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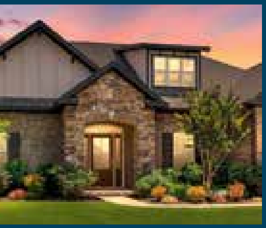

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Best Practices for Mortgage Lenders when Notifying Borrowers of Default

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A PRIMER ON PAYABLE ON DEATH ACCOUNTS FOR FINANCIAL INSTITUTIONS

Payable on death accounts. Your institution probably issues them on a regular basis, but how much do you really know about them? Whether you're a banking veteran or new to the game, it's always a good time to familiarize yourself with what they are, what they are for, and what you, the financial institution, do with them. Payable on death (**"POD"**) accounts are generally governed by the Minnesota Multiparty Accounts Act, Minnesota Statutes sections 524.6-201 to 6-214, which will be the focus of this primer. POD accounts provide account holders with a non-probate estate planning tool, while affording financial institutions certainty and liability protection in account succession.

I. What is a payable on death account?

A payable on death account is a type of multiple-party account. POD accounts allow the account owner to designate one or more "POD payees," who may claim the account upon the person's death. POD payees are not account holders.

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A PRIMER ON PAYABLE ON DEATH ACCOUNTS FOR FINANCIAL INSTITUTIONS

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During the life of the person (or persons), who open the account, the POD payees do not own any part of the account, have no interest in the account, and have no right to request funds from the account.

A POD account differs from a joint account with a right of survivorship. With a joint account, multiple parties are account owners and generally have an interest in the account and right to request funds throughout the existence of the account, and the surviving account owner simply succeeds to account following the passing of the other owners. However, a joint account can also include a POD designation; for example, mom and dad might be joint account owners with right of survivorship, so that the last to pass has immediate control over the account, and combine it with a POD designation that a child becomes receives the funds from the account following the death of the last parent.

II. What are payable on death accounts for?

Payable on death accounts allow account owners to control the beneficiaries of certain accounts, without having those accounts impacted by probate. Upon the death of the owner of a POD account, the account transfers to the surviving POD payees as a non-probate transfer. However, POD accounts do not shield assets from the owner's estate to the extent that those sums are needed to pay debts, taxes, and expenses of administration.

For financial institutions, POD accounts allow for orderly transitions of account ownership, with little liability risk. When a POD account holder dies, financial institutions already know who an account is payable to and need not wait for probate or other legal proceedings before knowing what to do with their deceased client's accounts. In addition, the Multiparty Accounts Act provides substantial liability protection to financial institutions who distribute POD accounts according to their terms.

III. Establishing and Administering a POD account.

A. Opening a payable on death account.

When setting up a POD account, institutions should be sure that the beneficiary or beneficiaries are listed in writing as POD payees. Minnesota statutes section 524.6-213 provides language for designating POD beneficiaries on accounts and contracts of deposit, which serves as conclusive evidence of the intent of the depositor to have an account payable on death to the persons listed. Using this language, or substantially similar language, affords the most certainty to financial institutions providing POD accounts.

B. Payable on death accounts during the account owner's lifetime.

During the life of the account owner, a POD account is treated just like any other account between the financial institution and the owner. As mentioned above, the POD payee has no rights in the account until the owner's death, and the payee should not be treated as an account owner. A POD account owner may change their POD payees at any time by submitting a signed written order or request to the financial institution during the owner's lifetime. A POD account owner may also request to be paid from the account on request at any time during their lifetime, subject to any other agreement the owner may have with the financial institution for the account. A POD account is subject to garnishment by a creditor of the account owner, but not the POD payee.

Financial institutions' right to setoff or liens upon accounts are unaffected by POD designations. Accounts remain subject to setoff, even after an account owner's death, to the extent that they were subject to setoff immediately before the owner's death.

C. Payable on death accounts after the account owner's death.

When a POD account owner dies, the account becomes immediately payable to the listed beneficiaries. A POD payee may request payment of the account upon proof that the account holder has died, which could be a death certificate, probate case filing notice, or obituary. The estate or heirs of a POD payee may also request payment of the account, upon proof that the payee survived the account owner. If the account owner outlived all listed payees, the account can be paid out to the owner's estate, upon proof that the owner survived the payees. If there is some uncertainty over who is rightfully entitled to the POD account proceeds, a financial institution could seek some resolution by a court before making payment.

By paying out an account as listed above, a financial institution discharges itself from all claims for the amounts paid, regardless of whether any other person has a claim to the funds. Although creditors are entitled to the funds held in a POD account, financial institutions are not liable to those creditors directly, and you are entitled to pay out a POD account according to its terms without liability, although the POD payee may be themselves liable to the estate or creditors. However, if your institution has been served with process in a proceeding to make a claim to POD funds or has been presented with a claim by a state or county agency to POD funds which have not been paid out, you should refuse to pay out unclaimed funds until the rights of the creditors are resolved. In addition, if your institution has received written notice from anyone entitled to request payment of an account that withdrawals should not be permitted, payments should not be made until the notice is withdrawn or the successor of any deceased account owner and all other persons entitled to payment agree that withdrawals are appropriate.

Ultimately, in the absence of notice to the contrary, financial institutions should feel confident in their ability to pay out POD accounts to named beneficiaries upon proof of the account owner's death without liability. However, if you are concerned that a dispute over the ownership of an account may exist, you are permitted to refuse to make payments in accordance with the terms of the account, without liability.

IV. Conclusion.

Payable on death accounts are useful tools for account holders and financial institutions alike. However, the statutory framework that they operate within and their unique nature as providing for non-probate transfers upon death could lead to confusion and questions, particularly in situations where there are multiple claims asserted over the funds. Following the account agreement will usually be the best course of action, but some situations might be best resolved by the courts.

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I AGREED TO WHAT? EMAILS AND TEXT MESSAGES AS ELECTRONIC SIGNATURES

As the world continues its shift towards electronic and virtual means of conducting business, lenders and lawyers remain stalwart in their commitment to physical paper, or at a minimum, PDFs with ink or e-signatures. However, our worlds are not immune to the encroachment of increasingly virtual and informal means of communicating and conducting business, even when making binding agreements. Courts in Minnesota have explicitly recognized that the signature block in emails can constitute electronic signatures.[1] Courts in other jurisdictions have found that even a text message may constitute an electronic signature under certain circumstances. Because of this, it is exceedingly important to understand: 1) what can be an electronic signature; 2) when a communication will be considered an electronic signature; and 3) how to prevent inadvertently forming binding agreements through informal electronic communication.

Uniform Electronic Transactions Act

In 2000, Minnesota enacted the Uniform Electronic Transactions Act ("UETA"). Under this statute, an electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."[2] This broad definition means text messages, emails, emojis, text reactions such as a "thumbs-up," electronic voice memos, check box, or other electronic means of communicating agreement can be electronic signatures creating an enforceable agreement. Even if an agreement is required to be in writing, under the UETA, an electronic record may satisfy that requirement.

By way of example, the 11th Circuit Court of Appeals found that the words "I [Defendant]" in a text message agreeing to pay outstanding bills constituted an electronic signature under Florida's enactment of the UETA.[3] In another case, the words "Best regards, [Defendant]" at the end of an email with a revised purchase order attached was considered to be an electronic signature of the email *and* the attached purchase order.[4] It is easy to imagine all the ways that this precedent can wreak havoc, luckily however, the context of the communications is equally important as the words themselves when determining what constitutes an electronic signature.

Context Matters

The actual words alleged to be an electronic signature are only one piece of the puzzle when determining whether an electronic signature actually exists and what effect it has. In order to prove a document was executed via electronic signature, the party offering the purported signature must show: 1) that the UETA applies to the transaction; and 2) that the electronic signature is attached to or logically associated with the electronic record or document at issue.[5]

[1] *Lange v. Olson*, A21-0032, 2021 WL 4059763, at 2 n. 3 (Minn. App. Sept. 7, 2021) (citing *SN4, LLC v. Anchor Bank*, FSB, 848 N.W.2d 559, 567-68 (Minn. App. 2014).

[2] Minn. Stat. § 325L.02(h).

[3] *BrewFab, LLC v. 3 Delta, Inc.*, No. 22-11003, 2022 WL 7214223, at 5 (11th Cir. Oct. 13, 2022).

[4] *US Iron FLA, LLC v. GMA Garnett* (*USA*) *Corp.*, No. 3:21cv943-TKW-ZCB, 2023 WL 2731714, at 9 (N.D. Fla. Mar. 2, 2023).

[5] *SN4, LLC v. Anchor Bank,* fsb, 848 N.W.2d 559, 566-69 (Minn. App. 2014).

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The UETA only applies to transactions in which the parties agreed to conduct transactions by electronic means.[6] Whether the parties have agreed to do so is determined from the context and surrounding circumstances of the transaction, including the parties' conduct. For example, in a case where the parties exclusively communicated through email and the defendant stated that she was only available via email, the court found the UETA applied.[7] However, in a case where the parties negotiated electronically, but hand-signed previous versions of the agreement and indicated that they wanted "executed" or "fully executed copies" of the agreement, a court found that there was no evidence showing an intent to transact electronically and therefore the UETA did not apply.[8]

If the proponent of the electronic signature demonstrates that the parties agreed, either explicitly or by conduct, to transact via electronic means, they must then show that the purported electronic signature was attached to or logically associated with the agreement at issue.[9]

The precedential Minnesota case on this issue involved a bank selling properties acquired through foreclosure with a real estate developer.[10] During the negotiations, the attorneys for the respective parties sent multiple emails with agreements attached to them.[11] In that case, the court found that while the emails sent from the bank's attorneys to the buyer's attorney were electronically signed through email headers and auto-generated signature blocks, the context of the emails and the attached agreements demonstrated that the electronic signatures on the emails did not also constitute electronic signatures on the attached agreements.[12] The Court found that the content of the emails, which asked for the parties' approval and signatures on the attached agreements, evidenced that neither party considered the attached agreements to be final versions meant to be signed.[13]

How to Prevent Inadvertent Electronic Signatures

If you have made it this far, you may be thinking that this seems twice as complicated and three times the headache than it should be, and you would be right. Luckily, avoiding the issue is as easy as litigating the issue is complicated. The following are some methods one could use to potentially alleviate the risk of an unintended electronic signature:

- First, the UETA provides that any provision in the statute may be varied by the agreement of the parties. This means that including a provision in the agreement requiring a specific means of signature, electronic or otherwise, may prevent the imposition of an unintended electronic signature.
- Second, when sending draft agreements via electronic means, explicitly stating that nothing in the email or other electronic communication is intended to be an electronic signature of the attached document may avoid the inference that the parties agreed to transact via electronic means.
- Third, unless intending to submit an executed agreement via attachment, specifying that the attached agreement is a draft requiring the parties' review, approval, and signature and specifying the means by which the parties should sign, i.e., via ink signature or affixing an e-signature to the attached document.
- Finally, as a general matter, when discussing and/or negotiating terms with the other party via electronic means, qualifying an expression of agreement with the need to execute the document via the parties' preferred means.

[6] *Id.* at 567.
[7] *Crestwood Shops, L.L.C. v. Hilkene*, 197 S.W.3d 641, 652-53 (Mo. Ct. App. 2006).
[8] *SN4, LLC*, 848 N.W.2d at 567.
[9] *Id.* at 568.
[10] *Id.* at 562-63.
[11] *Id.* at 566-68.
[12] *Id.* at 567-68.
[13] *Id.* at 568-69.

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BEST PRACTICES FOR MORTGAGE LENDERS WHEN NOTIFYING BORROWERS OF DEFAULT

As interest rates increase, the lending community is expecting an uptick in collection proceedings. As part of the collection process, lenders will need to send default notices to borrowers informing borrowers of the default and how to cure. It is imperative for those default notices to contain the appropriate and necessary information as required by the loan documents and the law.

Legal Requirements for a Notice of Default

In Minnesota, residential mortgages often, and sometimes must,[1] contain a provision requiring the bank to provide borrowers who have fallen behind on payments with a notice of default. This is a prerequisite to initiating foreclosure proceedings. For some mortgages, the law provides certain information which must be provided to the borrower within a notice of default, including:

a) the nature of the default;
b) the action required to cure it;
c) the date by which it must be cured;
d) notice that failure to cure may result in acceleration;
e) a statement informing the borrower of their right to reinstate after acceleration; and
f) a statement informing the borrower of their right to bring a court action to claim any defense or to deny the default.[2]

At the federal level, the law divides mortgage foreclosure requirements into separate categories for single-family dwellings[3] and multifamily dwellings.[4] While both chapters differ slightly on what information is specifically required in a notice of default, they each were passed with the purpose of creating a uniform federal foreclosure remedy for their respective dwelling types on loans held by the Secretary of Housing and Urban Development ("Secretary"), or loans which secure obligations of the Secretary.

Under federal law, for both single and multifamily dwellings, a lender must include the following information in a notice of default:

1) the names of the Secretary, the original mortgagee, and the original mortgagor;
2) the street address or description of the security property;

[1] Minn. Stat. § 47.20, subd. 8(3) (requiring a lender to give the borrower a written notice of default for mortgages on real property to noncorporate borrowers with an original principal amount of less than $100,000).

[2] *Id.*

[3] Defining "single family mortgage" as a mortgage that "covers property on which there is located a 1- to 4-family residence" that is either (i) held by the Secretary of Housing and Urban Development under title I or II of the National Housing Act, or (ii) secures a loan obligation of the Secretary under section 1452b of Title 42 as it existed before repeal. 12 U.S.C. § 3752(10).

[4] Defining "multifamily mortgage" as a mortgage held by the Secretary of Housing and Urban Development pursuant to either (A) section 608 or 801, or Title II or X, of the National Housing Act; (B) section 312 of the Housing Act of 1964, as it existed immediately before its repeal by the Cranston-Gonzalez National Affordable Housing Act ("CGNAHA"); (C) section 202 of the Housing Act of 1959, as it existed immediately prior to its amendment by section 801 of the CGNAHA; (D) section 202 of the Housing Act of 1959, as amended by section 801 of the CGNAHA; and (E) section 811 of the CGNAHA.

3) the date of the mortgage, the office where the mortgage is recorded, and the liber number and folio or other description of the location of recordation of the mortgage;
4) the nature of the default and the acceleration of the debt;
5) the date, time, and location of the foreclosure sale;
6) a statement that the foreclosure is being conducted pursuant to the applicable chapter of Title 12 of the United States Code;
7) the types of costs to be paid by the purchaser upon transfer of title; and
8) the amount and method of deposit required at the foreclosure sale, and the time and method of payment of the balance of the foreclosure purchase price.[5]

For single family dwellings only, a notice of default must also include the name and address of the foreclosure commissioner, the date the notice is being issued, and any other terms of the foreclosure sale or information that the Secretary deems necessary.[6]

How Financial Institutions Can Best Inform Borrowers of Default

Both Minnesota state and federal law only require a notice of default to include the name of a lender. Yet sometimes, it is best to go beyond the minimum legal requirements to ensure the borrower understands their rights and obligations under the mortgage. First, make sure the notice follows the requirements of the mortgage and applicable law, whether it be state or federal. It is vital for a lender to strictly comply with the applicable notice of default requirements in the event a foreclosure is necessary.[7]

Next, the notice should include not only the name of the lending institution, but the direct contact information for the individual or department handling the foreclosure or loss mitigation. This provides the borrower an opportunity to contact the lender to verify their default and cure the default. Communication is key to prevent a lender from devoting excess resources toward collecting on a defaulted loan where the default is only temporary, and the borrower will soon be caught up on payments. Additionally, in the event that a foreclosure proceeding is needed, any communication from the borrower to the lender will prevent the borrower from using the affirmative defense that they lacked notice and an opportunity to cure their default.

Finally, the notice should go beyond merely providing the borrower with a means to contact the lender. The notice should actively encourage communication between the borrower and lender to determine the best option to move forward while avoiding foreclosure and exploring other options available to the borrower. A change in work status, health issues, or other short-term economic changes may lead a borrower to fall behind on payments. While these events may lead to a temporary inability to pay, they should not prevent the borrower from catching up, nor should they sever the relationship between the parties. Ideally, a lender who demonstrates an understanding of the borrower's situation will generate more business from that borrower. Even if it does not directly lead to more business, finding alternative solutions for a temporary nonpayment prevents lenders from investing additional time and resources into a default that will be cured as soon as the borrower returns to normalcy.

[5] 12 U.S.C. §§ 3706(a)(1)-(8) and 3757(3)-(10).
[6] 12 U.S.C. § 3757(1)-(2), (11).
[7] *Papes v. CitiMortgage, Inc.*, 2013 WL 2149883 (Minn. Ct. App. 2013).

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