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TAKE A SECURITY INTEREST IN ACCOUNTS

If a loan goes bad, one source of repayment is funds that the borrower or any guarantor may have at the bank. Banks have a common law right of set-off to take the deposits. But, set-off rights have significant restrictions and banks cannot rely on the right of set-off alone. Some of these restrictions are:

1. Many standard account documents such as LaserPro prohibit set-off against trust accounts. There is no legal reason for such restrictions but the contractual limitations on set-offs will still apply.
2. The names of the borrower/guarantor and the account owner must be exactly the same. Therefore, the bank cannot set-off a joint account when fewer than all of the account owners are the borrower or guarantors.
3. Preexisting tax levies, judgment liens or garnishments will take priority over the bank's set-off rights.

In order to fully protect the bank's rights in deposit accounts in the event of a loan default, the bank should take an actual security interest in all deposit accounts to secure the note or guaranty. The best place for the pledge is in the account agreement so all deposits are automatically pledged to any debts of the depositor. If the security interest is not in the account agreement, a blanket security interest in all accounts should be contained in the note and guaranty. The security interest should include all debts of a trust of an individual obligor.

KEEP SENDING NOTICES TO CHAPTER 13 BORROWERS

A new court rule requires lenders to continue to send loan payment statements to borrowers who have filed for bankruptcy under Chapter 13 in the Eastern District of Missouri. For Chapter 7 or 11 filings, do not continue to send statements. Check with legal counsel for rules in other bankruptcy courts.

HANDLING HUSBAND AND WIFE ACCOUNTS IN MISSOURI

Unless otherwise indicated, a joint account between a husband and wife at a bank in Missouri is called a "tenancy by the entireties." For savings and loan associations, there must be a specific election to be a tenancy by the entireties. For tenancy by the entireties accounts, the account agreement must give each spouse the right to withdraw funds without the consent of the other. Otherwise, there must be joint signature for withdrawals including checks. Look at your account agreement to insure that it permits one-signature checks or withdrawals. (*William C. Scott, Sr., Appellant v. Union Planters Bank, N.A.*)

Under Missouri law a tenancy by the entireties account is not subject to garnishment or judgment liens unless the garnishment or lien is against BOTH the husband and wife. This is a significant protection for married persons. (A tenancy by the entireties account is probably not exempt from an IRS levy.) Some commercial forms companies have added language to the designation for joint accounts with rights of survivorship on account cards which waives tenancy by the entireties coverage. This can significantly harm customers by eliminating protection against liens and garnishments. Check your account signature card to see if the definition of joint accounts excludes tenancies by the entireties, and if so consult with their counsel on whether this limitation should be removed.

REMINDERS ABOUT POWERS OF ATTORNEY

The following rules apply to Missouri powers of attorney:

1. A durable power of attorney is just the same as a nondurable power of attorney, except the durable power of attorney remains effective if the grantor becomes incapacitated. The only time a financial institution needs to determine whether a power of attorney is durable is if the grantor is known to be incapacitated when the attorney in fact tries to exercise the power.
2. A trustee of a trust can give a power of attorney to someone else to act as trustee. But, the power of attorney must specifically reference the trust and must be signed by the trustee in such person's capacity as trustee.
3. An attorney in fact cannot add or remove a pay on death beneficiary, or add or remove a joint owner unless the power of attorney specifically grants the attorney in fact the power to change survivorship rights in the grantor's accounts.

In Illinois there is a question as to whether an attorney in fact can sign a guaranty for the principal unless that power is specifically granted. Check with counsel before accepting a guaranty signed by an attorney in fact in Illinois.

For all powers of attorney:

1. No attorney in fact can act after the death the grantor of the power of attorney.
2. Safe deposit deputies and authorized signers on accounts are attorneys in fact and all rules regarding powers of attorney apply.

The contents of this Update are for general information only. Consult your legal counsel before taking actions in reliance on anything contained in this law update. To cancel receipt of the Banking Law Update, send an e-mail to mforster@spvg.com and request "Cancel Update".

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