
ASK KENNEDY

September 7, 2022

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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: If a payment date on a mortgage is changed, do we have to file a mortgage modification and record it with the new payment date? For example, going from the 1st to the 15th of the month, with no other changes made.
Or can we skip the recorded modification? Either way, an internal modification agreement is signed for the payment date change.

Response: **The best practice would be to do a Mortgage Modification along with the Note Modification to avoid inconsistencies that may be construed against the Bank. While it might not be necessary, it may prevent this from turning into an unexpected issue or defense to enforcement of the Bank's rights under the mortgage.**

Question 2: Is there ND Century Code for handling out-of-state subpoenas (east coast), similar to garnishments? For example, a grand jury subpoena with a request to appear & provide documents? Do they have to go through ND Clerk of Court in our County?

Response: **(1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this rule does not constitute an appearance in the courts of this state.**

(2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

Below are links to both the ND and Federal Rules of Civil Procedure.

Link to ND Civ Pro:

<https://www.ndcourts.gov/legal-resources/rules/ndrct/5-1>

Link to Federal Rules of Civ Pro: Note that Federal Subpoenas can be served anywhere but compliance might still have its limitations.

https://www.law.cornell.edu/rules/frcp/rule_45

WELCOME TO OUR NEW NDBA CHAIR, KATHY TORSKE!

We would like to welcome Kathy Torske, the new NDBA Chair, to the Ask Kennedy family. Kathy is originally from Arnegard and is a lifelong resident of North Dakota. Along with being the NDBA chair, she is the President and CEO of Brevara Insurance. She is here with us today to talk about herself and her new role as NDBA chair. Please join me in giving Kathy a virtual round of applause!

BND Collateral Valuation Services with Dustin Bakken

At the beginning of 2022, the Bank of North Dakota rolled out and officially began offering collateral valuation services, including chattel, loan workout, and ag real estate evaluations. I'd like to introduce you to the manager of BND's Collateral Valuation Department, Dustin Bakken, to talk about this fantastic new program. Dustin joined BND in 2021 with thirteen years of experience in commercial and industrial construction, as well as multiple years of property tax assessment experience including capitalization rate studies, public utility valuation, and industrial and commercial property assessment.

FDIC Multiple Re-Presentation NSF Fees with Rick Clayburgh

The FDIC is issuing guidance to FDIC-supervised institutions to address certain consumer compliance risks associated with assessing multiple non-sufficient funds (NSF) fees arising from the re-presentation of the same unpaid transaction. Additionally, the FDIC is sharing its supervisory approach when a violation of law is identified, as well as expectations for full corrective action. Some of the important things to note include:

- Many financial institutions charge NSF fees when checks or Automated Clearinghouse (ACH) transactions are presented for payment but cannot be covered by the balance in a customer's transaction account. After being declined, merchants may subsequently resubmit the transaction for payment.
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- Some financial institutions charge additional NSF fees for the same transaction when a merchant re-presents a check or ACH transaction on more than one occasion after the initial unpaid transaction was declined. In these situations, there is an elevated risk of violations of law and harm to consumers.
- The FDIC has identified violations of law when financial institutions charged multiple NSF fees for the re-presentation of unpaid transactions because disclosures did not fully or clearly describe the financial institution’s re-presentation practice, including not explaining that the same unpaid transaction might result in multiple NSF fees if an item was presented more than once.
- Financial institutions are encouraged to review their practices and disclosures regarding the charging of NSF fees for re-presented transactions. The FDIC has observed some risk-mitigation practices financial institutions implemented to reduce the risk of consumer harm and potential violations.
- The FDIC will take appropriate action to address consumer harm and violations of law when exercising its supervisory and enforcement responsibilities regarding re-presentation NSF fee practices.

For more information, please see the below link. We also have Rick Clayburgh here to talk more about this, as well as to answer any questions.

[Supervisory Guidance on Multiple Re-Presentation Fees](#)

NDBA General Question: Child Support Liens

Question:

I have a question about a child support lien we received. The individual the lien is on has an IRA at our institution.

In North Dakota, is a retirement account safe from a child support lien or would I hold funds in the IRA for this lien? We did receive a notice of right to garnish federal benefits with the lien as well.

The Notice of Lien states: This lien attaches to all accounts of the obligor maintained by your financial institution and freezes all subsequent withdrawals (except those in excess of the past-due support amount).

Also, with garnishments, we hold what is in an account at the time the garnishment is received. Any deposits received after the garnishment hold is placed is not held and is available to the customer.

I was told that these liens “freeze” the account so that any deposits received after the date we received the lien are also held from withdrawal. Is this correct?

Answer:

A child support lien does attach to all accounts at the bank as of the date the bank is served the notice, and the bank must freeze all subsequent withdrawals up to the amount stated in the lien. Retirement funds are not exempt from enforcement of an order to pay child support.

A notice of a child support lien differs from a garnishee summons, as child support lien notice requires the bank to freeze all subsequent withdrawals, while a bank in receipt of a garnishee summons would freeze the amount as of the date the garnishee summons is received.

Child support liens are provided for in Chapter 35-34 of the North Dakota Century Code. Section 35-34-05, N.D.C.C., provides that the child support agency may establish a lien on an account maintained in a financial institution by serving a notice of lien upon the financial institution. “Upon service of the notice of lien on a financial institution, the lien attaches to accounts of the obligor maintained in the financial institution and freezes all subsequent withdrawals from the account except for funds in excess of the amount of past-due support for which a lien is claimed.” N.D.C.C. § 35-34-05(2). The child support agency may enforce the lien by demanding in writing the surrender of the property, issuing an execution under chapter 28-21, serving a deduction order under section 50-09-35, or filing a court action. See N.D.C.C. § 35-34-10.

North Dakota garnishment procedures are set out in Chapter 32-09.1, N.D.C.C. The garnishment process may be used to recover money after securing a judgment. See N.D.C.C. §§ 32-09.1-02, 32-09.1-06. The garnishee must disclose and retain the amount in the account as of the time the summons is served. See N.D.C.C. § 32-09.1-09.

The customer may claim exemptions from garnishment or execution under Ch. 28-22, N.D.C.C. Under section 28-22-03.1(7) retirement funds (up to \$100,000) that have been in effect for at least 1 year may be claimed exempt, to the extent those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986. However, retirement funds are not exempt from enforcement of any order to pay child support. N.D.C.C. § 28-22-03.1(7).

Disclaimer: As general counsel for NDBA, Tracy Kennedy does not provide legal services or legal advice to members. This response is limited to information regarding the general requirements of laws and regulations. All members must retain their own legal counsel in order to receive legal advice or counsel regarding how laws and regulations may apply to situations specific to their banks.

**Frequently Asked Questions:
 Garnishments**

Questions 1: Knowing that NDCC 32-09.1-19 states anything under \$10 is to be disclosed but not held, can the bank return the funds to the debtor?

Answer: A garnishee bank is only required to “retain funds” if the total amount of property, earnings, and money is ten dollars or more. So, if the total amount of property is in fact less than ten dollars those funds should be disclosed but do not have to be “retained.” Additionally, the garnishee bank may be discharged if the value of the property of the defendant held by the bank is less than ten dollars.

Question 2: What are the requirements of the plaintiff/attorney to have the correct verbiage in the documents they serve upon the bank?

Answer: The garnishment disclosure must be in substantially the same form as provided in subsection 3 of section 32-09.1-03. The question is, if the garnishment disclosure does not substantially comply with the above

referenced section, does the disclosure form comply with North Dakota law. If the garnishment form is insufficient the Bank would not be able to disclose customer information because the release of information would not be made pursuant to valid legal process.

The requirements of N.D.C.C. 32-09.1-03 are as follows:

Disclosure must include:

The amount of disposable earnings earned or to be earned within the defendant's pay periods which may be subject to garnishment and all of the garnishee's indebtedness to the defendant.

Whether the garnishee held, at the time, the title or possession of or any interest in any personal property or any instruments or papers relating to any property belonging to the defendant or in which the defendant is interested. If the garnishee admits any interest or any doubt respecting the interest, the garnishee shall set forth a description of the property and the facts concerning the property and the title, interest, or claim of the defendant in or to the property.

If the garnishee claims any setoff or defense or claim or lien to disposable earnings, indebtedness, or property, the garnishee shall disclose the amount and the facts.

Whether the defendant claims any exemption from execution or any other objection, known to the garnishee or the defendant, against the right of the plaintiff to apply upon demand the debt or property disclosed.

If other persons make claims to any disposable earnings, debt, or property of the defendant, the garnishee shall disclose the names and addresses of the other claimants and, so far as known, the nature of their claims

[Model disclosure form from NDCC](#)

Question 3: Can the bank refuse to process the garnishment when the garnishment disclosure doesn't substantially conform to the requirements of N.D.C.C. 32-09.1-03?

Answer: A Bank cannot disclose customer information without valid legal process. N.D.C.C. 6-08.1-03. The Bank may want to inform the Plaintiff's attorney that they will not process the garnishment and give them the reasons as to why you refuse to process the garnishment.

Question 4: What happens when a Bank is served with a garnishment via USPS but it lists a former president of the Bank?

Answer: When serving a Bank with a garnishment, service must be done upon a specifically named Bank President, Vice President, or the Bank's registered agent for service of process. If the Plaintiff fails to do so, service is invalid, and the Bank cannot disclose customer information.

Question 5: Is it the bank's responsibility to notify the plaintiff's attorney of a change in the specific person to whom the garnishee summons should be addressed?

Answer: No, but to avoid any possible liability for failure to answer a garnishment, the bank or their representatives should contact the plaintiff's attorney and tell them that service was improper and the reasons why it was improper. Failing to do so could result in a judgment being awarded against the Bank, something that is easily avoided by reaching out to the Plaintiff's attorney.

Question 6: Should a bank continue to accept service of a garnishee summons that has the bank's former name on it?

Answer: No, service of process which lists the wrong bank name is likely insufficient. Banks can only disclose customer information with the customer's consent or through valid legal process. Listing the wrong name on the garnishment is likely insufficient service therefore, the bank would not be able to disclose any information required by the garnishment. However, the Bank may want to contact the Plaintiff's attorney and tell them why service was insufficient failing to do so, may result in a judgment being awarded against the bank, something that is easily avoided by contacting the Plaintiff's attorney.

Question 7: Is it the Bank's responsibility to inform the plaintiff or the plaintiff's attorney of a name change? Would it be acceptable to note the name change somewhere on the disclosure stating that the bank is now known as _____ bank?

Answer: It is not the Bank's responsibility however, the bank may want to inform the Plaintiff that the bank's name has changed and therefore service of process was not sufficient. I would contact the Plaintiff's attorney directly and state the reasons as to why you are unable to comply with the garnishment and take no further action until the bank has been served with valid legal process.

WARNING

A Garnishee Bank has 20 days, after service of the garnishee summons and disclosures, to provide written responses. Failing to respond to the garnishee summons may result in a judgment being entered against the Bank for the total amount of the Plaintiff's judgment or the "retention amount" whichever is less. That is why we always suggest responding to valid garnishments or contacting the Plaintiff's attorney for invalid garnishments. If the Bank feels they weren't properly served or the garnishment disclosure form doesn't substantially comply with the statute, contact the Plaintiff's attorney, and inform them of the situation. This will help avoid the burdensome process of unwinding the default judgment entered against the Bank.

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**

- **NDBA Group Meetings**

September 12-15, 2022 | Grand Forks, Fargo, Bismarck, Minot

[Click Here to Register](#)

- **2022 Ag Credit Conference**

October 5-6, 2022 | Delta Hotel by Marriott, Fargo, ND

[Click Here to Register](#)

- **2022 Bank Security Seminar**

October 25, 2022 | Radisson Hotel, Bismarck, ND

[Click Here to Register](#)



FOUR LOCATIONS!
September 12-15

NDBA
GROUP MEETINGS

Featuring:
Kat Perkins

Grand Forks | Fargo | Bismarck | Minot