

LETTER OPINION
95-L-230

October 11, 1995

Senator Judy Lee
District 13
808 Sixth Street East
West Fargo, ND 58505

Dear Senator Lee:

Thank you for your letter concerning the interpretation of North Dakota Century Code (N.D.C.C.) § 35-05-01. Specifically, you ask whether N.D.C.C. § 35-05-01 authorizes a corporation to engage in cash rent financing and to take a security interest in growing and unharvested crops in situations when money is advanced to the owner of the property pursuant to a contract between the corporation and the tenant farmer.

The general rule of law is that "[s]ecurity interests in growing and unharvested crops are prohibited, and any security agreement purporting to create a security interest therein is void." N.D.C.C. § 35-05-01. However, the provisions of this prohibition do not apply to any security interest in favor of the United States or this state or to any financial institution, "nor to any security interest created by contract...to secure ... the rental ... of the land upon which the crops covered by the contract are to be grown." Id.

N.D.C.C. § 35-05-01.1 provides that "[a] security interest upon crops attaches only to the crop next maturing after the delivery of the security agreement." The general restriction of a continuing security interest upon crops prohibited under N.D.C.C. § 35-05-01.1, "do[es] not apply to liens by contract given to secure ... the rental of land upon which the crops covered by the lien are to be grown."

The meaning of a statute must be sought initially from the statutory language. County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). Words in a statute are to be given their plain, ordinary, and commonly understood meanings. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990); N.D.C.C. § 1-02-02, 1-02-03. Consideration should be given to the ordinary sense of these words, the context in which they are used, and the purpose which prompted their enactment. County of Stutsman, 371 N.W.2d at 327.

Under cash rent financing, a lease agreement exists between the owner of the property and the tenant farmer to permit the farmer as lessee to grow crops on the owner's land. Additionally, a financing agreement exists between the farmer and a lender to finance the farmer's operation with the loan proceeds going to the owner of the property as consideration to the owner for the farmers leasing of the

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property. Under this arrangement, the owner has greater assurances of having the lease payments made because of the support of the lender. It is, therefore, the lender that assumes part of the risk in the production and harvesting of the crops. Thus, the need for a lender engaging in cash rent financing to take a security interest in the farmer's growing and unharvested crops is manifest.

The plain language of N.D.C.C. §§ 35-05-01 and 35-05-01.1 authorizes an entity that engages in cash rent financing to take a security interest in growing and unharvested crops and to do so on a continuing basis. This is not to say that N.D.C.C. § 35-05-01 authorizes cash rent financing as an activity. Thus, the second part to your concern, is whether N.D.C.C. § 35-05-01 authorizes a corporation to engage in cash rent financing. It is within the context of this question, that the general prohibition of unauthorized banking comes into play. N.D.C.C. § 6-02-01(1) provides:

No person, firm, company, copartnership, or corporation, either domestic or foreign, not organized under this chapter or authorized to take on banking powers under this section, except national banking corporations and the Bank of North Dakota, may make use of or display in connection with its business, in signs, letterheads, advertising, or in any other way, such words as "bank", "banker", or "banking", or any other word or words of like import, nor may any person or concern do or perform anything in the nature of the business of a bank until and unless such business is regularly organized or authorized under this chapter.

The prohibition against persons conducting a banking business in North Dakota, except as lawfully organized under N.D.C.C. ch. 6-02, has been in effect for more than 100 years. Ch. 23, Laws N. Dak. 1890. The North Dakota Supreme Court upheld the constitutionality of this provision in State v. Woodmanse, 46 N.W. 970 (N.D. 1890). In so holding, the North Dakota Supreme Court explained that "the prohibition of private banking necessarily results from the inauguration of a banking system for the state, in which the business is made an exclusive corporate franchise; i.e., a business which can be carried on only by those who become incorporated, and are willing to subject their business to the restraints and safeguards found in the banking law under which they acquire the right to carry on such business." Id. at 971. See also Divide County v. Baird, 212 N.W. 236, 238 (N.D. 1927) ("[T]he business of banking is so intimately connected with the public interest that the Legislature may prohibit it altogether, or may prescribe the conditions under which it may be done.")

"Banking" is defined, in part, as the business of receiving deposits, making loans, and cashing checks. The lending of money, receiving deposits, and cashing checks has been described by the United States Supreme Court in Clarke v. Securities Indus. Ass'n, 479 U.S. 388

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(1987), as core banking functions. Thus, an entity cannot engage in the business of banking, especially a core banking function such as the lending of money, without statutory authorization to do so.

The Legislature has authorized many different types of financial institutions other than banks to engage in banking activities such as credit unions, savings and loan associations, and industrial loan companies. Money brokers also are licensed and regulated under N.D.C.C. ch. 13-04.1. N.D.C.C. § 13-04.1-02 provides that "no person other than a money broker licensed and authorized under [N.D.C.C. ch. 13-04.1] may advertise or solicit either in print, by letter, in person, or otherwise in North Dakota, the right to find lenders or provide loans for persons or businesses desirous of obtaining funds for any purposes." In general, financial institutions are excluded from this licensing requirement. A review of current money brokers licensed by the North Dakota Department of Banking and Financial Institutions indicates at least one money broker engaging in cash rent financing.

Based on the above, it is my opinion that a corporation that has lawful authority to engage in cash rent financing, such as a financial institution or money broker, may take a security interest in growing and unharvested crops as provided for under N.D.C.C. §§ 35-05-01 and 35-05-01.1.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dec/jrs