

# M|J|B BANKING LAW TODAY

## Dealing with the Unexpected Challenges Associated with a Strong Growing Year

With crop yields projected to return to near record levels, commodities prices (particularly soybeans) increasing dramatically over the last month, and a steady stream of new government subsidies, there appears to be a glimmer of hope in an agricultural economy that has been fairly bereft of it over the better part of the last decade. Increased profitability means opportunity for both farmers and their lenders, but it also gives rise to some unexpected challenges.

These challenges result from a number of interested parties all vying for the excess funds resulting from the newfound profitability after a prolonged period of loss or break-even. Perhaps counterintuitively, the most strenuous types of intercreditor disputes arise not when times are truly hopeless – since most creditors know that you cannot get blood out of a stone; instead, they arise when there is money to fight over but not enough to go around. Banks should go into the 2020 harvest expecting that other creditors will respond to the availability of additional agricultural funds by becoming more insistent on payment and more aggressive with collection efforts.

With that in mind, how does a bank best deal with the opportunities and challenges associated with an influx

of additional funds to agricultural borrowers? Below is a list of steps that every ag bank should take to deal with the opportunities and challenges associated with this strong growing year:

### **Make Sure that Your Bank is Named on all Commodities Checks**

Having a CNS in place is all well and good, but the protections afforded by a CNS count for surprisingly little if your borrower's buyers are either located in another state or if buyers simply ignore the CNS financing statements for any of a variety of reasons (simple negligence, doing an improper favor for the borrower, etc.).

To combat the problem of unheeded CNS financing statements, every ag bank should construct its own list of commodities buyers through deposit account records and should be sending statutorily compliant direct notice of security interest to all buyers that have not taken the important step of naming your bank on commodities checks.

Banks should also be insisting that their borrowers execute a Commodity Buyer Disclosure Form that specifically lists all commodities buyers utilized in the last 12 months, as well as all buyers the borrowers

intend to use over the next 12 months. Not only does such a disclosure provide the bank with vital information for proper borrower oversight and collection, but also if structured appropriately, this disclosure could form a basis for objecting to a borrower's discharge in bankruptcy, should they ever file.

### **Monitor New Statutory Liens**

More money coming in generally leads to more statutory lien filings. At harvest time in particular, harvester's liens can become a big issue. Banks can monitor the filing of any new liens by running UCC searches and CNS searches through the Minnesota Secretary of State.

Also, banks can efficiently monitor all ag customers simultaneously by subscribing to the searchable CNS Farm Produce Monthly List emailed out by the Minnesota Secretary of State and by running searches by debtor or secured party name. By running a simple search of your own bank's name, you will see every customer on which you have a CNS, and you will see any other creditors that also have CNS filings on any of your customers.

Once your bank becomes aware of competing filings, it can deal with them through actions such as objecting to improper liens and offsets and reaching intercreditor agreements with the supplier or service provider that filed the lien.

### **Utilize Payment Restructuring Agreements and Forbearance Agreement to Make Up Arrearages**

Many ag banks have been patiently waiting – often for multiple years – for financial conditions to improve enough for the borrowers to start making sizeable principal payments. Interest only payments, or just prolonged payment deferrals, have been incredibly common recently. With a strong influx of money from a robust growing season, banks should be looking to

have that patience rewarded through sizeable principal payments.

As a best practice, banks generally should not just accept the payment and move on, they should accept the payment in connection with a broader payment restructuring plan. The issue to keep in mind here is not just getting the bank principal payments right now; the bank should also consider and structure a workable arrangement to ensure that the bank keeps getting principal payments in the future.

A restructuring of this type can be done through loan modifications, renewals, and even forbearance agreements. Deciding which approach is best for a given situation depends upon a number of factors, including the overall level of economic strain impacting the borrower and whether the borrower has ever engaged in any type of misconduct regarding the bank's collateral. An attorney should be consulted for a complete discussion of what type of restructuring approach or agreement should be used and how the deal should be documented.

### **Look for Signs that Your Borrower is Utilizing a Secondary Bank Account**

If the borrower is being pressured into payment by aggressive creditors or service providers, the bank will typically know either directly (the borrower tells the bank) or indirectly through commodity proceeds mysteriously disappearing.

To ascertain whether this is occurring, banks should continuously: (1) monitor deposit account usage to see if there have been recent material shifts in cash inflows and outflows; (2) compare commodity checks actually received against cash flow projections as well as bank constructed projections (utilizing estimate bushels per acre, number of acres, and current prices).

If proceeds are disappearing, the most common scenario is that the borrower is depositing

commodities proceeds into a secondary bank account and is then utilizing the funds to pay off other creditors and service providers that may or may not have been previously disclosed to the bank.

The borrower should be questioned any time there appears to be a marked discrepancy between what should be hitting the bank account and what actually is hitting the bank account. To aid in this regard, banks should consider utilizing an Additional Financing and

Bank Account Disclosure Form. Such a form will either get the information directly, or it will form a potential basis for objecting to a discharge in bankruptcy if bank accounts or financing entities are not properly disclosed. And, the refusal of a borrower to execute this form is a clear signal that financial improprieties are occurring.

*-Matthew J. Bialick, Esq.*

### **Video Replay of the Best Webinar You Probably Missed – Successfully Navigating Commodity Check Disputes**

A commodity check is issued in the name of your bank, the borrower, and other lenders, suppliers and statutory lienholders. All parties claim the money is theirs and refuse to endorse the check until some type of agreement is reached. And, to make matters worse, the commodity buyer reduced the amount of the check as a result of past amounts it claims were owed by the borrower. Who is right and what should you do about it?

This presentation provides in-depth guidance on how bankers can successfully navigate through the above situation, which is all too common and frequently very messy.

**Viewing Link:** <https://register.gotowebinar.com/register/4671564727497705483>



MJB Law Firm, PLLC  
952-239-3095; [matthew@mjbblawmn.com](mailto:matthew@mjbblawmn.com)  
[www.mjbblawmn.com](http://www.mjbblawmn.com)