

community BANKER

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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:

Community Banker
c/o Olson & Burns P.C.
P.O. Box 1180
Minot, ND 58702-1180

olsonpc@minotlaw.com
Also, visit our web site at:
www.minotlaw.com

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.

Are You a Secured Lender? If So, You Should Periodically Review Your Collateral.

We know that secured creditors in a bankruptcy case are at the top of the food chain. A secured claim is entitled to be paid in full out of the proceeds of the collateral that secures it before any of those proceeds may be used to pay unsecured claims. Even better, if a claim is oversecured, the allowed secured claim includes interest accrued after the petition date, plus reasonable costs and attorneys' fees as provided for in the loan agreements up to the value of the collateral. Also, in a Chapter 11, a Plan cannot be crammed down on a class of secured creditors that did not accept the Plan, unless the Plan can show that the secured creditor is receiving a combination of cash or secured debt equal to the value of its collateral.

In order to enjoy secured creditor status, a lender has to get and stay properly secured *before* bankruptcy. A creditor who has a security interest should check, after the loan has closed and from time to time afterward, and confirm that its security interest has been properly perfected under



OLSON & BURNS P.C.

17 FIRST AVENUE S.E. • P.O. BOX 1180 • MINOT, NORTH DAKOTA 58702-1180
TELEPHONE (701) 839-1740 • FACSIMILE (701) 838-5315 • E-MAIL: olsonpc@minotlaw.com

applicable law. What if your bank isn't properly perfected at the time your borrower files for bankruptcy? You'll likely end up without a security interest and have to move to the back of the line with the other unsecured creditors.

Unperfected security interests are avoidable under the trustee's "strong-arm" powers; moreover, security interests that become perfected more than 30 days after the loan closes and within 90 days before bankruptcy are "avoidable transfers" of an interest of the debtor in property. We've compiled a general checklist for creditors to go through within the 30 days after closing, and thereafter according to your bank's policy on maintaining secured status.

1. When the security interest can be perfected by filing a UCC financing statement: Do you have information confirming that the filing was actually done? Or, have lien searches been done in the right jurisdictions to confirm that the UCC financing statements have actually been filed?
2. When were the UCC financing statements first filed? UCC financing statements are effective for five years, and UCC-3 continuations should be filed within the six-month period prior to the lapse date (timely-filed UCC-3 continuations do not re-start the 90-day preference period). If the financing statements *have* lapsed, new financing statements will need to be filed (this would re-start the 90-day preference period).
3. Does the description of collateral in the UCC financing statement match the collateral that was pledged by the borrower?
4. Has your borrower or guarantor changed his or its name? Its jurisdiction of organization? If so, it may be necessary to file a UCC-3 amendment to reflect the name change, or a new financing statement if the entity has changed its state of organization (timely-file UCC-3 amendments for name changes don't re-start the 90-day preference period; filing a *new* financing statement will re-start the 90-day preference period).

Generally, a secured creditor generally remains perfected for four months following a name or jurisdiction change.

5. Did your borrower grant a security interest in real estate? If so, was the mortgage properly recorded? Were UCC fixture filings recorded in the proper county if they were not already covered by the mortgage?
6. Did your borrower grant a security interest in intellectual property? If so, was a security agreement recorded with the U.S. Patent and Trademark Office and/or the U.S. Copyright Office?
7. Did your borrower grant a security interest in deposit, security, or commodities accounts? If so, is there a control agreement in place or did your bank get possession or control over the deposit, security, or commodities account in another way? If it was a security account, did you become the entitlement holder or the borrower's securities intermediary?
8. Did your borrower grant a security interest in motor vehicles that are not inventory of the borrower? If so, is your bank's name identified on the certificate of title or are you holding the title?

9. Did your borrower grant a security interest in certificated securities? If so, have you taken control of the certificated securities through possession and delivery of a stock power? Are the names shown on pledged stock certificates accurate and current to show any corporate name changes?
10. Did your borrower grant a security interest in instruments, tangible chattel paper, goods, equipment, money, or negotiable documents? If so, have you taken physical possession of this collateral?
11. Did your borrower grant a security interest in uncertificated securities? If so, is there an agreement in place, signed by the issuer and acknowledged by the owner, where the issuer agrees to comply with the instructions of the bank without further consent of the owner?
12. Did your borrower grant a security interest in rights to a letter of credit? If so, did the issuer of the letter of credit consent to an assignment of proceeds of the letter of credit?
13. Did your borrower grant a security interest in an insurance policy? If so, was notice given to and acknowledged by the insurer, and was the bank named as an additional insured or a loss payee?

Mark Your Calendars - Farmland Foreclosure and the Redemption Period

We get the occasional question about the redemption period in a farmland foreclosure – how long it is and how it is calculated. One number to remember is “60”: in North Dakota, the redemption period for farmland will end no earlier than *60 days after* the Sheriff’s sale. Another number to remember is “365”: The redemption period for agricultural real estate is *always* at least 365 days.

The redemption period in *all* mortgage foreclosures -- commercial, farmland, or residential -- begins on the date the summons and complaint is *filed* with the clerk of court. N.D. Cent. Code § 32-19-18. The required 365-day redemption time and the required 60-days-after-Sheriff’s sale redemption time seem to contradict each other, but they exist for two scenarios.

Say we filed a farmland foreclosure action on May 1, 2018. The redemption clock starts running on that day, and because of the 365-day redemption time we know the redemption period will not end before May 2, 2019. Suppose it’s relatively smooth sailing and we get our Judgment of Foreclosure on October 30; for whatever reason, we have the Sheriff’s sale on January 8, 2019. Even though the 60-days-after-Sheriff’s sale date will be March 10, 2019, the redemption period won’t end until May 2, 2019, which is 365 days from the filing the Summons and Complaint. The 60-day rule isn’t triggered.

In the second scenario, we filed the action on May 1, 2018. Again, the redemption clock starts running on that day, and again we know the redemption period is 365 days - May 2, 2019. Suppose this foreclosure action is contested every step of the way, but we finally get our Judgment of Foreclosure on May 10, 2019. The 365 days have elapsed, but the Sheriff’s sale won’t be held until June 30. Here, the 60-day time *is* triggered. The 365-day time is up, but the redemption period

can't end earlier than 60 days after the Sheriff's sale, which in this example is August 30, 2019.

So, we have to keep track of both the one-year date and the 60-day date to ensure the redemption period is at *least* 365 days after we filed and *no earlier* than 60 days after Sheriff's sale.

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