ASK KENNEDY
July 6, 2022

Topics Covered:

- Member Questions
- It’s Called Secured Transactions, Not Secured Lending
- Succession of a Single-Member LLC
- Anti-Corporate Farming
- CFPB Examination Manual Update
- Upcoming NDBA Events

Question #1: My question is in regards to an Ag loan secured by chattels. When an individual gets married, what steps should be taken to perfect the chattels, i.e. crops & machinery?

Response: **Banks should have the new spouse sign a security agreement listing the new spouse as a debtor, which pledges the new spouse’s interest in the crops and machinery. Banks could also have the spouse sign a property disclaimer which states that they are disclaiming any interest in the crops and machinery, either now owned or hereinafter acquired.**

Question #2: Do I understand correctly, that in ND, once married, without a prenuptial agreement, those assets are technically, once married, now owned 50/50 between the spouses?

Response: **No, those assets are not technically owned 50/50 after marriage. N.D.C.C. 14-07-05 states that neither the husband nor the wife has any interest in the property of the other. Additionally, the separate property of the husband and wife is not liable for the debts of the other spouse, but each are liable for their own debts contracted before and after marriage. However, if the property is owned jointly banks should have both spouses sign the security agreement, or have the new spouse who is not an original debtor sign a disclaimer that effectively disclaims any interest they have in the property that is pledged as collateral.**

Question #3: Does the bank need to wait until a new credit request to change their security agreement and UCC/CNS filings, or can the bank update the Security agreement and filings as soon as the bank becomes aware of the marriage?

Response: **Banks should update the security agreement and financing statement as soon as they find out about the marriage and should not wait until a new credit request comes in.**

Question #4 What is acceptable for both bank and customer signatures in regards to certificate of deposits?

Response: **Under North Dakota law, a Certificate of Deposit ("CD") is a negotiable instrument and subject to UCC Article 3, as enacted in North Dakota. Under the North Dakota Century Code a "Negotiable Instrument" is an unconditional promise or order to pay a fixed amount of money. However, before a CD becomes negotiable it must meet the following requirements: it must be in writing; signed by the maker or drawer; contain an unconditional promise or order to pay a fixed amount of money, on demand or at a definite time; contain words of negotiability; and be free from unauthorized promises.**

North Dakota law defines a "Maker" as the person who signs or is identified in a note as a promisor of payment. Consequently, the bank is the only party required to sign a CD because they are the "promisor or payment."

Question #5: We currently report to the credit bureau on consumer purpose loans/ Regarding loans to a trust, what is best practice for credit bureau reporting? Also, does it matter if the trust is revocable or irrevocable?

Response: **Personal credit reporting requirements are governed by the Fair Credit Reporting Act. Section 603 of the FCRP differentiates between the broad definition of "person" as including a trust and the limited definition of "consumer" as an individual and lastly Section 603 defines a "consumer report" as information regarding the creditworthiness of a Consumer. I can not give you specific legal advice but suggest that you talk to your legal counsel about the CFPB and the Fair Credit Reporting Act found at 15 U.S.C. § 1681a. With that being said there are commercial credit reporting agencies that may be applicable to corporate trusts.**

It's Called Secured Transactions, Not Secured Lending

Border State Bank v. Bagley Livestock Exch., Inc.[1]

Bert Johnson, doing business as Johnson Farms, and Hal Anderson entered into an oral cattle-sharing contract in December 1997. Under the oral contract, Anderson agreed to care for and breed cattle owned by Johnson and Johnson would receive a guaranteed percentage of the annual calf crop. The contract further provided that

[1] https://casetext.com/case/border-state-bank-v-bagley-livestock

the cattle Johnson placed with Anderson were considered to be owned by Johnson Farms and any offspring is to be sold under Johnson Farms' name. In March 2000, Anderson negotiated with Border State Bank for loans totaling $ 155,528. To secure these loans, Anderson granted Border State Bank a security interest in, among other things, all of Anderson's rights, title and interest in all livestock then owned or thereafter acquired. In December 2000, 289 calves that had remained with Anderson were sold at Bagley Livestock Exchange. The livestock exchange knew of Border State's security interest in Anderson's livestock but, after discussing the agreement with Johnson, determined the security interest did not attach to the calves. Border State Bank sued Bagley Livestock Exchange and Johnson, contending that they had converted Border State Bank's perfected security interest in the calves sold in December 2000. In a third-party complaint, Johnson sought indemnity from Anderson, in the event that Border State Bank was successful on its conversion claim. Anderson served a counterclaim against Johnson, claiming breach of contract. The district court granted the motion, finding that under the cattle-sharing agreement, Johnson did not grant Anderson an ownership interest in the calves. Ultimately, the jury determined that the written contract between Anderson and Johnson had been modified, Johnson breached the contract, and Johnson's breach directly caused damages to Anderson totaling $ 92,360. Johnson moved for a new trial, but the District Court denied Johnson's motion, and, on appeal, this ruling was upheld.[2]

Death of the Only Member of a Single Member LLC: Authority and Winding up

In the event of the death of the only member of a limited liability company ("LLC"), the question arises for financial institutions as to who has the authority to complete transactions on behalf of the entity. In a single-member LLC ("SMLLC") in which the single member is a natural person, the deceased is dissociated from the entity upon death. Without an operating agreement or a Transfer on Death Designation specifically indicating the succession of the membership interest, when a sole member dies, the economic and management rights pass to the decedent's estate. [3] If the interest is passing through the probate process, the North Dakota Century Code ("NDCC") allows the personal representative of the deceased member or other legal representative to exercise the rights of a transferee and for the purposes of settling the estate the rights of a current member under the uniform limited liability company act. [4]

WARNING: the decedent's membership interest must be transferred to a new member no later than 90 days after the death of the single member, failing to do so will result in the mandatory dissolution and winding up of the SMLLC. The decedent's membership interest can be transferred under the operating agreement. If there is no operating agreement, the deceased member's legal representative may designate a new member, as long as, the new member consents.

In most instances in a SMLLC, no one has been designated to manage the company or the financial institution has not been provided adequate information, leaving financial institutions in the dark as to who has the authority to complete transactions on the LLCs behalf. Banks, credit unions, and financial institutions holding accounts for single member LLCs have three options: 1) They can require a SMLLC to have a statutorily binding operating agreement to open an account in which there is specific language indicating the process to occur upon the member's death; [5] 2) the financial institution can ask for the contact information of individuals who would

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[2] Border State Bank v. Bagley Livestock Exch., Inc., 690 N.W.2d 326
[3] *NDCC 10-32.1-51(2)* https://ndlegis.gov/cencode/t10c32-1.pdf#nameddest=10-32p1-51
[4] *NDCC 10-32.1-46* https://ndlegis.gov/cencode/t10c32-1.pdf#nameddest=10-32p1-46
[5] *NDCC 10-32.1-14(1)* https://ndlegis.gov/cencode/t10c32-1.pdf#nameddest=10-32p1-14

know who the authorized personal representative is upon the death of the member or 3) if no one approaches the financial institution claim the funds, the account could sit dormant and eventually be submitted as unclaimed property. [6]

Financial institutions should not provide a member of a single person LLC with forms indicating who should receive the member's interest because this could potentially create a fiduciary obligation to by the financial institution to the single member of the LLC. Transfer on Death Designations of membership interests should be drafted by the member's estate planning attorney to be consistent with that member's estate planning goals. However, it would be prudent to ask for the additional information described above, so upon learning of the death of a member of a single member LLC the financial institution has an idea of who to contact to determine authority to complete transactions.

Anti-Corporate Farming

Recently, the sale of over 2,000 acres of valuable North Dakota farmland from Grafton-based Campbell Farms to a trust tied to Bill Gates, who is considered the largest private owner of farmland in the country, has brought ups concerns that the sale violates North Dakota state law that is meant to protect family farms. Consequently, the North Dakota attorney general has asked the trust that acquired the North Dakota land to explain how it plans to use it in order to meet the rules as outlined below.

As well-known among individuals and organizations in North Dakota's agriculture community, North Dakota has what are referred to as "anti-corporate farming laws", which prohibit all corporations or limited liability companies from owning or leasing farmland or ranchland, with some exceptions. NDCC Article 10-06.1 provides: "All corporations and limited liability companies, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching. A corporation or a limited liability company may be a partner in a partnership that is in the business of farming or ranching only if that corporation or limited liability company complies with this chapter."[7]

The law provides an exception for North Dakota-based family-owned corporations or limited liability companies. In these types of corporations and companies, all members or shareholders must either be a parent, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, brother, sister, uncle, aunt, nephew, niece, great-grandparent, great-grandchild, first cousin, or a spouse of one of those listed. Additionally, all officers, directors, governors, or managers in the corporation or LLC must be shareholders or members actively engaged in farming, at least 65% of gross income must come from farming or ranching operations, and one shareholder or member needs to be operating or residing on the operation. As another exception, corporations are exempted from the law if the land "…is necessary for residential or commercial development; the siting of buildings, plants, facilities, industrial parks, or similar business or industrial purposes of the corporation or limited liability company; or for uses supportive of or ancillary to adjacent nonagricultural land for the benefit of both land parcels." At the moment, the Gates trust purchasing the land does not appear to be located or registered in North Dakota, nor is it a family farm registered in North Dakota,

[6] *NDCC 47-30.2-04(10)* https://ndlegis.gov/cencode/t47c30-2.pdf#nameddest=47-30p2-04
[7] N.D. Cent. Code § 10-06.1-02.

which means they must divest themselves of the land within ten years if they do not prove to the AG that they fit any of the above exceptions.[8]

The worry about purchases of this magnitude by out-of-state farming corporations is nothing new. Wealthy buyers of farmland have long been criticized for contributing to the restriction of independent land ownership; because they can usually make higher bids than what local farmers can afford, fewer farmers end up owning their own farmland. Further, these buyers, who are frequently tied to corporations, tend to use more aggressive and industrial farming techniques to generate greater results in a quicker manner, as opposed to small-scale farmers who are more cautious and sustainable with their approach.

CFPB Examination Manual Update

In a joint white paper issued June 28, the American Bankers Association, Consumer Bankers Association, Independent Community Bankers of America and the U.S. Chamber of Commerce detailed why the CFPB's recent update to its UDAAP examination manual, as well as its announcement that it would begin examining financial institutions for alleged discriminatory conduct based on unfairness, exceeds the bureau's legal authority. The groups urged CFPB to rescind the new examination manual and explained how the bureau is using unfair, deceptive, and abusive acts and practices beyond the fair lending laws set by Congress.

Congress, the white paper explained, does not use the statutory concepts of "unfairness" and "discrimination" interchangeably. On March 16, the CFPB "conflated the concepts by announcing, via a UDAAP examination manual update, that it would examine financial institutions for alleged discriminatory conduct that it deemed to be unfair under its UDAAP authority," the groups wrote. The Associations also argued that the change is contrary to law and subject to legal challenge, as well as potential congressional action, and urged the CFPB to reconsider the changes.

For more information and comments, please click below:

https://www.aba.com/advocacy/policy-analysis/unfairness-and-discrimination

To view the ABA White Paper regarding the CFPB changes, please click on the link below:

https://www.aba.com/-/media/documents/white-paper/aba-udaap-white-paper.pdf?rev=3cd415cb06f242cfb73aa4baa9a185c8

Upcoming NDBA Events - 2022

[8] N.D. Cent. Code § 10-06.1-07.

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
