NDBA Live
June 25, 2025

Topics Covered:

Member Questions

Question 1: There was something you went over yesterday [at the loan documentation and enforcement seminar] that I was trying to document and my shorthand notes came up a little short for me to get a good, clear record.

You were talking about Future Advance Clauses, Unlimited Maximum Secured Debt & mortgage modifications. I want to document something on this regarding lien position and value of the first mortgage when there is a second behind the first.

first mtg the prom note $500,000 (Bank #1) – but mtg has future advance & unlimited max secured debt

second mtg prom note $250,000 (Bank #2)

five years after the first mortgage was recorded - Bank #1 does a mtg mod adding a second prom note $300,000

Total value of land $700,000

For easy figuring let's say $100,000 principal paydown of prom note on the first mortgage. Where does Bank #2 land in the lien position? Before or after the $300,000 modification?

Response: **It depends on the terms and conditions of the first mortgage. If the first mortgage contains a broad definition of indebtedness (which includes future obligations), a future advance clause, an unlimited maximum lien amount, and a cross-collateralization clause, the additional $300,000 will be secured by the first mortgage ahead of Bank #2's mortgage.**

Question 2: I have a question on authorization of running a credit bureau report. If no loan application is being signed, can a signed personal financial statement (PFS) be considered authorization? And if the PFS is for husband and wife and only the husband signs the PFS can a credit bureau be ran on the wife?

Response: **Best practice, I don't think so. Generally, your credit application will give consent to pull a credit report.**

Further, you must seek to use the consumer report for a permissible purpose. The Fair Credit Reporting Act (FCRA) provides, in part, that any consumer reporting agency may furnish a consumer report to a person which it has reason to believe:

- **Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or**
- **Intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or**
- **Otherwise has a legitimate business need for the information in connection with a business transaction that is initiated by the consumer; or**
- **Otherwise has a legitimate business need for the information to review an account to determine whether the consumer continues to meet the terms of the account.**

***See* 15 U.S.C. § 1681b.**

If you violate the FCRA, you can be liable for damages as well as attorney's fees.

Question 3: Borrower of a loan is an LLC, but the members of that LLC are also LLCs. Would you collect organizational documents on all LLCs that are listed as members?

Response: **Yes.**

Question 4: What are the required documents to register a company or LLC with NDSOS? Would it ever be acceptable to receive unsigned operating, etc. agreements?

Response: **To form a limited liability company, articles of organization must be signed and filed with the secretary of state. *See* N.D.C.C. § 10-32.1-20.**

"'Operating Agreement' means the agreement, whether or not referred to as an operating agreement and whether oral, in a record, implied, or in any combination thereof, of all the members of a limited liability company, including a sole member, concerning the matters described in subsection 1 of section 10-32.1-13 and includes the operating agreement as amended or restated." N.D.C.C. § 10-32.1-02(36). "A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself manifested assent to the operating agreement." N.D.C.C. § 10-32.1-14(1). "A person that becomes a member of a limited liability company is deemed to assent to the operating agreement." N.D.C.C. § 10-32.1-14(2).

You should never accept an unsigned operating agreement.

Question 5: Single Owner LLC – If there is no Operating Agreement, what documentation would you recommend receiving to verify ownership?

Response: **Statement of Authority**
Affidavit

Question 6: Guarantor Resolutions – if the resolution received is generic and doesn't specifically address the authority to sign as guarantor would this statement suffice: "Is authorized to make any and all contracts"?

Response: **Generally, a guaranty would fall under the definition of any and all contracts, but this cannot be construed as legal advice – you must get an opinion from your counsel.**

Question 7: Operating Agreement – also doesn't specifically address the authority to sign as guarantor but has this statement: "All deeds, mortgage, bonds, checks, contracts & other instruments pertaining to the business and affairs of the company."

Response: **Generally, guaranty would be a contract or other instrument, but this cannot be construed as legal advice – you must get an opinion from your counsel.**

Question 8: When Real Estate is owned in an undivided share (for instance 2 brothers) – Can a mortgage be taken by just one of the shareholders? What value would you place on that mortgage?

Response: **This cannot be construed as legal advice. You have to reach out to your counsel.**

"Although a joint tenant may not convey or otherwise encumber another joint tenant's interest in property without the authorization or consent of the cotenant, one may deal with strangers as freely as owners of property held individually, and may convey or otherwise encumber one's own interest in the property without the consent of the other joint tenant." ***American Standards Life & Accident Ins. Co. v. Speros*****, 494 N.W.2d 599, 606 (N.D. 1993) (citing** ***Olson v. Fraase*****, 421 N.W.2d 820 (N.D. 1988)). "It follows that during the continuance of the joint tenancy, each joint tenant may have his or her fractional interest taken for the satisfaction of their individual debts."** ***Id.*** **(citation omitted). However, "a security agreement encumbering only the interest of one joint tenant is extinguished upon that joint tenant's death prior to default."** ***See Olson*****, 421 N.W.2d at 831-32.**

Question 9: We had a situation today where we have a DDA account that was a Multi-Party account Without Right of Survivorship and the one individual has passed away. We've researched our Legal Documentation for New Accounts book and the ND Century Code but were looking for some clarification on any steps we need to take.

Do we need to freeze the remaining funds in the account at all? The documentation leans towards we do not as it states the bank is not responsible to determine the ownership percentage, but we just want to make sure we handle the account correctly.

Response: **This cannot be construed as legal advice. You have to reach out to your counsel.**

However, N.D.C.C. Chapter 30.1-31 addresses non-probate transfers.

"Sums on deposit…in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under section 30.1-31-08 is transferred as part of the decedent's estate." N.D.C.C. § 30.1-31-09(3).

"During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent." N.D.C.C. § 30.1-31-08(2). "'[N]et contribution' of a party means the sum of all deposits to an

account made by or for the party, less all payments from the account made to or for the party which have not been padi to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance." N.D.C.C. § 30.1-31-08(1).

Question 10: Can a CNS be docusigned?

Response: **There is nothing in Electronic Signatures in Global and National Commerce Act (ESIGN) and/or the Uniform Electronic Transactions Act (UETA) (adopted by North Dakota as Chapter 9-16, N.D.C.C.) carving out an exception for Central Notice System (CNS), so an electronic signature should be valid.**

Question 11: Default Interest Rate Statute

Response: **47-14-05. Legal rate of interest - Interest after maturity.**
Interest for any legal indebtedness must be at the rate of six percent per annum unless a different rate not to exceed the rate specified in section 47-14-09 is contracted for in writing. Unless otherwise agreed by the parties in writing, all contracts must bear the same rate of interest after maturity as they bear before maturity. A charge for a late payment penalty may be imposed only if the amount of the late charge or the method of calculation of the late charge has been agreed to by the parties in the loan documents that are signed by the borrower.

Question 12: Do you have to give 30 days notice before foreclosure or 30 days notice before acceleration?

Response: **32-19-20. Notice before foreclosure.**
At least thirty days and not more than ninety days before the commencement of any action or proceeding for the foreclosure of a mortgage on real estate, a written notice shall be served on the title owner of record of the real estate.

The terms of your note will likely cover acceleration.

Question 13: Can you send out a notice before foreclosure before 120 days of delinquency for (Fannie Mae and Freddie Mac)?

Response: **We cannot give legal advice. Refer back to the policy. If you have questions about the policy or its application and notices, reach out to Fannie Mae/Freddie Mac.**

A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) A borrower's mortgage loan obligation is more than 120 days delinquent;
(ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or
(iii) The servicer is joining the foreclosure action of a superior or subordinate lienholder.

12 C.F.R. § 1024.41(f)(1).

Question 14: Should we get signatures on personal financial statements and tax returns?

Response: **Yes, it's preferred.**

Question 15: Should we get be getting new security agreements from the same debtor each time we do a loan?

Response: **That will depend upon the terms and conditions in your original security agreement, including the collateral identified therein, the definition of secured debt, and whether there is a cross-collateralization clause. It would generally be recommended to obtain a new security agreement each time.**

However, be careful about the statute of limitations for enforcement of contracts. *See* N.D.C.C. § 28-01-16(1) (providing that an action upon a contract must be commenced within 6 years after the claim for relief has accrued).

Question 16: Should we do a new mortgage modification each time we modify the terms of a loan?

Response: **To change the terms of the mortgage, you will need a mortgage modification. Again, the existing terms may cover additional debt (no maximum obligation, future advances, cross-collateralization), but it would generally be recommended to obtain a mortgage modification or a new mortgage so that the debt is specifically covered.**

If your mortgage is insured, make sure you run the modification by your title insurer.

June 2025 OCC Enforcement Actions

On June 18, 2025, the Office of the Comptroller of the Currency (OCC) released enforcement actions taken against national banks and federal savings associations, as well as individual affiliated with banks the OCC supervises. Actions against banks include:

- Formal Agreement with Carver Federal Savings Bank for unsafe or unsound practices, including those related to strategic planning and earnings performance.
- Formal Agreement with Sterling Federal Bank, FSB for unsafe or unsound practices, including those related to strategic planning, capital planning, credit administration, and liquidity risk management.
- Formal Agreement with Texas Heritage National Bank for unsafe or unsound practices, including those related to strategic planning, capital planning, liquidity risk management, interest rate risk management, concentration risk management, the allowance for credit losses, and violations of law, rule, or regulation, including those relating to reports of condition and independent audit.

CFPB 1033 Litigation

On May 30th, the Consumer Financial Protection Bureau (CFPB) filed a motion for summary judgment in the lawsuit challenging the Section 1033 rule (which requires banks to make a consumer's financial information available to them or a third party at the consumer's direction while prohibiting the charging of fees for doing so). In its motion, the CFPB argues that the rule exceeds the CFPB's statutory authority and is arbitrary and capricious, and therefore is unlawful and should be set aside.

Section 1071 Compliance Dates Extended

On June 18, 2025, the CFPB published an interim final rule extending compliance dates for the 2023 small business lending rule as follows:

Compliance Tier	Original Compliance Date in the 2023 Final Rule	Revised Compliance Date in the 2024 Interim Final Rule	New Compliance Date	New First Filing Deadline
Highest Volume Lenders (Tier 1)	October 1, 2024	July 18, 2025	July 1, 2026	June 1, 2027
Moderate Volume Lenders (Tier 2)	April 1, 2025	January 16, 2026	January 1, 2027	June 1, 2028
Smallest Volume Lenders (Tier 3)	January 1, 2026	October 18, 2026	October 1, 2027	June 1, 2028

Covered financial institutions are permitted to continue using their small business originations from 2022 and 2023 to determine their compliance tier, or they may instead use their originations from 2023 and 2024, or from 2024 and 2025.

ABA Emerging Leader Awards

The ABA Emerging Leader Awards identify and recognize the next generation of bank leaders who are committed to the highest standards of achievement and service to the industry and their communities. You can apply or nominate a colleague until 5:00 PM ET June 30, 2025!

Upcoming Events

NDBA has many exciting and informational events planned for 2025. Below are some special dates to mark on your calendars!

- **ABA Women Lead Symposium** | July 17, 2025 | Virtual Conference | Link
- **NDBA Regional Member Meetings** | September 8-11, 2025 | Grand Forks, Fargo, Bismarck, and Minot
- **Effective Leadership Seminar** | September 30 - October 1, 2025 | Bismarck
- **NDBA Ag Credit Conference** | October 2-3, 2025 | Bismarck
- **NDBA Bank Security Seminars** | October 7-8, 2025 | Bismarck and Fargo
- **NDBA Compliance School** | October 20-23, 2025 | Bismarck and Virtual
- **NDBA Fraud Forum** | October 20, 2025 | Bismarck
- **NDBA Peer Group Consortium** | October 21, 2025 | Bismarck
- **NDBA IRA Seminars** | October 27-30, 2025 | Fargo and Bismarck
- **NDBA HSA Workshop** | October 31, 2025 | Bismarck