

Opinion No. 62-03

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BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. Robert H. Sprecher, Assistant District Attorney, Fifth Judicial District, Roswell, New Mexico

QUESTION

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Section 50A-9-402, N.M.S.A., 1953 Compilation provides that a financing statement is sufficient if it is signed by the Debtor and the Secured party, etc., and sets out a form which may be used. Is it absolutely essential that the lender or secured party sign the financing statement for it to be valid? Is the provision in the statute as to the lender's or secured party's signatures mandatory or is it permissive?

CONCLUSION

See Analysis.

OPINION

ANALYSIS

Section 50A-9-402, N.M.S.A., 1953 Compilation prescribes the formal requisites for financing statements required to be filed under the provisions of the Uniform Commercial Code. This section provides in part as follows:

"(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

"(2) A financing statement which otherwise complies with subsection (1) is sufficient although it is signed only by the secured party when it is filed to perfect a security interest in

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this state. Such a financing statement must state that the collateral was brought into this state under such circumstances.

(b) proceeds under Section 9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral." (Emphasis supplied)

Under the above quoted section, it is expressly provided that the signatures of both the debtor and the secured party are essential requisites of a valid financing statement, except that a financing statement which otherwise complies substantially with the provisions of this section may be signed only by the secured party when filed to perfect a security interest in collateral already subject to a security interest in another jurisdiction when it is brought into this State, or where such is filed to perfect a security interest in proceeds under Section 50A-9-306, N.M.S.A., 1953 Compilation.

The necessity for both the signatures of the debtor and the secured party upon a financing statement is recognized in the comments of the drafters of the Uniform Commercial Code under Section 9-402. Such comments provide in part:

"1. Subsection (1) sets out the simple formal requisites of a financing statement under this Article. **These requirements are: (1) signatures AND addresses of both parties;** (2) a description of the collateral by type or item. Where the collateral is growing crops or fixtures, the financing statement must also contain a description of the land concerned. Section 9-110 provides that 'any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described', Subsection (3) suggests a form which complies with the statutory requirements. **A copy of the security agreement may be filed in place of a separate financing statement, if it is signed by both parties and contains the required information.**

4. Subsection (2) allows the secured party to file a financing statement signed only by himself where the filing is with reference to collateral already subject to a security interest in another jurisdiction when brought into this State or with reference to proceeds when his security interest in the original collateral was perfected. (Section 9-103 states when a financing statement must be filed when collateral is brought into this State; Section 9-306 defines proceeds and states when refiling is necessary to continue a perfected security interest in them.) Section 9-401 (3), alternative provision, contains similar permission on removal between counties in this State. The reason for dispensing with the debtor's signature in the two cases covered by subsection (2) and in the case covered by Section 9-401 (3), is that the necessity for refiling arises from actions of the debtor (in moving his place of business or residence, or the collateral, or disposing of it), which may have been unauthorized or fraudulent . . ." (Emphasis supplied)

In Anderson's Uniform Commercial Code, Vol. 2, "Secured Transactions" Section 9-402:4 at page 621, the author states that:

"A financing statement must be signed by both the debtor and the secured party. A signing by the secured party alone is sometimes sufficient when the statement is the refiling of an interest which was already perfected. This is so in the following cases:

(1) **Out-of-state property.** If collateral already subject to a security interest is brought into the state and a financing statement is then filed in the state to perfect the security interest, a signature by the secured party is sufficient.

(2) **Proceeds.** If the security interest in the original collateral was perfected, it is sufficient if a filing to perfect the interest in the proceeds is signed only by the secured party.

It is apparent both under the express wording of Section 50A-9-402, N.M.S.A., 1953 Compilation, and the authorities above cited that it is essential that both the debtor and the secured party sign the financing statement.

It should be noted however, that the requisites of an effective signature under the provisions of the Uniform Commercial Code are liberal in scope. Section 50A-1-201 (39) N.M.S.A., 1953 Compilation, defines the term "signed" as used in the Act as follows:

"Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing."

Under the official code comment of the drafters of the Uniform Commercial Code it is stated that:

"The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in this Act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letter-head. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing."

Under the express provision of Section 50A-9-402, N.M.S.A., 1953 Compilation, it is essential except in limited situations specified in Subsection (2) of this Section that the debtor and the secured party sign the financing statement in order to comply with the required elements necessary to constitute such instrument under the statute. As indicated under the authorities quoted herein, such signature requirements are mandatory in nature. The requisites of a valid signature however, under the provisions of Section 50A-1-201 (39) N.M.S.A., 1953 Compilation may be broadly interpreted, and may include initials, printing, or any symbol if such has been in fact adopted by the party with an intention to authenticate such writing.