

LETTER OPINION
2003-L-07

February 10, 2003

The Honorable Lawrence R. Klemin
House of Representatives - District 47
1709 Montego Dr
Bismarck, ND 58503-0856

Dear Representative Klemin:

Thank you for your letter asking whether a security interest in fixtures that is both filed in the central indexing system and recorded in real estate records with the county recorder lapses after five years and must be continued in order to remain effective after five years, or whether it is effective for an indefinite period, such as the life of a mortgage. The answer depends on whether the securing interest is contained in a mortgage¹ or whether it is in the form of a financing statement.

Generally, a financing statement which has been filed to perfect a security interest in goods or other property under article 9 of the Uniform Commercial Code (U.C.C.), is effective for a period of five years after the date of filing. N.D.C.C. § 41-09-86(1). The effectiveness of an initial financing statement may be continued for additional five year periods by timely filing continuation statements. N.D.C.C. § 41-09-86(5).

A secured party's security interest in fixtures may be perfected in two ways. One way is found at N.D.C.C. § 41-09-73(3), which allows a secured party to file record of a mortgage in the central indexing system. A "record of mortgage" filed as a fixture filing under N.D.C.C. § 41-09-73(3) "remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property." N.D.C.C. § 41-09-86(7). Therefore, when a "record of mortgage" is filed as a fixture filing under N.D.C.C. § 41-09-73(3), the security interest in the fixtures remains until the mortgage holder terminates the mortgage or it otherwise expires. N.D.C.C. §§ 35-01-27, 35-03-14. This is an exception to the general five-year effective period of N.D.C.C. § 41-09-86(1).

¹ See N.D.C.C. § 35-03-14 for rules concerning expiration of mortgage liens.

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Another way to perfect a security interest in fixtures is to file a financing statement in the central indexing system under article 9 of the Uniform Commercial Code and to also file the financing statement in the real estate records recorded with the county recorders. N.D.C.C. § 41-09-73(2). See also N.D.C.C. §§ 35-01-01, 35-03-02, 47-19-19, 47-19-41. Such a financing statement in the personal property records is effective only for five years after the date of filing unless continued. N.D.C.C. § 41-09-86(1), (5). A question may arise whether such a financing statement recorded in the real estate records continues in effect until terminated under real property law, N.D.C.C. §§ 35-01-27 and 35-03-14, or whether it would terminate after five years unless it is continued. In this instance, the financing statement that is filed both in the central indexing system and also recorded in the county real estate records does not come under the exemption for mortgages contained in N.D.C.C. § 41-09-86(7). See Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993) (the mention of one thing implies the exclusion of another). Therefore, it is my opinion that the general requirement to file a continuance at least every five years for continued effectiveness of the security interest applies to financing statements that are dually filed under N.D.C.C. § 41-09-73(2).

Sincerely,

Wayne Stenehjem
Attorney General

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