homestead under N.D.C.C. § 28-22-03.1(1). While that's good news for creditors, the legislature also amended N.D.C.C. § 28-22-03.1(1) to increase the amount of the alternate exemption from \$7,500 to \$10,000.

Senate Bill 2180 - Relating to unrecorded conveyances; effective August 1, 2015.

- SB 2180 appears to have ended an invitation to litigation on the effect of not recording. Previously, the final sentence of the statute provided that "The holder of an unrecorded conveyance may not question the good faith of the first recording party unless it can be established that the first recording party had actual knowledge of the existence of the unrecorded conveyance." Unintentionally, that language created an opening for someone who hadn't taken the trouble to record to question the good faith of the prudent person who recorded. SB 2180 deletes that troublesome sentence.

House Bill 1194 – Direct Bank Loans to Political Subdivisions

- Relating to a political subdivision borrowing funds; effective date August 1, 2015.

-HB 1194 authorizes political subdivisions to borrow up to \$500,000 from a North Dakota bank or credit union. The political subdivision may borrow against its anticipated revenue and the loan must be authorized by resolution of the governing body of the political subdivision; the loan must be paid in full within five years from the date of loan origination. The loan documents must describe the revenues from which the loan is anticipated to be paid and may require the political subdivision to establish a separate fund for the repayment of the loan, including interest, on or before the due date. Collateral for a loan may consist only of property that is purchased with loan proceeds. If designated revenues are not sufficient to pay a loan balance, the political subdivision may also set aside up to 10% of the amount of the collections from current tax revenues to pay to the bank or credit union on a monthly basis until the delinquent loans have been paid in full.

House Bill 2084 - Various provisions relating to the investigation of bank holding companies, relating to definitions, prompt corrective action for state banks, the examination of technology service providers, and investments of state banks; effective August 1, 2015.

- SB 2084 (section 3) gives the Department of Financial Institutions the authority investigate a bank holding company that owns a state-chartered bank if the commissioner has received information material to the holding company's safety and soundness; the commissioner may pursue and impose penalties against the holding company. SB 2084 (section 4) also gives the commissioner authority to examine the books and records of any technology service provider that provides IT services to banks under the commissioner's supervision.

House Bill 1135 – Relating to the Uniform Voidable Transactions Act.

The Uniform Voidable Transactions Act (UVTA), formerly named the Uniform Fraudulent Transfer Act (UFTA), strengthens creditor protections by providing remedies for certain transactions by a debtor that are unfair to the debtor's creditors. HB 1135 is a revision of the Uniform Voidable Transaction Act, with most of the changes characterized as "technical." The changes include removing reference to "fraudulent" transfers and replacing it with "voidable" transfers, removing the language of N.D.C.C. § 13-02.1-02 that set out a separate insolvency standard for partnerships (section 2), adding provisions to make it clear that the creditor has the burden of proving a violation of the Act (section 4), providing that the law of the jurisdiction where the debtor is located when the transfer is made or the obligation was incurred is the applicable law (section 9), and treating each series of a "series organization" (*i.e.* Smith Holdings I, LLC, Smith Holdings II, LLC, Smith Holdings III, LLC, etc.) as a *separate* person for purposes of the voidable transaction Act, even if that is not how it is treated under other law (section 10).

House Bill 1312 – Relating to title insurance limitation on risks.

-HB 1312 amends N.D.C.C. § 26.1-20-04, removing the requirement that a title insurance company may not expose itself to loss from any one risk or hazard to an amount exceeding 50% of its paid-up capital and surplus if a stock company, or 50% of its surplus if it's a mutual company. Effective August 1, 2015, a title company may issue a title policy on property located in this state involving a potential policy liability up to 90% of the company's surplus. Other provisions loosen the title insurance limitation on risks, with various safeguards imposed by statute. In sum, HB 1312 should enable local title companies to write policies for large real estate deals that they previously couldn't handle due to the 50% limitation.

DISCLAIMER

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