
ASK KENNEDY

May 4, 2022

Topics Covered:

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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: What can be charged on consumer loans in North Dakota, and are there special rules for mortgage loans?

Response: According to the North Dakota Century Code, interest charges and other fees must be set at rates as agreed to by the parties. However, no agreement between the parties allows for a bank to receive finance charges in excess of an annual rate of 36%. This includes all charges and fees that are necessary for the extension of credit.

The parties may also agree to charges for late or nonpayment of the loan. The maximum amount allowed under North Dakota law for loans over \$50,000 is 5% of the late payment. For loans less than \$50,000, the maximum late penalty allowed is \$20.00 for each late or nonpayment. These rules are applicable to all loans in North Dakota regardless of the type of loan or borrower.

Question #2: When titling a POD account, do you just include the acronym POD or do you need to include the POD's name?

Response: When titling a POD account, you do not need to include the beneficiary's name in the title of the account, as long as it is clearly stated somewhere in the account agreement.

Question #3: When opening an account of a business, can the business be both an LLC and DBA?

Response: A DBA is a trade name or fictitious name that allows businesses and corporations to operate under a name that is different from their legal name. Consequently, an LLC could be operating under a DBA.

Question #4: Does the FSA POA form give the bank authority to file the assignment of government payment without the borrower signing (*i.e.*, the bank signing as POA)?

Response: **Yes, the bank has the authority as long as the POA form is signed by the borrower. Then, moving forward, the bank could sign the government assignment document on behalf of the borrower without the need for the borrower to again sign the assignment.**

Question #5: Does the FSA POA need to be recorded at the FSA office?

Response: **An FSA POA would not need to be recorded right away. The bank could put it in their file's and have it recorded later if needed.**

Question #6: If the entity providing a secondary source of funds obtains the FSA POA, can they take the assignment of government payment without the first priority lienholder knowing? The first lienholder may have taken an assignment of previous government payment programs, but would they miss out on new government programs?

Response: **Yes and no. The government will likely just put the second lienholder on the check, but priority between the two lienholders is determined by Article 9 of the Uniform Commercial Code, Secured Transactions, adopted in North Dakota as Ch. 41-09, N.D.C.C. Thus, if the bank has a first priority lien, the bank can demand payment of the check proceeds from the secondary lienholder.**

Question #7: If a loan was included in a bankruptcy, what, if any, notices should be generated on these loans?

Response: **It depends on if the notice would violate the automatic stay.**

Question #8: If a guarantor of a loan has filed personal bankruptcy, what, if any, notices should be generated on the business loans?

Response: **Guarantor bankruptcy is likely to be a default of the borrower's loan, check the terms of your loan agreement.**

Question #9: If a loan is an uncollectable Chapter 7 bankruptcy variable rate or a line of credit loan, can a bank discontinue the automated rate changes for that loan (increase or decrease) on our core system where the loan information is stored?

Response: **Hard to say because of the automatic stay and the discharge of the indebtedness. A bank cannot violate the automatic stay, nor can a bank seek to collect a debt discharged in bankruptcy.**

Question #10: Are there steps for a bank to take to allow the successor in interest to make payments on a loan in the event of death of a consumer borrower?

Might this impact liens? What about future workout/foreclosure down the road if the successor quits making payments?

Response: Yes, there are steps a bank can take to allow a consumer successor in interest to make payments on a loan after the death of a consumer borrower. First, a bank must maintain policies and procedures reasonably designed to ensure that the servicer can retain information provided by the potential successor in interest and promptly facilitate communication with potential successors in interest when they are notified of their existence. The bank must also confirm a potential successor in interest's identity and ownership interest in the property by requiring reasonable documentation under the circumstances. For example, successors in interest to deceased borrowers may need to provide a death certificate, an executed will, or a court order confirming their interest in the property. Banks may also want to ask for additional documentation when necessary to prevent fraud or other criminal activity. After receiving documentation, the bank must then notify the potential successor in interest that the bank has either:

- a. Confirmed the potential successor in interest status
- b. Has determined that additional documents are required, or
- c. Has determined that the potential successor in interest is not successor in interest

If a bank cannot make the determination of the potential successor's status based on documentation provided, the bank then must specify what additional documentation is required. A common example of this would be when there is pending litigation involving the potential successor in interest and other claimants regarding who has title to the property at issue, the bank may specify that documentation of a court determination or other resolution of the litigation is required.

After the bank has confirmed that a successor is in fact a successor in interest the bank must provide them with written notice that includes the following:

- a. The servicer has confirmed the successor in interest's identity and ownership interest in the property;
 - b. Unless the successor in interest assumes the mortgage loan obligation under state law, the successor in interest is not liable for the mortgage debt and cannot be required to use the successor in interest's assets to pay the mortgage debt, except that the lender has a security interest in the property and a right to foreclose on the property, when permitted by law and authorized under the mortgage loan contract;
 - c. The successor in interest may be entitled to receive certain notices and communications about the mortgage loan if the servicer is not providing them to
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- another confirmed successor in interest or borrower on the account;
- d. In order to receive such notices and communications, the successor in interest must execute and provides to the servicer an acknowledgement form that:
- i. Requests receipt of such notices and communications if the servicer is not providing them to another confirmed successor in interest or borrower on the account; and
 - ii. Indicates that the successor in interest understands that such notices do not make the successor in interest liable for the mortgage debt and that the successor in interest is only liable for the mortgage debt if the successor in interest assumes the mortgage loan obligation under State law; and
 - iii. Informs the successor in interest that there is no time limit to return the acknowledgment but that the servicer will not begin sending such notices and communications to the confirmed successor in interest until the acknowledgment is returned; and
 - iv. The successor in interest is entitled to submit notices of error, requests for information, and requests for a payoff statement with respect to the mortgage loan account.

Allowing a confirmed successor in interest to make payments on the loan does nothing to impact liens or affect future workout/foreclosure proceedings down the road if the successor quits making payments. This is because a confirmed successor in interest must be considered a borrower regardless of whether or not the successor in interest assumes the mortgage loan obligation under state law.

Title Searches and Title Lock

Title Letter/O& E Report

A Title Letter or Ownership and Encumbrance Report is a statement of the current ownership and encumbrances affecting the property. However, not all encumbrances are covered and the individual creating the report will not examine the chain of title for the property. The individual creating the Report will only look at the last deed recorded to assess who is the apparent record title holder. The information in the report varies depending on who completes the Report. They are often not attorney prepared.

Title Opinion

A Title Opinion is prepared by an attorney. A Title Opinion will assess the chain of title and provide an opinion of the validity of the title vested in the current owner and any other parties having an interest in the property. An updated abstract is usually required to complete the opinion, which is not ordinarily prepared by the attorney providing the opinion. An abstract is simply a summary of the deeds, mortgages and other documents of public record affecting title to the real estate covered. The Title Opinion also details any encumbrances.

Title Insurance

Title Insurance is a form of casualty insurance that pays for damages incurred by the insured party for defects in the title and/or invalidity or unenforceability of mortgage liens. Title Insurance may be underwritten by a title agent (who may or may not be an attorney) approved by the company through which the insurance is placed

and licensed by the State in which the property is located. Title insurance is retrospective, it covers defects in title that may have already happened, whereas most other insurance protects from a situation that may happen in the future.

A memo on Title Lock is [Attached](#)

By Abigayle Lindgren

Special Guest: Christopher Gray

Christopher Gray currently serves as Vice President in ABA’s Office of Strategic Engagement. In this role, he is responsible for shaping and driving a portfolio of high-priority, member-driven advocacy campaigns. He works closely with industry, state, and federal partners managing key strategic relationships.

Christopher joined ABA in 2021 after working as the Deputy Chief of Staff of the U.S. Small Business Administration where he assisted in leading the emergency capital relief response to small businesses impacted by the Coronavirus (COVID-19). After the President nominated then-U.S. Treasurer Jovita Carranza to serve as SBA Administrator, he served as her “Sherpa”, helping prepare and guide her to an 88-5 confirmation vote in the U.S. Senate.

He has also held positions with the White House, the U.S. Export-Import Bank, PSECU, Pennsylvania Department of Environmental Protection, and the Pennsylvania Governor’s Office. Christopher earned his bachelor’s degree in political science from Shippensburg University of Pennsylvania.

It's Not My Birthday Case

A Kentucky man, Kevin Berling, won a lawsuit against his employer, Gravity Diagnostics, for throwing him a birthday party he did not want. Kevin had requested that Gravity Diagnostic not throw him a birthday party because it would trigger a panic attack. The office manager forgot this request and threw a party for him, which resulted in a panic attack. Kevin was sent home for the day and when he arrived the following day, he met with his bosses to talk about the incident, which triggered another attack. Shortly after the second meeting, Kevin was fired because his employers were worried that he could become violent and angry during these panic attacks. Gravity Diagnostics also accused Kevin of stealing his co-workers’ joy throughout this whole ordeal. The jury ultimately awarded Kevin \$450,000 for the incident, which included \$300,000 in mental anguish and \$150,000 for lost wages.



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 SDBA/NDBA Crypto Webinar**
May 9-10, 2022 | Online
[Registration Link](#)
- **2022 NDBA/SDBA Annual Convention**
June 14-15, 2022 | Radisson Hotel, Bismarck, ND
[Registration Link](#)
- **2022 Ag Credit Conference**
October 5-6, 2022 | Delta Hotel by Marriott, Fargo, ND

- **SCHOOLS**

- **Dakota School of Banking**
June 5-10, 2022 | Jamestown, ND | University of Jamestown
[Registration Link](#)
 - **National School for Beginning Ag Bankers**
June 20-23, 2022 | Spearfish, SD | Black Hills State University
[Registration Link](#)
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