

community BANKER

JULY / AUGUST 2017

Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker 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: Our elderly customer has given her daughter, who lives a couple of hours away, her durable power of attorney. The daughter wants to set up internet banking on our customer's account, though she is not a joint owner of the account. Are we able to do this?

A: Whether she can do that would be in the power of attorney document. If you are unsure of what the daughter can or can't do regarding your customer's account, have your bank's lawyer look at the POA and advise you.

Q: A customer has given us a durable power of attorney document that says it will "continue in force and effect after the death" of the customer. Can his daughter, the attorney in fact, use this document to handle the account even after he dies?



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A: No. Powers of attorney come to an end upon the death of the principal. A provision stating that it continues in force and effect after the death of the principal *can't* make it continue after the death.

Q: We have a farmer borrower who is in some trouble financially; luckily, his wife has a good job in town. We suspect that they are looking at filing a Chapter 12, but think that they may not be eligible for that Chapter. What are the requirements for a Chapter 12?

A: First, only a family farmer with "regular annual income" may file under chapter 12. This is to ensure that the debtor's annual income is stable enough and regular enough to permit him to make payments under a Chapter 12 plan. Under the Bankruptcy Code, the individual debtor or individual and spouse family farmer must meet each of the following four factors as of the date the petition is filed in order to qualify for relief under Chapter 12: (1) the individual or husband and wife must be engaged in a farming operation; (2) the total debts, both secured and unsecured, of the operation must not exceed \$4,031,575; (3) at least 50% of the total debts that are fixed in amount (not counting debt for the debtor's home) must be related to the farming operation; and (4) more than 50% of the gross income of the individual or the husband and wife for the taxable year preceding, or for each of the 2nd and 3rd prior tax years must have come from the farming operation.

If your borrower files a Chapter 12, you'll be able to examine the list of all creditors and the amounts and nature of their claims; the source, amount, and frequency of the debtor's income; the list of all of the debtor's property; and a detailed list of the debtor's monthly farming and living expenses (food, shelter, utilities, taxes, transportation, medicine, feed, fertilizer, etc.) Married individuals must provide this information for a spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only *one* spouse is filing so that the court, the trustee, and the creditors can evaluate the household's financial position. That means the wife's off-farm income is included.

Once a lender has its hands on all of this information its attorney can determine whether the borrower/debtor is eligible for the protections of Chapter 12.

2017 Legislative Session - Continued

Our previous newsletter briefly reported on several bills that came out of the 65th Legislative Assembly. Below are summaries of additional legislation that we thought you should know about.

Senate Bill 2223

Subject: Relating to profits and losses for limited liability companies, limited liability company distributions, and management and partnership transferable interests.

Effective Date: August 1, 2017

Summary: Of most interest to lenders, SB 2223 provides that for limited liability companies, general partnerships, and limited partnerships, charging orders are the *sole* remedy of a judgment creditor against

the membership interest of the debtor member or partner. The amendments remove the ability of a court to order in a charging order the foreclosure of the debtor's interest in the partnership or LLC. Now, a "charging order" appears to be limited to a court's order directing that the LLC or partnership pay to the creditor any distribution that is to be made to the debtor by the LLC or partnership.

It also created N.D.C.C. § 10-32.1-30.1 to provide that the allocation of profits and losses of a limited liability company created after July 31, 2017, must be in proportion to the value of the contributions of its members. The allocation formula can be modified in either the articles of organization or in an operating agreement.

Finally, SB 2223 amends N.D.C.C. § 10-32.1-39(2) to state that unless otherwise provided in the articles of organization or the operating agreement, members have voting power in the management and conduct of the company in proportion to the interest of the member in distributions of the limited liability company. This is a big change from former N.D.C.C. § 10-32.1-39(b), which stated that "Each member has *equal* rights in the management and conduct of the activities of the company." (*Emphasis added.*) As of August 1, 2017, voting rights are tied to the value of the member's contributions for LLCs created after July 31, 2017.

HOUSE BILL 1219

Subject: Relating to the process for converting manufactured housing to real property.

Effective Date: August 1, 2017

Summary: The amendment to N.D.C.C. § 39-05-22(9) does away with the need to transfer the certificate of origin or certificate of title of the manufactured house once the procedure of affixing the house to real property is completed. This amendment also requires the Department of Transportation to maintain a website where an interested person may input a VIN to in order to confirm the status of a manufactured home as real estate and to confirm that the department retired the manufacturer's certificate of origin or certificate of title. This will make lenders' work easier by providing the information they need to confirm that a manufactured home is affixed to real estate or that certificate of origin or certificate of title issues won't come back to haunt them.

HOUSE BILL 1228

Subject: Relating to actions to contest the validity of a trust, trust decanting, and directed trustees; to amend certain sections relating to the rule against perpetuities and a trustee's duty to inform; to repeal certain sections relating to the capacity of a settlor of a revocable trust, actions contesting the validity of a trust, and powers to direct a trustee; and to provide for retroactive application.

Effective Date: August 1, 2017

Summary: House Bill 1228 is 22 pages long and is required reading for bank trust officers. A few notable provisions are:

Section 1: Business trusts are now deemed to have a perpetual existence - meaning that they can last forever if the governing instrument does not say otherwise and are now excluded from the statutory rule against perpetuities. (The common law “rule against perpetuities” invalidates instruments such as contracts, wills, or trusts from tying up property for too long a time beyond the lives of people living at the time the instrument was written. In plain English, the rule limits the ability of owners to control dispositions of their property far in the future and long after they’re dead.)

Additionally, business trusts may not own real property in North Dakota.

Section 2: Provides that a trustee may adjust between principal and income, and lays out the factors a trustee may consider in making those adjustments. It also has restrictions and sets out circumstances where the trustee may not make adjustments. See N.D.C.C. §59-04.2-03.

Section 3: Creates a new section providing that a court may not exercise control over the discretionary power of a trustee unless the court determines that the trustee’s decision was not made in good faith or was an abuse of the fiduciary’s discretion. See N.D.C.C. §59-04.2-03.1.

However, if the fiduciary/trustee is unsure of whether a proposed exercise of a discretionary power will result in an “abuse of discretion” (and liability for abusing his discretion), the trustee may petition the court for a determination of whether the proposed action will result in an abuse of discretion. The beneficiary who challenges the action will have the burden to show that the trustee’s action was an abuse of discretion. See N.D.C.C. §59-04.2-03.1(4).

Section 6: Creates a new section providing that while a trust is revocable, the trustee may follow a direction of the settlor which is contrary to the terms of the trust. See N.D.C.C. §59-14-05.

HOUSE BILL 1250

Subject: Relating to property sales price disclosures.

Effective Date: August 1, 2017

Summary: N.D.C.C. § 11-18-02.2 was amended to require a statement of the full consideration paid for the property on the face of the deed, or, a statement designating one of the exemptions must be certified on the face of the deed. The grantee of real property requiring a statement of full consideration may no longer make a separate filing of the full consideration paid with the state board of equalization or the recorder.

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COMMUNITY BANKER is designed to share ideas and developments related to the field of banking. It is not intended as legal advice and nothing in the COMMUNITY BANKER should be relied upon as legal advice in any particular matter. If legal advice or other expert assistance is needed, the services of competent, professional counsel should be sought.