

N.D.A.G. Letter to Meier (Nov. 3, 1987)

November 3, 1987

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

Dear Secretary Meier:

Thank you for your letter of October 27, 1987. Mr. Ernest Lang has again requested that you remove the UCC-1 financing statement that provides notice of a security interest in favor of the Bank of Steele covering certain personal property of Mr. Lang. As you will recall, I have written two prior letters on this subject recommending that you do not remove the UCC-1 statement.

Mr. Lang's letter of October 21, 1987, argues that N.D.C.C. § 42-09-42(2) applies to his UCC-1. This section which states that a perfected security interest becomes unperfected 60 days after termination of an insolvency proceeding or the expiration of five years from filing of the financing statement, whichever is later. Mr. Lang appears to believe that the lawsuit brought by the Bank of Steele to collect its promissory note and to execute and foreclose on the secured property was an "insolvency proceeding."

An "insolvency proceeding" is a defined term under the Uniform Commercial Code. N.D.C.C. § 41-01-11(22) provides:

41-01-11. (1-201) General definitions. Subject to additional definitions contained in the subsequent chapters of this title which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this title:

....

22. "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

A routine collection case, such as that brought against Mr. Lang, is not an "insolvency proceeding." An insolvency proceeding is an assignment for the benefit of creditors under state law, a receivership, or a proceeding under federal bankruptcy law. See, e.g., Morrison Steel Co. v. Gurtman, § 113 N.J. Super. 474, 274 A.2d 306, 310 (N.J. Super. Ct. App. Div., 1971) (Chapter XI of federal bankruptcy law was an "insolvency proceeding"); In re Bank of Erlsboro, 391 P.2d 887, 887 (Okla. 1964) (taking over state bank by bank commissioner is an insolvency proceeding"); 1 R. Anderson, Uniform Commercial Code

§1-201:359 (3rd Ed. 1981, Supp. 1986).

Because the Bank of Steele's suit for a money judgment was not an insolvency proceeding, there is no bar to continuation of the financing statement pursuant to N.D.C.C. § 41-09-42(3) and you should not deem the financing statement in favor of the Bank of Steele to have lapsed under N.D.C.C. § 41-09-43.1.

In conclusion, you should deny Mr. Lang's request that you remove the UCC-1 statement in favor of the Bank of Steele.

Sincerely,

Nicholas J. Spaeth

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