

N.D.A.G. Letter to Lundberg (Dec. 20, 1985)

December 20, 1985

Ms. Jane M. Lundberg
Commissioner
Department of Banking and
Financial Institutions
State Capitol
Bismarck, ND 58505

Dear Ms. Lundberg:

Thank you for your letter of October 31, 1985, to which you attached a draft copy of a letter which had been prepared by this office in reply to Marilyn Foss' letter of March 20, 1985. I apologize for the delay in finalizing this letter.

In that letter, Ms. Foss asked whether the existence of an enforceable judgment against a state chartered bank which has not been executed upon by the plaintiff and the amount of which is in excess of the bank's capital, in and of itself, causes insolvency under N.D.C.C. § 6-07-03.

N.D.C.C. § 6-07-03 lists four circumstances under which a state chartered bank will be deemed insolvent.

6-07-03. BANKS INSOLVENT, WHEN. A bank shall be deemed insolvent:

1. When the actual cash market value of its assets is insufficient to pay its liabilities;
2. When it is unable to meet the demands of its creditors in the usual and customary manner;
3. When it shall fail to make good its reserves as required by law; or
4. When it shall fail to comply with any lawful order of the state banking board within any time specified therein.

Another action by a state chartered bank that will trigger its insolvency is contained in N.D.C.C. § 6-08-06. That section provides as follows:

6-08-06. BANKS EXEMPT FROM ATTACHMENT AND EXECUTION. Every banking association in this state shall be exempt from

the legal process of attachment and execution. If any bank fails, neglects, or refuses to pay valid final judgment or decree that may be rendered against it by any court of competent jurisdiction, not Properly stayed by an appeal bond within the time prescribed by statute or an order of court after rendition thereof, the state banking board shall declare such bank insolvent or in failing circumstances and forthwith shall cause a receiver to be appointed to wind up its affairs. (Emphasis supplied).

Therefore, in addition to the insolvency tests contained in N.D.C.C. § 6-07-03, a state chartered bank which fails, neglects, or refuses to pay a valid final judgment rendered against it by any court of competent jurisdiction must be declared by the state banking board under N.D.C.C. § 6-08-06, to be insolvent or in failing circumstances. However, an exception to such action results when the state chartered bank has properly stayed the judgment by posting an appeal bond within the prescribed statutory time period or the court has otherwise stayed the judgment.

The question that you have raised concerns the time when the enforceable judgment received against the state chartered bank should be reflected in its financial statements as a current liability. Obviously, when this liability is recognized by the state chartered bank, the bank will be insolvent under N.D.C.C. § 6-07-03(1) inasmuch as its liabilities will be in excess of its assets. The answer to the timing of the recognition of this judgment depends on whether the judgment against the state chartered bank constitutes a "debt" or a "contingent liability."

A judgment for the recovery of money has been described as a debt, a form of indebtedness, or evidence of indebtedness due from one person to another. See 46 Am. Jur.2d Judgments § 231 (1969); see also Toth v. Toth, 217 N.W. 913 (Mich. 1928). The term "debt" has been judicially defined as "an obligation arising out of contract express or implied which entitled a creditor unconditionally to receive from the debtor a sum of money which a debtor is under legal, equitable, or moral duty to pay without regard to any future contingency." McGee v. Stokes Heirs at law, 76 N.W.2d 145, 156 (N.D. 1956). (Emphasis supplied). On the other hand, a "contingent liability" is a liability which "depends upon some future event, which may or may not happen, thereby making it uncertain whether it will ever become a liability." Hanson v. Hanson, 302 N.W.2d 801, 803 (S.D. 1981) (citations omitted). The distinction, therefore, between a debt or current liability and a contingent liability is that in the case of the former, the obligation does not depend on the happening of a future event. In the latter situation, the obligation of the debtor hinges on the occurrence or non-occurrence of a future event.

This distinction seems to have been clearly implied by the legislature in enacting N.D.C.C. § 6-08-06. Under N.D.C.C. § 6-08-06, if a state chartered bank properly stays a valid final judgment rendered against it by filing an appeal bond within the time period set by statute or a court orders the final judgment stayed, then the state banking board need not declare such bank insolvent or "in failing circumstances." However, if the bank fails, neglects, or refuses to pay the judgment and does not seek to stay the judgment by the filing of an appeal bond or by order of the court, then the state banking board is mandated by

N.D.C.C. § 6-08-06 to declare the state chartered bank insolvent or in failing circumstances and to appoint a receiver to wind up its affairs. The contingency implicit in N.D.C.C. § 6-08-06 is that when a bank properly stays a final judgment entered against it for the purposes of prosecuting an appeal, there arises an uncertainty as to whether the judgment will withstand appellate review. Thus, given this uncertainty, the final judgment issued against the bank constitutes a "contingent liability" rather than a "debt" as defined by McGee.

In addition, where a judgment is stayed by the filing of an appeal bond with or by an order of the court, the judgment, although still legally effective, is not enforceable and cannot be executed on or by the creditor pending the outcome of the appeal. The stay also effectively prohibits a judgment creditor from attempting to execute or otherwise enforce the judgment against the debtor.

However, if the state chartered bank fails to stay the final judgment, then the judgment constitutes a "debt" within the meaning of McGee, which should be reflected as a current liability on the financial statements of the state chartered bank. There is nothing in N.D.C.C. § 6-08-06, to require that the creditor attempt to execute or demand payment from the state chartered bank before the state banking board declares such bank insolvent or in failing circumstances. In fact, the use of the word "neglects" regarding the nonpayment of a final judgment by a state chartered bank seems to indicate that the bank through its own carelessness or inaction may trigger insolvency under N.D.C.C. § 6-08-06.

Sincerely,

Nicholas J. Spaeth

ja