

N.D.A.G. Letter to Meier (April 14, 1987)

April 14, 1987

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

Dear Secretary Meier:

Thank you for your letter of March 18, 1987, asking whether the Secretary of State should accept filings (North Dakota Central Notice System filings) on statutory liens that do not contain the signature of the debtor.

First of all, I think it is important to note some applicable statutes. N.D.C.C. § 41-01-11 states, in part, as follows:

41-01-11. (1-201) GENERAL DEFINITIONS.

37. "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. . . .

N.D.C.C. § 41-09-02 states, in part, as follows:

41-09-02. (9-102) POLICY AND SCOPE OF CHAPTER.

* * *

2. . . . This chapter does not apply to statutory liens except as provided in section 41-09-31. . . .

N.D.C.C. § 41-09-04 states, in part, as follows:

41-09-04. (9-104) TRANSACTIONS EXCLUDED FROM CHAPTER. This chapter does not apply:

* * *

3. To a lien given by statute or other rule of law for services or materials except as provided in section 41-09-31 on priority of such liens.

N.D.C.C. § 41-09-31 states as follows:

41-09-31. (9-310) PRIORITY OF CERTAIN LIENS ARISING BY OPERATION OF LAW. When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

The law, prior to July 1, 1985, excluded statutory liens from the buyer in the ordinary course of business rule of N.D.C.C. § 41-09-28. In fact, those exclusions remain. Nevertheless, N.D.C.C. § 41-09-28, as amended in 1985, specifically includes liens, statutory or otherwise. This statute requires a secured party who intends to impose liability for a lien against a crop or livestock buyer to file the appropriate form with the Secretary of State. See generally N.D.C.C. § 41-09-28, and specifically subsection 9. The signature of the debtor is not required for a filing under this section.

Since the recent amendments of N.D.C.C. § 41-09-28 in 1985, which added the language concerning liens and the method for imposing liability on crop or livestock buyers, Congress has enacted §1324 of the Food Security Act of 1985 (protection for purchasers of farm products) (hereinafter "the Federal Statute"). Pub.L. 99-198, 99 Stat. 1535, 7 U.S.C. 1631.

The Federal Statute defines "security interest" as "an interest in farm products that secures payment or performance of an obligation." §1324(c)(8). Arguably, that definition includes liens and statutory liens. However, the only mention of the word "lien" or "liens" that I find in the Federal Statute occurs in the intent portion of the statute, §1324(a). The basic rule established by subsections (d) and (g) of the Federal Statute only mentions security interests. The basic rule states substantially as follows:

- (d) Except as provided in subsection (e) and notwithstanding any other provision of federal, state, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of the security interest created by the seller, even though the security is perfected; and the buyer knows of the existence of such interest.

(Subsection (g) is similar to (d) except that it relates to commission merchants or selling agents who sell farm products.)

The law existing in 1985 in North Dakota, prior to the Federal Statute, stated the basic rule as follows:

41-09-28. (9-307) PROTECTION OF BUYERS OF GOODS.

1. A buyer in the ordinary course of business (subsection 9 of section 41-01-11) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence. A crop or livestock buyer is a buyer in the ordinary course of business as to security interests and liens if such person qualifies under the Provisions of subsection 13. As used in this section, a crop or livestock buyer is a person who buys crops or livestock from, or who sells crops or livestock on a fee or commission for, a person engaged in farming operations. . . (Emphasis supplied.)

It seems that by the language of the Federal Statute (specifically subsections (d) and (g)), Congress has preempted the states from legislating in this area, with limited exceptions. See Meyer, "Congress's Amendment to the UCC: The Farm Products Rule Change," Journal of Agricultural Law and Taxation, at 8, (1986). See generally, H. Cohen, "Clear Title to Purchasers of Secured Farm Products: Federal Preemption of Uniform Commercial Code §9-307(1)" (January 28, 1986, Congressional Research Service, the Library of Congress.)

Assuming federal preemption of this area, if a secured party or lienholder wishes a buyer of farm products, or a commission merchant or a selling agent who sells farm products, to take subject to a security interest or a lien, in North Dakota, he must file an effective financing statement or notice with the Secretary of State for inclusion in the Central Filing System. The Federal Statute requires that an effective financing statement be signed by the debtor. §1324(c)(4)(C). Therefore, in order to comply with the federal law, that form must require the signature of the debtor in order for North Dakota Central Filing System to be approved by the Packers and Stockyards Administration pursuant to federal regulations. See generally 9 C.F.R. part 205. The North Dakota Central Notice System form, which acts as an effective financing statement pursuant to the federal law, requires the signature of the debtor.

It may be argued that the Federal Statute does not apply to statutory liens. However, where the lienholder seeks to subject a buyer of farm products, or a commission merchant or a selling agent who sells farm products, to the lien under the Federal Statute he must meet the requirements of filing under the Federal Statute. The lien should be considered a security interest under the Federal Statute. Even though under the state law, the name of the debtor was not required on the form to be filed with the Secretary of State, it is now required by the Federal Statute if the lienholder wishes to remove the burden of the basic rule of the Federal Statute and subject the buyer of farm products, commission merchant, or selling agent to the lien. There appears to be no sound basis in the Federal Statute for omitting the signature and still claiming that other Parties take subject to the lien.

Of course, the perfection of a statutory lien still occurs when it is filed, according to statute, in the office of the register of deeds of the appropriate county. Additionally, a statutory lien still takes priority over a perfected security interest. See N.D.C.C. § 41-09-31.

Sincerely,

Nicholas J. Spaeth

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