VIRGINIA BANKING LAW QUESTIONS AND ANSWERS

As I travel around Virginia speaking with bankers, I get asked a lot of questions about the application of the Virginia banking laws to a variety of situations. Here are a few that may be of interest to many bankers.

Question: Is a confession of judgment provision in a promissory note binding on an entity domiciled in another state that borrows from a Virginia based bank?

Answer: Yes. A confession of judgment provision in a promissory note appoints an attorney-in-fact to confess judgment on behalf of the borrower if the borrower defaults on the note in the future, thereby eliminating the need for a lengthy legal proceeding to obtain a judgment on the note. Federal regulations prohibit confession of judgment clauses in consumer loan transactions, but they are permitted in commercial loans. Virginia law expressly permits confession of judgment provisions in promissory notes and other debt instruments. Many other states prohibit the practice. Whether a confession of judgment clause is enforceable depends on which state's law governs the promissory note. Whether Virginia law governs will depend on whether there is an adequate nexus to Virginia. If the bank is headquartered or chartered in Virginia or has branches in Virginia, there is likely adequate nexus for the note to be governed by Virginia law. If Virginia law governs, then the confession of judgment provision will be enforceable against a commercial loan borrower that is domiciled in another state. Once a confessed judgment is entered in the appropriate Virginia court, it will be enforceable against any of the borrower's assets located in that court's jurisdiction. If the borrower has assets in other jurisdictions in Virginia or in other states, the judgment will need to be domesticated or registered in those other jurisdictions in order to be enforced against the borrower's assets located in those other jurisdictions. The rules for domesticating or registering a judgment in other jurisdictions vary by state, but are usually fairly easy administrative procedures.

Question: Our bank is in the process of changing its document retention policy to retain most of our loan files and other important documents in an electronic storage medium. What, if any, loan documents or other important bank documents should be retained in physical paper form?

Answer: Virginia law does not require any specific documents be retained in paper form. However, there may be some advantages to keeping certain key documents (such as promissory notes, deeds of trust, guaranties, etc.) in paper form, and banks will need to balance those advantages with the costs of maintaining some paper records. For example, the Uniform Commercial Code provides that a promissory note may be enforced by the person entitled to payment under the note, even if the note has been lost, destroyed or stolen. In addition, rules of evidence in most state and federal courts permit copies of promissory notes and other business documents to be admitted as evidence. However, to admit and enforce a copy of a note under those provisions requires compliance with additional administrative and evidentiary burdens to prove that it is a true, complete and authentic copy. In addition, handwriting experts may be able to provide better expert testimony as to the authenticity of signatures if they can inspect original signatures. Because promissory notes are negotiable instruments, and transactions to enforce, transfer or payoff notes are often easier and more efficient when in possession of the original

note, some banks elect to retain original promissory notes even when most other bank documents are stored electronically.

Question: Our bank is chartered and headquartered in Virginia and most of our branches are located in Virginia. For abandoned deposit accounts where the customer's last known address is outside of Virginia, is our bank required to escheat account funds to the state of last known address or to Virginia? Also, do we follow the escheat timelines and other escheat rules of Virginia or the state of the customer's last known address?

Answer: In most circumstances, banks should escheat account funds to the state of the customer's last known address, regardless of whether or not the bank has branches or other contacts with that state. In limited circumstances, banks may escheat the account funds to Virginia, and Virginia will forward them to the other state. The escheatment laws and time periods of the state of the customer's last known address will apply and should be followed by the bank. Different rules may apply for safe deposit box contents, securities and distributions on securities, and money orders and travelers checks. When in doubt, it may be a good practice to contact the Virginia Treasury Department's Division of Unclaimed Property and ask for guidance.

For more information about these and other Virginia banking law questions, contact Mel Tull, VBA General Counsel, at mtull@vabankers.org or (804) 819-4710.

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