
ASK KENNEDY

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DISCLAIMER: THESE MATERIALS PROVIDE GENERAL INFORMATION AND ARE INTENDED FOR EDUCATIONAL PURPOSES ONLY. THESE MATERIALS DO NOT PROVIDE, NOR ARE THEY INTENDED TO SUBSTITUTE FOR, LEGAL ADVICE.

Question #1: When an original UCC is filed with First, Middle (full), and Last Names (Driver's license at that time had full middle name), and the DL is renewed with only a First name, Middle initial and last name, should the original UCC filing that no longer matches the driver's license be amended to only show Middle initial?

Response: Yes, whenever the name listed on a financing statement no longer matches the name listed on the driver's license the financing statement should be amended so that it is not seriously misleading. The North Dakota Century Code states that a financing statement must provide the name indicated on a driver's license or identity card, otherwise it is seriously misleading. Despite being seriously misleading the financing statement will still be effective to perfect a security interest in collateral acquired by the debtor before, or within four months after the name has changed. However, it will not perfect a security interest in collateral acquired by the debtor more than four months after the name change.

Best Practice: Add an additional debtor with a first name, last name, and middle initial, but keep the original debtor's name with a full middle name.

Question #2: When a corporation organized under the laws of the State of North Dakota builds in another state, and files a fixture filing in that state, should they also file a fixture filing in North Dakota?

Response: No. Fixture filings, like mortgages, must be recorded in the county where the real property is located. So, if the real property is not being built in a North Dakota County, there is no need to record a fixture filing in North Dakota; however, your general UCC-1 financing statement should be filed in North Dakota.

Question #3:

Hypothetical:

1. A corporation is organized in different state (WY)
2. Originally, the office for this company was in MN
3. Company moved their office to North Dakota
4. Building is being completed North Dakota
5. Currently the UCC filing has been filed in the state the company is organized in (WY), as well as the original state (MN)
6. Should this filing also be filed in North Dakota?

Response:

This answer will depend on the type of collateral. Generally, you should file in the state where the debtor corporation is incorporated or organized. If the Debtor reincorporates in another state, then you will need to file a UCC-1 in the new state AND reference the UCC-1 from the original state in the new filing. If the collateral is real property instead of personal property you should file with the county recorder's office in the county where the debtor's real property is located.

Question #4

We have a department that would like to have new team members listen in on calls with customers; the purpose of this function would be to train team members by allowing them to shadow calls with a senior team member. Would we need to disclose to the customer that the call is being monitored?

Response:

Because each state has its own laws regarding recorded conversations, it is most prudent to give full notice and ask for permission to record the call. While North Dakota and Minnesota only require the consent of one person involved in the conversation, other states (including Montana) require the consent of all people involved in the conversation.

NDBA General Question: Cashier's Checks

Question:

We have a question on due diligence and Cashier's Checks relating to payee vs remitter. One of our client's purchased a cashier's check to pay a third party (non-bank client), the third party has not negotiated the item. It is over \$50, so due diligence is required, but we are unsure if we contact the payee, the remitter or both. The client is still with us, however, we do not have a relationship with the third party nor any contact information. How do we handle this situation?

Response:

Cashier's checks are negotiable instruments, which are subject to the provisions of Article 3 of the Uniform Commercial Code (adopted in North Dakota as Ch. 41-03, N.D.C.C.). Thus, the parties' interest in the cashier's check are subject to Ch. 41-03, N.D.C.C.

Section 42-03-49 (UCC 3-412) requires a bank to pay a cashier's check according to its terms. This duty is owed only to the person entitled to enforce the cashier's check. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. N.D.C.C. § 41-03-27. Official commentary to U.C.C. § 3-312 indicates that a remitter is not a person entitled to enforce a cashier's check.

Section 41-03-37.1 (UCC 3-312) covers the loss of a cashier's check by either the remitter or the payee. It establishes procedures by which a party can obtain payment of a lost, destroyed, or stolen cashier's check. A remitter or payee must make a claim to the bank, including a sworn declaration of loss. If a sufficient claim is asserted, the claim becomes enforceable at the later of the time the claim is asserted or the 90th day following the date of the cashier's check. Until the claim becomes enforceable, it has no legal effect and the bank must pay the check. Payment to the payee during this time discharges all liability of the bank with respect to the check. Once the claim is enforceable, the bank must pay the amount of the check to the claimant if it has not been paid. Payment to the claimant discharges all liability of the bank with respect to the check. If the claimant is paid and the check is presented for payment by a person having rights of a holder in due course, the claimant must refund the payment to the bank if the check is paid, or pay the amount to the person having rights of a holder in due course if the check is dishonored.

Under the North Dakota Revised Uniform Unclaimed Property Act, cashier's checks are presumed abandoned if unclaimed by the apparent owner two years after issuance (or the latest indication of interest by the apparent owner in the property). N.D.C.C. § 47-30.2-04. "Apparent owner" means a person whose name appears on the records of a holder as the owner of property held, issued, or owing by the holder. N.D.C.C. § 47-30.2-01(3). "Owner" means a person that has a legal, beneficial, or equitable interest in [the] property," including a payee. N.D.C.C. § 47-30.2-01(24). So, an apparent owner is a person in the bank's records that has a legal, beneficial or equitable interest in the cashier's check.

The holder of property presumed abandoned must file a report with the administrator of the state abandoned property office. N.D.C.C. § 47-30.2-21. The holder shall send to the apparent owner notice by first-class United States mail that complies with section 47-30.2-27 not more than 120 days before filing a report if the holder has in the holder's records an address for the apparent owner which the holder's records do not disclose to be invalid and is sufficient to direct the delivery of first-class United States mail to the apparent owner; and the value of the property is \$25 or more. N.D.C.C. § 47-30.2-26. On filing a report, the holder shall pay or deliver to the administrator the property described in the report. N.D.C.C. § 47-30.2-32(1). An issuer or holder is not liable to the apparent owner for, and shall be indemnified by the state against, a claim arising with respect to the property after the property has been delivered in good faith to the administrator. N.D.C.C. § 47-30.2-32(6); see also N.D.C.C. § 47-30.2-33.

The obvious "apparent owner" is the payee. If the bank does not have any contact information for the payee, it does not need to send the notice required in § 47-30.2-26. Additionally, although a remitter does not have a right to enforce a cashier's check, it does have an interest in the cashier's check. Therefore, the bank should give notice to the remitter. Regardless, the bank should identify both the remitter and payee in the report to the administrator.

Marijuana Banking Update

Members of the US House of Representatives have once again advanced marijuana-based legislation, the Secure and Fair Enforcement (SAFE) Banking Act, to the US Senate. On July 14, members of the Senate voted in favor of the 2023 National Defense Authorization Act (NDAA), a legislative defense package that includes the SAFE Banking Act as an amendment. The vote marks the seventh time that House members have advanced this language to the Senate as either an amendment or as a stand-alone bill and is the second time that members have included the provisions in the NDAA.

The Senate has yet to introduce its version of the bill; once passed, the House and Senate will need to reconcile both bills. Earlier this year, the House approved a manufacturing competitiveness package that included the SAFE Banking provision, which would give safe harbor to financial institutions entering into relationships with state-licensed marijuana-related businesses. Without passage of banking reform, most US banking institutions will not do business with companies that sell cannabis. According to the Treasury Department, only about 11% of banks and 4% of credit unions currently do business with licensed cannabis businesses. These low percentages are partly due to the massive penalties from federal regulators that banks face for transacting with businesses that sell cannabis. The current regulatory landscape forces cannabis businesses to rely on all-cash transactions, thus preventing them from taking advantage of federally insured banking systems and leading to a less secure business environment. While legislation like the SAFE Banking Act would not go as far as legalizing cannabis, it would effectively shift the risks involved for federally insured financial institutions.

Overdraft and Nonsufficient Funds Fees

On December 1, 2021, the Consumer Financial Protection Bureau (CFPB) released research showing that banks continue to heavily rely on overdraft and non-sufficient funds (NSF) revenue.¹ On the same day, Director Rohit Chopra [announced](#) that CFPB bank examiners will be prioritizing examinations of banks that have a higher share of frequent overdrafters or a higher average fee burden for overdrafting.

In a recent class-action lawsuit, a customer of Gate City Bank alleged that the bank breached its account agreement by routinely assessing more than one insufficient fund fee (“NSF Fee”) on the same item. According to the plaintiff, the account agreement stated that the bank would charge a single NSF Fee (\$32.00) or single overdraft fee (\$32.00) if an item was returned for insufficient funds or paid into insufficient funds, but the bank would reject payment of an item for insufficient funds and charge the NSF Fee of \$32.00, then subsequently process the same item (without the customer’s request) and charge another NSF Fee of \$32.00 on the same item. Based on the foregoing, the plaintiff further alleged that the bank’s actions constituted deceptive, unfair, and unlawful trade acts or practices in violation of section 51-15-01 of the North Dakota Century Code. Though this case was ultimately settled, it is a good reminder to review your overdraft practices and the terms of your account agreements, especially given the current focus of examiners.

Overdrafts are addressed by various laws and regulations, including:

- State usury and deceptive practices statutes (like the North Dakota statute cited in the Gate City Bank case)
 - Federal Trade Commission (FTC) advertising rules
 - Truth in Lending Act (TILA) (if the institution makes a loan to a consumer to repay an overdraft)
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¹ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/>

- Equal Credit Opportunity Act (ECOA) antidiscrimination rules
- Truth in Savings Act (TISA)
- Electronic Fund Transfer Act (EFTA) (if electronic transactions can trigger the overdraft protection)

Institutions should consult counsel if there are any concerns about compliance with applicable laws and regulations.

Fintech Banking Podcasts

With the rise of technology in the banking world, including advancements in fintech and crypto, it is important for those in the finance sphere to stay on top of the many changes and updates. The following are some of the podcasts that we find helpful in doing so.

[Finance Regulation Technology](#)

Hear the latest from the IIF's experts on where the dynamic world of digital innovation in finance intersects with key regulatory and public policy considerations. Specific topics include access to innovative technologies, data sharing and protection, machine learning, cloud computing and cultural change within firms in the digital era.

[Banking With Interest](#)

Banking With Interest, a podcast by IntraFi Network, features in-depth analysis and insight into the policy changes reshaping the banking industry. With insightful interviews and previews of pending policy challenges, the podcast is an essential listen for anyone connected to the financial services industry. Banking With Interest is hosted by Rob Blackwell, an award-winning former journalist with more than two decades of experience as an expert on financial services policy.

[Banking Transformed with Jim Marous](#)

Hosted by fintech influencer Jim Marous, Banking Transformed highlights the leadership and cultural challenges facing the banking industry. Featuring interviews with some of the top minds in business, this podcast explores how financial institutions can prepare for the future of banking.

[Banking Information Security Podcast](#)

Exclusive, insightful audio interviews with banking and security leading practitioners and thought-leaders.

[Fintech Insider Podcast by 11:FS](#)

Fintech Insider by 11:FS is a bi-weekly podcast dedicated to all things fintech, banking, technology and financial services. Hosted by 11:FS experts David Brear, Jason Bates, and Ross Gallagher, and joined weekly by a range of guests, Fintech Insiders discuss the latest news, developments, and trends within the industry. Interviews with subject matter experts allows for deep dives on APIs, AI, digital banking, and all other areas disrupting our industry.

[Bankless](#)

The Ultimate Guide to Crypto Finance. DeFi, NFTs, and cryptocurrencies.

[ABA Banking Journal Podcast](#)

Bank executive insights, unique business strategies, regulatory updates from D.C., and fun banking stories brought to you in 20-minute episodes each week by the American Bankers Association's award-winning podcast team.

[Main Street Banking: A Podcast for Community Bankers](#)

The Paul W. Barret, Jr. School of Banking is a non-profit independent school created by and governed by a Board of Regents, whose members are executives from banks and other firms involved with the financial services industry. The mission of the School is to provide an adult learning experience for the career-oriented individual in commercial banking or a related financial services industry business.

WARNING FOR GRAIN FARMERS

WARNING SCALE TICKETS MUST BE CONVERTED WITHIN 30 DAYS

When a grain warehouse receives grain, they must issue a uniform scale ticket for the load of grain received. The original is returned to the provider of the grain, and a copy is retained by the warehouse. But farmers do not realize these tickets must then be converted into cash, noncredit-sale contracts, credit-sale contracts, or warehouse receipts, within thirty days after delivery of the grain N.D.C.C. 60-02-11. **If the grain elevator goes insolvent and a farmer has failed to convert their ticket within thirty days, they will lose any of the protections offered by the grain warehouse insolvency trust fund or the contract indemnity fund.**

CREDIT SALE CONTRACT REQUIREMENTS

Credit sale contracts are written contracts which state the grain delivered to the warehouse will be sold more than thirty days after the delivery or release of the grain to the warehouse. A warehouse cannot purchase grain via a credit sale contract unless the contract contains the following information:

1. the seller's name and address
2. the condition of the grain
3. the amount and kind of the grain delivered
4. the price per unit or a basis of value
5. the date payment is to be made
6. the duration of the credit sale contract
7. a clear and prominent notice that the sale is not protected by bond coverage; and
8. **the contract must be in writing and signed (either a wet signature or electronic) by both parties.**

Any credit sale contracts that are not signed within thirty days will be treated as an unconverted scale ticket and will lose all the protections provided by the grain insolvency trust fund and the contract indemnity fund.

TRUST FUND ESTABLISHED AFTER INSOLVENCY

When a grain warehouse goes insolvent the Ag. Commissioner will establish a trust fund. The trust fund is for the benefit of all the grain providers who converted their scale tickets in accordance with the above-mentioned requirements and offers no protections for any producer who has failed to convert their scale ticket within thirty days.

FARMERS CAN NOW GET BOND PROTECTION FOR GRAIN VALUES OVER \$280,000

North Dakota law now requires grain elevators to offer bonds for deferred-payment contracts, (i.e. credit-sale contracts for which the amount owed for the sale of grain has been established, but the payment is postponed until a later date.) The elevator must now tell farmers they are able to purchase their own bond protection to cover any losses that exceed the amounts covered by the state's Credit Sale Indemnity Fund. The amount of loss protected by the Credit Sale Indemnity Fund is the lesser of 80% of the amount owed to a farmer who has properly converted their scale ticket or \$280,000. Therefore, farmers who are owed more than \$280,000 should purchase bond protection for the excess amount owed.

CURRENT ELEVATOR INSOLVENCIES

- C & F foods, Manvel ND
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Upcoming NDBA Events - 2022

The North Dakota Banker's Association has many exciting and informational events planned for 2022. Below are some special dates to mark on your calendars –

- **CONFERENCES**

- **2022 Ag Credit Conference**
October 5-6, 2022 | Delta Hotel by Marriott, Fargo, ND
- **NDBA Group Meetings**
September 12-15, 2022 | Grand Forks, Fargo, Bismarck, Minot

[Click Here to Register](#)



FOUR LOCATIONS!
September 12-15

Featuring:
Kat Perkins

NDBA
GROUP MEETINGS

Grand Forks | Fargo | Bismarck | Minot