

N.D.A.G. Letter to Preszler (Aug. 17, 1990)

August 17, 1990

Mr. Gary Preszler
Commissioner
Department of Banking and
Financial Institutions
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioner Preszler:

Thank you for your June 7, 1990, letter requesting my opinion on the procedures that a receiver of a failed savings and loan association must follow in North Dakota.

As you indicated in your letter, on August 9, 1989, the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) established the Resolution Trust Corporation (RTC). The RTC is a temporary agency whose duties are to dispose of failed thrift institutions and the assets of failed institutions. The RTC, in conjunction with the FDIC will operate as a receiver of failed thrifts and will offer deposit liabilities and assets to qualified purchasers.

N.D.C.C. § 6-07-04.2 establishes the procedures a receiver of an insolvent institution must follow to permit acquisition of a financial institution. This section provides:

6-07-04.2. Acquisition of an institution. The receiver of an insolvent institution or the state banking board, when it has acquired possession of the institution for the purpose of acquisition pursuant to section 6-07-10, may permit the acquisition of the financial institution. In considering potential acquisition, the receiver of an insolvent institution or the board, when acting under the provisions of this section, shall entertain bids from potential purchasers in the following manner:

1. First consideration must be given to bids to purchase any or all of the total assets and liabilities made by any of the following, which intend to operate the acquired institution as a bank:
 - a. An individual or individuals desiring to acquire control of the institution.
 - b. A new bank organized under chapter 6-02.

- c. A bank holding company the home state of which is North Dakota.
2. Second consideration must be given to banks acquiring any or all of the total assets and liabilities of the institution to operate it as a paying and receiving station, in which case the bids must be considered in the following order:
 - a. Banks qualifying to acquire the institution under section 6-03-14.
 - b. North Dakota banks within a seventy-five mile radius of the insolvent or failing institution.
 - c. Banks within the state of North Dakota.

The receiver of an insolvent institution or board when acting under the provisions of this section, may accept a bid of a lower bidder under subsection 1 or 2, provided the bid is otherwise acceptable and is for an amount at least ten percent greater than a bid of a higher order. The receiver of an insolvent institution or board when acting under the provisions of this section, may reject any and all bids.

The procedure for acquisition to operate as a bank or a paying and receiving station may be modified by the state banking board to the extent the board deems necessary under the circumstances. No notice of application need be given and no public hearing need be held. Notwithstanding section 6-03-18, a paying and receiving station established by acquisition under this section shall not be required to discontinue operation by commencement of business by a banking institution at the same place.

A "financial institution" includes a "savings and loan association organized under the laws of [North Dakota] or of the United States." N.D.C.C. § 6-01-02(7.1). Because a savings and loan association is a financial institution, it is my opinion that North Dakota law requires a receiver of a failed savings and loan association to follow the procedures outlined in N.D.C.C. § 6-07-04.2 for the acquisition of a failed financial institution. Therefore, the RTC in conjunction with the FDIC, as receiver of failed financial institutions, is permitted to accept bids in the manner specified in N.D.C.C. § 6-07-04.2.

A second issue which should be addressed so a potential bidder is cognizant of the available alternatives, is the question of whether a paying and receiving station may be established in a community where another financial institution exists. N.D.C.C. § 6-07-04.2(2)(a) provides banks which qualify under N.D.C.C. § 6-03-14 are to be given priority when considering bids from banks wishing to acquire institutions and operate them as paying and receiving stations. N.D.C.C. § 6-03-14 limits the ability of a bank to establish a paying and receiving station in a community when an existing banking institution is located there. Thus, subdivision 2(a) authorizes a bank to acquire a failed institution and establish a paying and receiving station if there is no other banking

institution present in the community. Subdivisions 2(b) and 2(c) offer the opportunity to acquire a failed institution and establish a paying and receiving station to banks within a 75 mile radius of the failing institution or banks within North Dakota respectively. The limitation in subdivision 2(a) that the restrictions on paying and receiving station locations under N.D.C.C. 6-03-14 must be complied with is not present in subdivisions 2(b) or 2(c).

Thus, although the geographical limits in 2(b) and 2(c) apply to determine the priority given a bidder under subdivision 2, it is unclear whether the presence of banking institution also limits the bidder's opportunity to establish a paying and receiving station.

When a statute is unclear extrinsic aids such as the legislative history, the object sought, and the administrative construction of the statute may be considered. N.D.C.C. § 1-02-39(1), (3) and (6).

N.D.C.C. § 6-07-04.2 was enacted as Senate Bill 2134. 1987 N.D. Sess. Laws ch. 120, § 1. In testimony on that bill before the Senate Committee on Industry, Business and Labor, you indicated that the limitation on a paying and receiving station in a community where another bank existed applied only to subdivision 2(a). In part, you stated "2(a) would allow the failed institution, provided it is the only bank in that community, to be operated as a paying and receiving station." Hearings on S. 2134 Before the Senate Comm. on Industry, Business and Labor, 50th N.D. Leg. (Jan. 13, 1987) (Statement of Gary Preszler). Your testimony concerning 2(b) and 2(c) spoke only to the geographical limits and not the presence of another bank in the community. You stated "2(b) . . . allows a bank located within 75 miles of the failed bank to operate it as a paying and receiving station Subsection 2(c) . . . opens up the scope of potential bidders to all North Dakota banks." Id. In closing, you stated you hope that the bill would be unnecessary but if it became necessary it would be better to achieve the objective of continual "banking service [rather] than to see liquidation and deposit payout." Id.

You have also indicated in conversations with my staff members that it has been the administrative practice of the Department of Banking and Financial Institutions to interpret N.D.C.C. § 6-07-04.2(2) to allow banks to establish paying and receiving stations in communities where a banking institution already exists. Although a circumstance has never arisen where that situation actually occurred, you indicated that it has consistently been your advice to potentially acquiring financial institutions that they would be permitted to operate a paying and receiving station in a community where there was an existing financial institution.

Based upon the legislative history, the objective to provide continued financial services after a bank fails, and the construction of the statute by your agency, it is my opinion that N.D.C.C. § 6-07-04.2(2) contemplates the possibility that a successful bidder may operate a failed institution as a paying and receiving station although there is an existing financial institution in the community.

I trust this has satisfactorily addressed your inquiries. If you have additional questions, please feel free to contact me again.

Sincerely,

Nicholas J. Spaeth

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