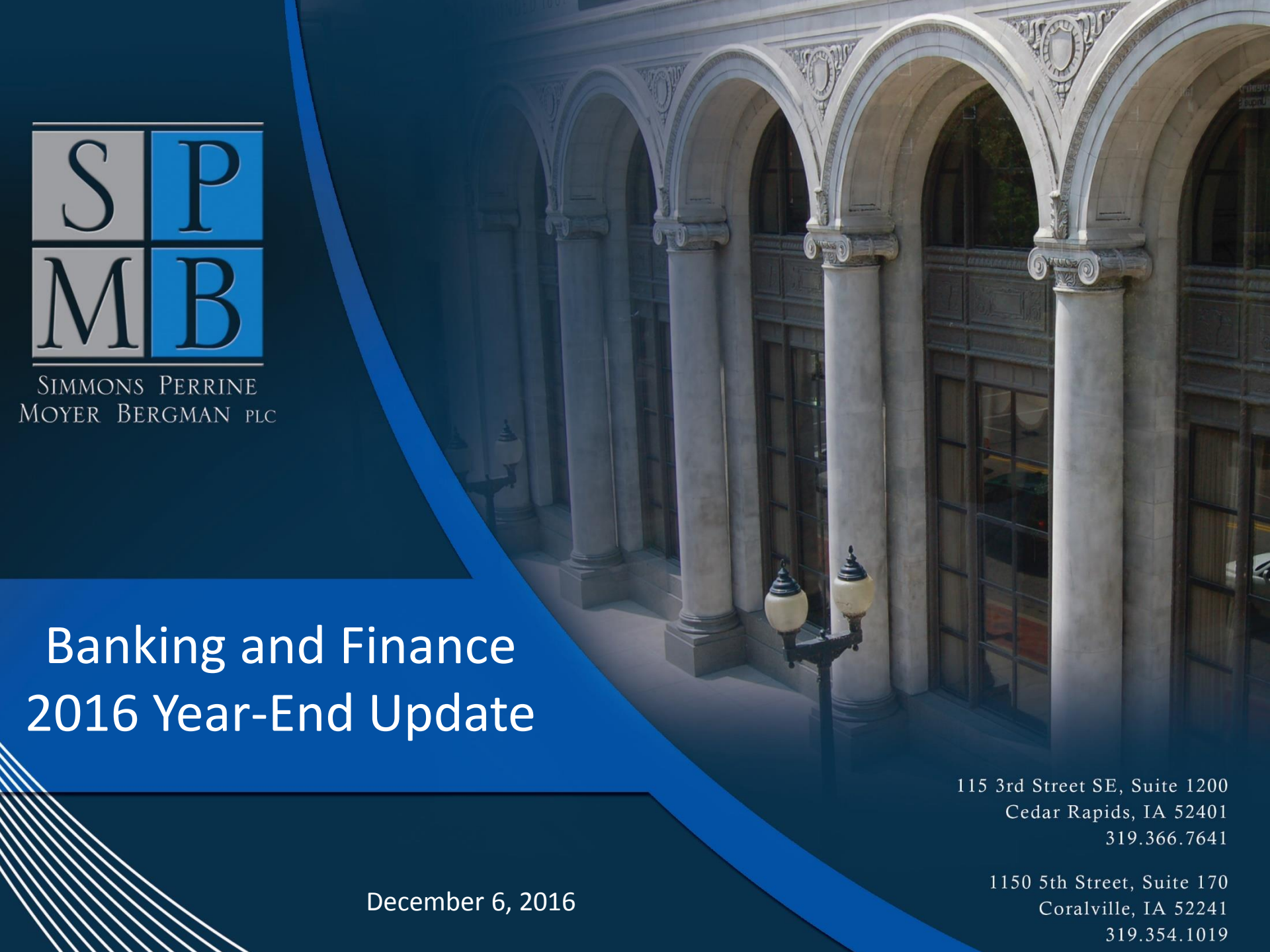

SIMMONS PERRINE MOYER BERGMAN PLC

Banking and Finance 2016 Year-End Update

December 6, 2016

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Commercial Lending Case Law Update

Receivership and Secured Creditors

- DHS v. CCI, 861 N.W.2d 868 (Iowa 2015)
  - DeWitt Bank & Trust – fully secured, properly perfected, lender
  - DHS argued its appointed receiver entitled to receive super-priority payments for its expenses and services
  - District Court ruled that Iowa Code §680.7 allowed a receiver to avoid secured liens in favor of receivership expenses
  - Iowa Supreme Court rejected lower court super-priority findings
  - Iowa common law mirrors Title 11 U.S.C. §506(c)
    - Secured creditor liable only for the reasonable and necessary expenses of preserving or disposing collateral to the extent of the benefit received by the secured creditor

Bank Overdrafts and Duties of Good Faith

- Legg v. W. Bank, 873 N.W.2d 763 (Iowa 2016)
  - Class action against West Bank challenging West Bank's decision to change the sequencing process of posting transactions from low-to-high to high-to-low resulting in more NSF fees
  - Claims
    - Finance charge in excess of 21% in violation of Iowa Code §537.2201
    - Unjust enrichment and breach of duties of good faith
  - Court found overdraft payment not an extension of credit under the ICCC

Bank Overdrafts

- Legg v. W. Bank, 873 N.W.2d 763 (Iowa 2016)
  - Plaintiffs claim West Bank breached implied duties of good faith when it changed the sequencing order without informing customers survived
  - Unjust enrichment claim denied because express contracts (agreements, signature card) allowed sequencing changes

In re Agriprocessors, Inc., 2016 WL 1060297 (N.D. Iowa 2016)

- Issue: Whether an intraday overdraft (under UCC 4–301 and the two-day check clearinghouse process) is a "debt" for purposes of bankruptcy law

- Court held that, unless/until the intraday overdraft becomes a *true* overdraft (i.e., after midnight on the second day or the bank honors the check), the provisional overdraft is *not* a debt, and therefore could not be avoided as a preferential transfer

Hanjy v. Arvest Bank, 94 F.Supp.3d 1012 (E.D. Ark. 2015)

- High-to-low posting case involving debit account
- Article 4 allows a bank to do high-to-low posting with checks, explicitly
- Court unwilling to extend Article 4 to cover debit accounts and stated that debit transactions were governed by the EFTA and therefore, outside the scope of the UCC

Mortgage Foreclosure & Statute of Limitations

- U.S Bank Nat. Ass'n v. Callan, 874 N.W.2d 112 (Iowa 2016)
  - Mortgagee obtained decree of foreclosure in February 2010; notice of rescission in March 2012; subsequent foreclosure petition filed in October 2013
  - Under Iowa Code §615.1 , mortgagee has two years to solely extinguish "all liens"
  - Ruling: only judgment lien is extinguished by two-year statute of limitations; recession valid under Iowa Code §654.17

Filing Deadlines

- Concerned Citizens of Se. Polk Sch. Dist. V. City Dev. Bd. Of State, 872 N.W.2d 399 (Iowa 2015)
- Uzma Amin v. Iowa Dep't of Human Servs., No. 14-0399, 2016 WL 2981612 (Iowa Jan. 22, 2016)
- In both cases, the Iowa Supreme Court held that a notice of appeal filed 30 days after receiving *notice* of an order, but 31 days after the order was *actually electronically filed* was late, and therefore the appellate courts had no jurisdiction to hear the appeals.
    - Measure all time limits from the time stamp on the actual filed document, not the electronic notice of filing.

UCC First to File Rule Upheld

- Bayer CropScience LP v. Texana Rice Mill Ltd., 2015 U.S. Dist. LEXIS 80348, *12 (E.D. Mo. June 22, 2015)
  - Motion to reconsider restated the law correctly as "conflicting perfected interests on the same collateral are accorded priority according to which was first filed or perfected"

Independent Repo Company Must Comply with UCC 9-609

- Nelson v. BMW Fin. Servs. NA, LLC, 2015 U.S. Dist. LEXIS 165012, *6 (D. Minn. Dec. 8, 2015)
  - Lawsuit alleging wrongful repossession under the Minnesota version of UCC 9-609
  - Court agreed with several other cited court decisions which requires third party repossession companies to comply with standards in UCC §9-609
  - Court ruled damages under UCC 9-625(c)(2) did not apply to third parties because of specific language

Claim Objections/FDCPA

- Gatewood v. CP Medical, LLC (In re Gatewood), 553 B.R. 905 (B.A.P. 8th Cir. 2015)
  - Debtors listed the debt at issue in their schedules
  - Proof of claim that was factually accurate and not misleading even though statute of limitations had run
  - Debtors did not object; a timely and factually accurate proof of claim on a stale debt, alone, is not a prohibited "false, deceptive, misleading, unfair or unconscionable" debt collection practice under the FDCPA

Reaffirmation Agreements

- Venture Bank v. Lapides, 800 F.3d 442 (8th Cir. 2015)
  - Bank initiated state court action to enforce post-discharge agreements and foreclosure of third mortgage
  - [R]eaffirmation agreements are enforceable only if they are enforceable under state law and meet the requirements of federal law in §524(c)
  - Court ruled reaffirmation agreements unenforceable because they did not meet USC §524 requirements
  - Conclusion renders application of state law or other legal issues involving contracts unnecessary
  - Decision affirmed the conclusion that the actions of the bank provided "ample evidence of pressure and inducement" to conclude that Lapides' were not voluntary

Discharge

- Home Service Oil Company v. Cecil (In re Cecil), 542 B.R. 447 (B.A.P. 8th Cir. 2015)
  - Bankruptcy court denied discharge for debtor's failure to include 12 bank accounts, jewelry, firearms, business interests and income on schedules
  - On appeal, debtor claimed no evidence of intent
  - Creditors would not have received anything had she disclosed all her assets and missing information
  - BAP affirmed denial of discharge stating full disclosure required to give the bankruptcy system credibility and make it function properly and smoothly
    - BAP said debtors are not free to pick and choose what to disclose

Use Care When Relying On Debtor Insurance Policy

- Commerce Bank v. West Bend Mutual Insurance Company, 870 N.W.2d 770 (Minn. 2015)
  - Commerce Bank was named in the policy as mortgagee
  - Commerce Bank made a claim on the policy but West Bend denied the claim under the vacancy clause
  - Court held that when a property insurance policy contains both a vacancy clause and a standard mortgage clause, a mortgagee has coverage for vandalism damage only if the building was vacant because of the "acts" of the owner

Bank Loses Secured Claim Because It Was On "Inquiry Notice" Of Borrower's Fraud

- In re Sentinel Management Group, Inc., 809 F.3d 958 (7th Cir. 2016)
  - Debtor transferred customer assets to accounts used to collateralize its loans
  - Trustee brought an adversary proceeding to avoid the alleged fraudulent transfers
  - Court ruled in Trustee favor because Bank was not acting in good faith because on "inquiry notice"
  - Inquiry notice is knowledge that would lead a reasonable law-abiding person to inquire further

Perfected Lien Status of Agent Relates Back to Effective Date of Bank's Original Financing Statement

- In re: Oak Rock Financial, LLC, 527 B.R. 105 (Bankr. E.D.N.Y. 2015)
- Issue: Whether a creditor's financing statement, filed in 2001, gave creditor priority when the creditor did not obtain a security interest in the debtor's collateral until 2006
- Holding: The financing statement was valid and perfected the creditor's security interest relating back to the time of filing, i.e., 2001. This is consistent with the UCC's provisions allowing a financing statement to be filed prior to a security interest attaching to any collateral
- Also of interest: The court held that the assignee of a financing statement (the creditor in this case) steps into the shoes of the assignor, such that the assignee is perfected to the same extent as the assignor was immediately prior to the assignment

Bank Not Required to Accept Possession of Real Property

- Hamilton State Bank v. Nelson, 769 S.E.2d 317 (2015)

- Georgia bank brought an action on two promissory notes, one of which pledged the company's real estate. The trial court ordered the defendant to tender possession of the real estate. The bank appealed, arguing it should not be required to accept possession

- The Georgia Supreme Court held that an order requiring a tenant to *tender* possession did not require the bank *accept* possession, and therefore the bank was not harmed by the order because it could simply refuse possession

In re Nardoni, No. 1-13-1075, 2015 WL 1514908 (Ill. App. Mar. 31, 2015)

- Lender failure to liquidate pledged stock was commercially unreasonable and resulted in discharge of guaranty obligation of guarantor estate

- Lender held stock in vault for three years and gave no reasonable explanation for refusal to liquidate and apply against guaranteed obligations

- Loan Document cumulative remedies language and impairment of collateral waiver did not protect lender

BV Capital, LLC v. Hughes, 474 S.W.3d 592 (Mo. App. 2015)

- Trial court entered motion for summary judgment against guarantors
- Appellate court reversed because substantial evidence of guaranty delivery was not received
- Jury should resolve question of whether guaranty was delivered to bank

8th Circuit: Iowa Would Adopt 'Modern Rule' of Guaranty Assignment

- Avnet Inc. v. Catalyst Resource Group LLC, et al., No. 14-2164, 2015 WL 4031901 (8th Cir. 07/02/15)
  - U.S. Circuit Court of Appeals panel relied on "the well-established principle of Iowa law" that the rules of construction applicable to contracts would apply equally to personal guaranties
  - No Iowa court had specifically decided whether a special guaranty may be assigned
  - Court reasoned Iowa courts would adopt § 13 because they have adopted other sections of the Restatement
  - Since the assignment did not materially change the guarantors duties and the guaranty didn't prohibit assignment no Restatement exceptions

NV One, LLC v. Potomac Realty Capital, LLC, 84 A.3d 800 (R.I. 2014)

- NV One LLC entered into a loan agreement and promissory note for $1,800,000
- Default rate at the lesser of 24 percent annual interest and the maximum rate of interest
- Note contained a usury savings clause
- Entire $1.8 million principal balance never fully disbursed

NV One, LLC v. Potomac Realty Capital, LLC, 84 A.3d 800 (R.I. 2014)

- Trial Court
  - Refused to enforce note and mortgage and removed the liens on the property and declined to honor the usury savings clause
- Supreme Court
  - Lender's subjective intent to comply with the usury laws was immaterial and the face amount of the loan was irrelevant
- PRC argues that because the two parties were sophisticated business entities, they should be bound by the usury savings clause to which they agreed
- Court held usury savings clauses were "unenforceable as against the well-established public policy of preventing usurious transactions"

Boston v. Citizens Banking Co. (*In re Boston*), 531 B.R. 719 (Bankr. N.D. Ohio 2015)

- The court rejected the discharged Chapter 7 debtors' assertions that the lender violated the discharge injunction, in both refusing to remove a UCC-1 financing statement and filing a UCC-3 continuation statement
- The law was clear that validly secured creditors may proceed in rem against prepetition assets, and that included the filing of continuation statements
- Some potential for confusion regarding the extent of Citizens' lien did not make renewal of that lien a violation of the discharge injunction
- Citizens did not demand any payment from the debtors, not attempt to collect upon, or claim a lien upon, any property acquired postpetition

Etzler v. Ind. Dep't of Revenue, 43 N.E.3d 250 (Ind. App. 2015)

- Court of Appeals held:
  - Department could not levy on real or personal property that was located in county where tax warrant was filed
  - Statute providing that Uniform Commercial Code did not apply to security interests created by State or government unit of State was not relevant to whether Department of Revenue had any interest in tax payer's personal property located outside in which tax warrant was filed
  - Department was not lien creditor within meaning of statute governing priority of liens, with respect of breeder award proceeds
  - Department was not secured creditor with respect to breeder award proceeds

Regulatory Update: A Review of the Recent Changes to the Military Lending Act

Overview

- Created to provide "covered borrowers" (i.e. service members and their dependents) with specific protections
- Initially applied to limited consumer credit products:
  - Closed-end payday loans
  - Closed-end auto title loans
  - Closed-end tax refund anticipation loans
- Department of Defense passed new rule in 2015 expanding MLA coverage

2016 Changes

- Expanded coverage to almost all "consumer credit" transactions governed by TILA
  - Does not include residential mortgages or loans secured by personal property
- Expanded the categories of fees to be included in MAPR
- Created a "safe harbor" for lenders who verify the MLA status of a borrower

Covered Borrowers

- Full-time active duty Service members
  - Service members under a call or order of more than 30 days
  - Full-time National Guard on duty for a period of 180 consecutive days
  - Service members in the reserve components of the Army, Navy, Air Force, or Marines
- Service members' dependents
  - Spouse
  - Children under age of 21
  - Parents or parents-in-law residing in the Service member's household
  - Unmarried person under the custody of Service member

Covered Transactions

- Consumer credit transactions:
  - [C]redit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is: (i) Subject to a finance charge; or (ii) Payable by a written agreement in more than four installments
- Excluded transactions
  - Residential mortgages
  - Loan to purchase motor vehicle
  - Loan to purchase personal property
  - Exempt transactions under Regulation Z
  - Any transaction in which the borrower is not a "covered borrower"

Military Annual Percentage Rate ("MAPR")

- The MAPR caps interest rates at 36 percent for consumer credit transactions involving covered borrower
- MAPR includes additional charges not included in Truth-in-Lending APR
- MAPR includes the following:
  - Premiums for credit insurance
  - Fees for debt cancellation contract or debt suspension agreement
  - Any fee for a credit-related ancillary product sold in connection with the credit transaction

MAPR / Fees for Credit Card Accounts

- Credit card accounts also have additional fees included in MAPR
  - Finance charges as defined by Reg Z
  - Application fees
  - Participations fees
- Bona fide fees
  - Lender can exclude fees that are bona fide and reasonable
  - Compare fee to similar fees typically imposed by other creditors for the same or substantially similar product or service
- Effective October 3, 2017

Required Disclosures

- Disclosure required to be provided to covered borrowers:
  - Statement of the MAPR applicable to consumer credit transaction
  - Any disclosure required under Regulation Z
  - A clear description of the payment obligation, which can either be a payment schedule for closed-end transactions or account opening disclosures for open-end transaction
- Disclosures must be provided in writing and orally

MAPR Model Disclosure

Federal law provides important protections to members of the Armed Forces and their dependents relating to extensions of consumer credit. In general, the cost of consumer credit to a member of the Armed Forces and his or her dependent may not exceed an annual percentage rate of 36 percent. This rate must include, as applicable to the credit transaction or account: The costs associated with credit insurance premiums; fees for ancillary products sold in connection with the credit transaction; any application fee charged (other than certain application fees for specified credit transactions or accounts); and any participation fee charged (other than certain participation fees for a credit card account).

Safe Harbor for Verification

- Lenders can use any method to determine whether a borrower is considered a "covered borrower"
- DOD has provided a "safe harbor" to protect lender from liability
  - MLA website
  - Nationwide consumer reporting agency
- To be protected by the safe harbor, lender must create a record of the verification
- MLA Website:
  - https://mla.dmdc.osd.mil/

Limitations and Restrictions

- MLA bars certain loan terms:
  - Waiver of rights under SCRA
  - Arbitration
  - Demand unreasonable notice as a condition for legal action
  - Require the establishment of an allotment
  - Prohibit prepayment or charge a prepayment fee
  - Use a check to access an account

Enforcement

- Enforced by CFPB
- Criminal penalties
- Civil penalties
- Statute of Limitations
  - 2 years of discovery, but not more than 5 years
- Defenses
  - Bona fide error defense available
  - Not intentional
  - Error made despite procedures in place

Effective Dates

- October 3, 2016 for all provisions except credit card provisions
- October 3, 2017 for credit card provisions

Banking Webinar Library

Our banking practice regularly offers educational webinars. A link to our archived presentations can be found at: http://www.simmonsperrine.com/banking-webinar-library-

- Minimizing Risk on Problematic Ag Loans, RMA Lunch & Learn, October 11, 2016
- Banking Mergers & Acquisitions, June 22, 2016
- White Collar Exemption Rule, June 15, 2016
- Capital Financing Options for Hospitals, Iowa Hospital Association, May 19, 2016
- Historic Tax Credits: A Guide for Lenders, March 22, 2016
- Minimizing Risk on Problematic Ag Loans, November 3, 2015
- Timely Changes Impacting Financial Institutions, July 14, 2015
- Lender Liability, May 20, 2015 (Presentation)
- Overview of Qualified 501(c)(3) Bonds; Electronic Signatures, November 4, 2014
- New Rules for Consumer Mortgage Loan Servicing and Loss Mitigation; 2014 Legislative Update, Enforcing Non-Compete and Non-Solicitation Agreements Practical Strategies, July 31, 2014
- Revised Article 9, May 6, 2014
- Iowa Case Law Update, Title Insurance and Regulatory Update, March 18, 2014
- Mechanics Lien, Iowa Banking Case Law Update, and Revised Article 9, December 6, 2012

Questions?

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