

N.D.A.G. Letter to Meier (Feb. 17, 1987)

February 17, 1987

Honorable Ben Meier
Secretary of State
State Capitol
Bismarck, ND 58505

Dear Secretary Meier:

Thank you for your letter of January 8, 1987, concerning Section 1324 of the Food Security Act of 1985 (Protection for Purchasers of Farm Products) (hereinafter "the Statute") Pub.L. 99-198, 99 Stat. 1535, 7 U.S.C. 1631, and specifically your questions concerning the use by secured parties of North Dakota's central filing system. I apologize for the delay in responding to your letter, however, I wanted to study the legislative history before answering your questions.

Subsections (d) and (g) of the Statute establish the basic rule that a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations, or a commission merchant or selling agent who sells in the ordinary course of business a farm product for others, takes free of or is not subject to a security interest created by the seller. This basic rule applies even through the security interest is perfected and even though the buyer, commission merchant, or selling agent knows of the existence of the security interest.

Two exceptions are then established by which a buyer of farm products, or a commission merchant or selling agent, becomes subject to a security interest created by the seller. The first is if direct notice is given by the secured party as required by the Statute. See subsections (e)(I) and (g)(2)(A). The second is if the state has established an approved central filing system, and if notice is given by the secured party through it.

In the Statute, the two alternatives (direct notice or the central filing system) are, in the first instance, connected by an "or," and the language after the "or" is as follows:

In the case of a farm product produced in a state that has established a central filing system --

See subsection (e). In the second instance, the wording of the alternatives is merely separated by a semicolon. There is no "or" between them. However, once again, the language setting forth the central filing system alternative is as follows:

In the case of a farm product produced in a state that has established a central filing system --

See subsection (g)(2).

On its face, the notice provisions and the central filing provisions of the Statute are presented as alternatives. Although there has been case law to the contrary, the better reasoned view is that the word "or" and the word "and" as used in statutes are not interchangeable, the word "or" being strictly of a disjunctive nature and the word "and" being strictly of a conjunctive nature. Their ordinary meaning should be followed if it does not render the sense of the statute uncertain or unless such an application would fly in the face of clearly contrary legislative intent. See 30 Words and Phrases, "Or" (1972 and Supp. 1986-87). See also Sutherland, Stat. Const. §21.14 (4th Ed. 1985).

In short, the Statute presents the central filing system as an alternative to the notice system. One or the other may be used, but not both. The use of the words "[i]n the case of a farm product produced in a state that has established a central filing system" makes the central filing alternative exclusive if chosen by the state. This use of the disjunctive does not clearly make the statute uncertain. Neither does this disjunctive interpretation fly in the face of clearly contrary legislative intent.

In fact, what little legislative history there is directly on point substantiates an interpretation of exclusivity of alternatives. The conference report accompanying H.R. 2100, which established Section 1324 of the Food Security Act of 1985, states, in part as follows:

The Senate amendment is essentially the same as the House provision, except that it exempts buyers of farm products in states having central systems for the recording of financial statements from the general provisions explained in paragraph (a). [Paragraph (a) explains the notice provisions proposed, originally without alternative, in the House bill.] In states having a central filing system, the buyer purchases the farm products subject to a lender's security interest if. . .[followed by the provisions of the central filing system alternative]. (Emphasis supplied.) H.R. Rep. No. 99-447, 99th Cong., 1st Sess. 485.

In the Congressional Record, Senator Zorinsky from Nebraska makes a statement highlighting the conference report on H.R. 2100. He discusses the clear title provisions. After discussing the notice provisions, Senator Zorinsky states:

Similarly, in those states that choose to set up a central filing system rather than providing for prenotification, a purchaser buying farm products takes them subject to a lender's security interest if first. . .[followed by the provisions of the central filing system alternative]. (Emphasis supplied.) 131 Cong. Rec. §17888 (Daily Ed. Dec. 18, 1985).

Neither Senator Zorinsky's statements nor the conference report contemplate the use of the notice alternative in central filing system states. In fact, both can easily be interpreted as statements for exclusivity of alternatives.

Moreover, when the Statute and the regulations are read together, one is left with an impression that once the central filing system is established and approved, it is the exclusive means for reversing the effects of the basic rule. See Clear Title -- Protection For Purchases of Farm Products, 51 Fed. Reg. 29,449 (1986) (to be codified at 9 C.F.R. Part 205).

The supplemental information to the regulations refers to the establishment of "a statewide 'central filing system'." 51 Fed. Reg. at 29,450.

Seemingly, the only exception to the exclusivity of the central filing exception to the basic rule, once it is adopted, is stated in proposed 9 C.F.R. §205.206(c):

- (c) A state may establish a system for specified products and not for all. A state establishing a system for specified products and not for all will be deemed to be "a state that has established a central filing system" as to the specified products, and will be deemed not to be such a state as to other products.

Id. at 29,453.

Later, the exclusivity of buyer remedies is discussed when the rules state that Section 1324:

. . . does not require such persons [buyers of farm products, commission merchants, and selling agents] to register [with the Secretary of State]. Not registering with a particular system operator has the effect under Subsections (e) (2) and g(2)(C) of making such persons whether they are inside or outside of the State covered by that system subject to security interests shown on that system's master list whether or not such persons know about them, so that such persons for their own protection will need to query the system operator about any seller "engaged in farming operations," of a product produced in the state covered by that system with whom they deal."

- (c) The effect of registration by such persons with a particular system is to get them on the list for regular distribution of portions of that system's master list, the portions to be determined by the registration.

Id. at 29,454.

In discussing the effect of an effective financing statement outside the state in which it was filed, the rules state:

Upon such filing in such system, subsections (e) (2) and (g)(2)(C) make buyers, commission merchants and selling agents not registered with that

system subject to the security interest in that product whether or not they know about it, even if they are outside that State. Subsections (e)(3) and (g)(2)(D) make persons registered with that system subject if they receive written notice of it even if they are outside that State.

Id. at 29,455.

Finally, for the very policy reasons stated in the legislative history to the Statute, the notice system and the central filing system should be considered exclusive alternatives. The legislative history over and over again points to the need for uniformity of law for the protection of purchasers of farm products. North Dakota had, prior to the statute, established a central filing system and not a notice system. While it is true that the statute and the regulations preempt state law that is contrary, to allow secured parties either alternative would seem to fly in the face of both the state and federal legislative intent. Uniformity, the exclusivity of the central filing system, is clearly preferred. It seems more than just a bit strange that a statute purporting to provide uniformity would allow any alternatives. But certainly since it does, it should be construed to require the exclusivity of the two alternatives, consistent with the legislative intent promoting uniformity.

Therefore, since North Dakota has established a central filing system for all products, the notice provisions of the statute are not an alternative. All secured parties inside or outside of the state must proceed to protect their security interests in North Dakota through the central filing system by means of filing effective financing statements or notices with the Secretary of State.

Sincerely,

Nicholas J. Spaeth

ja

cc: Kent Jones, Commissioner of Agriculture
Dina Butcher, Deputy Commissioner of Agriculture