community BANKER

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Welcome to the November/ December 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.

YOU ARE ASKING . . . .

Q: A check was presented having only a hand-written amount of Five Hundred and 00/100 on it. We took the check, but now are wondering if it was properly negotiable or whether it also needed a numeric amount of $500.00 on it. Is the written amount in words sufficient? What if it were only in numbers and had no written amount?

A: Most, if not all, checks have a payment amount in words and one in numbers. Under the UCC, either one is sufficient to make a check valid. It seems counter-intuitive that a check having a payment amount only in numbers or only in words is negotiable, but it's still a negotiable instrument under the UCC if it orders payment of a fixed sum:

> 1. "Negotiable instrument" means an unconditional promise or order to pay *a fixed amount of money*, with or without interest or other charges described in the promise or order, ...

N.D.C.C. § 41-03-04 (U.C.C. § 3-104) (*emphasis added*). A check payable to Donald Duck in the amount of $500.00 numerically written and without a written amount, or vice versa, is still an order to pay a fixed amount.

This does not conflict with N.D.C.C. § 41-03-14 (U.C.C. § 3-114) and the familiar rule that if a check contains contradictory terms, typewritten words prevail over printed words, handwritten words prevail over both, and

words prevail over numbers. In the situation you described, there are no contradictory terms so no interpretation is necessary; it's a negotiable instrument for $500.

Q: Do we have to have the "Member FDIC" statement on our notice of overdraft or notice of returned deposit item, etc.? We include the statement as much as possible in our correspondence, but we want to use the same notice paper for overdrafts as we use for correspondence about non-FDIC insured items like the payment notice for a customer's safe deposit box.

A: Without having seen your particular notice, we would say no because these types of notices do not meet the definition of an "advertisement." 12 C.F.R. § 328.3(a) defines an advertisement as "a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business." Your customer already has an account with you and you have disclosed the insurance to the customer already. However, if your overdraft notice should happen to have an advertisement for another insured deposit product in this letter, THEN you must include the Member FDIC statement.

Q: A check is presented. The payee line reads "Big Machines Excavating, Inc. c/o Mick Jagger, CEO, 234 E. 10th Street, Somewhere, ND." Is Big Machines Excavating, Inc. the payee? Is Mr. Jagger, CEO of the corporation, the payee? If he's not, does he need to endorse the check along with the corporate endorsement?

A: Big Machines is the payee. The c/o is the abbreviation for "care of," and its use tells us that the check is being delivered to payee Big Machines through its CEO, Mr. Jagger. In other words, the check was sent to Mr. Jagger with the expectation that he will ensure the check is given to Big Machines or credited to the account of Big Machines. The wording does not require his endorsement, nor does it mean that it gets deposited into Mr. Jagger's account.

Q: A customer claims that he made a withdrawal from a drive up ATM machine at a branch location. As he was putting his pickup into gear to drive away, someone jumped in on the passenger side and he was robbed. Is this kind of customer loss covered by Reg E?

A: Under these facts, we'd say no. If your customer *intended* to make the transaction, was *authorized* to make the transaction, and was robbed *after* the transaction was completed, then Reg. E isn't applicable. An unauthorized transfer is defined in relevant part by 12 C.F.R. § 1005.2(m):

> "Unauthorized electronic fund transfer" means an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit. . . . .

Under this definition, your customer actually initiated the withdrawal, though he didn't receive any benefit from it. Our answer is different if the robber jumped into the pickup as it was pulling up to the ATM and forced him at gunpoint to make the withdrawal - in that case the loss is covered by Reg. E. The Official Interpretation of 12 C.F.R. § 1005.2(m) includes these scenarios as an Unauthorized Electronic Funds Transfer:

> 3. ACCESS DEVICE OBTAINED THROUGH ROBBERY OR FRAUD.
> An unauthorized EFT includes a transfer initiated by a person who obtained the access device from the consumer through fraud or robbery.
>
> 4. FORCED INITIATION.
> An EFT at an ATM is an unauthorized transfer if the consumer has been induced by force to initiate the transfer.

12 C.F.R. § 1005.2(m), Official Interpretation. In the case of your customer, the transfer wasn't initiated by the robber nor was he induced by force to initiate the transfer.

This and That

Below are a few interesting cases we've come across in our recent reading.

In re Faison, 518 B.R. 849 (Bankr. E.D.N.C. 2014). As a part of his divorce proceedings, husband filed a lis pendens against soon-to-be ex-wife in her 20% interest in an LLC. An interest in an LLC is a general intangible, and filing a financing statement is the only way to perfect an interest in a general intangible. Husband failed to perfect any interest he might have had in her interest in the LLC.

What caught our eye: Under Revised Article 9, an interest in a limited liability company is a general intangible and may be secured only by the filing of a financing statement. Creditors tend to overlook this often-valuable item of collateral.

Heritage Bank v. Kasson, 853 N.W.2d 868 (Neb. Ct. App. 2014). The court determined that the parents, who had given a security interest in their farm products to the bank to secure their debts were not in a partnership or joint venture with their son, who had also given the bank a security interest in his farm products to secure *his* obligations. The court found that they were not engaged in a joint venture because, while they helped one another and shared equipment and resources, no intent to engage in a joint venture was shown because they received separate financing, had separate accounts, notes, and security agreements, owned separate equipment and livestock, maintained separate insurance on their equipment and herds, filed separate tax returns, used different brands and ear tags on their herd, did not guarantee each other's loans, and generally were treated separately by the bank. Accordingly, the parents were not liable for the son's debts and the bank could not use the proceeds of the parents' cattle to reduce the debt owed by the son.

What caught our eye: Thou shalt know thy borrower - don't assume the existence of a partnership or joint venture. If parents and farming children farm the same land using the same machinery but keep their finances separate, a court may likely find them to *be* separate.

In re Baker, 511 B.R. 41 (Bankr. N.D.N.Y. 2013) A properly-filed financing statement that identified registered Holstein cows by name and ear tag number was ineffective with respect to cattle whose ear tag had either fallen off or did not match one of the listed numbers. Though the names of the cattle were referenced in a certificate of registration for each cow and each certificate included a sketch of the cow's distinctive markings, and those markings could be used to identify the cows, there was insufficient evidence that lenders in the cattle industry regularly used registration certificates to identify cows subject to a prior interest for the certificates to overcome the problems /deficiencies in the financing statement. In other words, it's not a regular business practice for a lender to utilize registration certificates when checking for a prior lien or when securing cows as collateral because typically the lender's interest will be collateralized by the entire herd. It's not industry custom to use a registration certificate to supplement a collateral description on a UCC-1 financing statement.

What caught our eye: Just because this was an interesting discussion on identifying cattle collateral. While a registered dairy cow may be more valuable than a non-registered cow, dairy cattle are not regularly identified for purposes of collateralization and secured lending by reference to purebred registration certificates. Accordingly, do not rely solely on a cow's registered name or ear tag number - obtain a security interest in the entire herd.

Wells Fargo Bank v. Witt, 2014 U.S. Dist. LEXIS 481982014, WL 1373633 (N.D. Ala. 2014). Mr. Witt was the guarantor of debtor Alabama Cylinder Head. Some time after default and during the course of the action, the debtor voluntarily sold the collateral to apply the proceeds to the debt. Because the *debtor* and *not* the secured party sold the collateral, the secured party had no duty to provide notice of the sale to guarantor Mr. Witt. Additionally, because the sale was voluntary, the sale occurred outside of the foreclosure process so the requirement that the sale be conducted in a commercially reasonable manner did not apply.

What caught our eye: Remember to give notice of sale to the guarantor if the lender is selling the collateral.

In re Sandpoint Cattle Co., LLC, 2014 U.S. Dist. LEXIS 83780, 83 U.C.C. Rep. Serv. 2d 863 (D. Neb. 2014). Four months into a Chapter 11, debtor Sandpoint filed a motion seeking to abandon 2,453 cattle to the secured party because maintaining the cattle for the secured party wouldn't benefit the bankruptcy estate, the maintenance would be very costly, and because the collateral was 100% encumbered. The court found that: (1) the secured party gave debtor a fair credit of $95,000 on the secured debt for the 38 cattle he did not sell but simply retained; (2) the secured party conducted a commercially reasonable disposition of 167 bred heifers because the evidence showed that these were the "bottom end" in quality of the abandoned cattle and the small increase in price that might have resulted from keeping and calving the heifers would not outweigh the increased costs of feeding and sheltering them; (3) the secured party conducted a commercially reasonable public disposition of 509 cattle even though there was minimal advertising (some personal phone calls and online ads), the sale was conducted at a commercial beef barn, not a registered Angus sale barn because the debtor insisted that the secured party take the cattle on short notice, and there were few or no other options for where to take the cattle and sell them; (4) the secured party's sale of cattle at an annual bull sale was also commercially reasonable, noting that the debtor's suggestion that the secured party should have held on to the bulls was not valid because the law doesn't require a secured party to hold on to collateral for an extended amount of time in the hope that the delay in selling will result in higher profits; (5) the secured party's final sale of 1,210 cattle at a public sale was commercially reasonable even though the sale was held in December, at a sale barn predominantly used to auction commercial beef cattle, not purebred Angus, and was advertised for only four months. The court observed that the cattle were sold for more than their appraised value, the secured party had no duty to delay the sale, and the sale was on a recognized market.

What caught our eye: Fact driven, but still an interesting discussion on what may constitute a commercially reasonable sale of cattle collateral.