

Opinion No. 70-78

October 2, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. S.L. Sanders Commissioner of Banking Department of Banking Lew Wallace Building Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

Does Section 15(a)(3) of the New Mexico Small Loan Act, [§ 48-17-44(a)(3), N.M.S.A., 1953 Comp.] require the filing of a termination statement and a new financing statement under Sections 50A-9-402, 404, N.M.S.A., 1953 Comp., when a loan is refinanced?

CONCLUSION

No.

OPINION

{*133} ANALYSIS

This question requires a review of Opinion of the Attorney General No. 62-50, issued March 26, 1962. The answer to Question Number 2 in that opinion is hereby overruled.

Section 50A-9-404, N.M.S.A., 1953 Comp. merely provides for the filing of a termination statement when there is "no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value . . ." That section does not by its terms provide that a termination statement must be filed when a loan is refinanced and the parties retain the same security agreement or enter into an identical, albeit new, security agreement. The Attorney General of Kentucky concluded prior to the issuance of our Opinion No. 62-50 that the Kentucky version of U.C.C. § 9-404 did not require a termination statement when the note was refinanced. See Opinion of the Kentucky Attorney General No. 61-1096, issued December 18, 1961. (1 U.C.C. Rep. 689).

In considering the effect of Section 48-17-44(a)(3) upon the Uniform Commercial Code and especially Section 9-404, Opinion of the Attorney General No. 62-50 referred to Section 50A-9-203(2), N.M.S.A., 1953 Comp., which provides, in part, that "A transaction, although subject to this article, is also subject to . . . the New Mexico Small Loan Act of 1955, Sections 48-17-30 through 48-17-58, New Mexico Statutes Annotated, 1953 Compilation (being Laws 1955, Ch. 128, as amended) . . ."

Section 48-17-44(a)(3) provides that:

"Upon payment of the loan in full, mark plainly every note and {~~*134~~} promise to pay signed by any obligor with the word "paid" or "canceled" and promptly file or record a release of any mortgage if the same has been filed or recorded; restore any pledge and cancel and return any note and any assignment given to the licensee."

Opinion of the Attorney General No. 62-50 concluded that Section 48-17-44(a)(3) required a termination statement each time a loan was refinanced, although the same security for the previous loan would be granted by the debtor, either under the original security agreement or under a new security agreement. The identical conclusion was reached by the Attorney General of Minnesota in Opinion of the Attorney General No. 29a-20, issued August 10, 1966 (3 U.C.C. Rep. 931) and the Attorney General of Maryland in 49 Opinions of the Attorney General 38 (June 1, 1964), (2 U.C.C. Rep. 177). The Maryland opinion relied on Section 197(5) of the Maryland Industrial Finance Law, which is almost identical to our Section 48-17-44(a)(3).

The opinion of the Maryland Attorney General was later challenged. In **Household Finance Corp. v. Bank Commissioner**, 248 Md. 233, 235 A.2d 732 (1967) the plaintiff brought a declaratory judgment action against the defendant to determine the validity of the Opinion of the Attorney General. The court found that there was no conflict between the Uniform Commercial Code provisions on termination statements and the Industrial Finance Law and ruled in favor of the plaintiff. The Maryland court also found that the Attorney General Opinion was inconsistent with the philosophy of the Uniform Commercial Code and disturbed the system of priorities established by the Code. Although not agreeing completely with the reasoning of the Maryland decision, we believe that the New Mexico courts would reach the same conclusion and would hold that Section 48-17-44(a)(3) does not require the filing of a termination statement merely because the loan is refinanced.

We further suggest that Opinion No. 62-50 does do violence to the scheme of the Uniform Commercial Code by effecting the problem of perfecting future advances. Section 50A-9-204(5), N.M.S.A., 1953 Comp. provides that:

"Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."

Comment No. 7 to the 1962 Official Text of U.C.C. § 9-204 states that "Under subsection (5) collateral may secure future as well as present advances when the security agreement so provides . . ."

Although this Opinion should in no way be construed as an official position on the Uniform Commercial Code, we believe that the question of whether a termination statement should be filed in situations of refinancing, is best left for interpretation under the Uniform Commercial Code. For example, a termination statement and a new financing statement may be required under the U.C.C. if a future advance is made and the security agreement did not provide for future advances as required by U.C.C. 9-

204(5), **supra. Coin-o-Matic Service Co. v. Rhode Island Hospital Trust Co.**, 3 U.C.C. Rep. 1112 (R.I. Super. 1966).

On the other hand, it has also been held that the failure to file a new financing statement for the last in a series of security agreements could not prejudice any prospective creditor when a previous financing statement was on file. **In Re Merriman**, 4 U.C.C. Rep. 234 (S.D. Ohio 1967) (Anderson, Referee in Bankruptcy). The proper interpretation of the future advances section would appear to be in doubt at the present time. Compare, **Safe Deposit Bank & Trust Co. v. Berman**, 393 F.2d 401 (1st Cir. 1968), with, **In Re Cantrill Constr. Co.**, 418 F.2d 705 (6th Cir. 1969) and **In Re Rovit**, 299 F. Supp. 374 (E.D. Mich. 1969). See generally Cohen, **The Future Advance Interest under the Uniform Commercial Code: Validity and Priority**, 10 B.C. Ind. & Com. L. Rev. 1 (1968).

Finally, we find that the greatest difficulty with Opinion No. 62-50 is its inconsistency with the notice filing provision of Section 50A-9-402, N.M.S.A., 1953 Comp. See Comment No. 2 to the 1962 Official Text of U.C.C. § 9-402. Opinion of the Attorney General No. 62-50 states that:

{*135} "The financing statements required to be filed under the Uniform Commercial Code are, in effect, mortgages because they create a lien on the property pledged. Concluding then, that financing statements are tantamount to mortgages, we must also conclude that a release of such a lien must be filed whenever a note is paid in full, as provided for in Section 48-17-44(a)(3) . . ."

The opinion, coming as it did during the infancy of Uniform Commercial Code Law, can be excused for confusing transactional filing with notice filing, a mistake made even by one outstanding Federal Court of Appeals. See **Republic Nat'l Bank v. Vial**, 232 F.2d 785 (5th Cir. 1956).

Nevertheless, the Opinion does not accurately interpret the purpose of the filing of a financing statement under Section 50A-9-402, N.M.S.A., 1953 Comp. As a case in point, it has been held that the financing statement need not contain any information that the security agreement covers future advances. **Moody Day Co. v. Westview Nat'l Bank**, 452 S.W.2d 572 (Tex. Civ. App. 1970). For other decisions on the purpose and effect of notice filing see also **National Cash Register Co. v. Firestone & Co.**, 346 Mass. 255, 191 N.Ed.2d 471 (1963); **Plemens v. Didde-Glaser, Inc.**, 244 Md. 556, 224 A.2d 464 (1966); **Security Bank and Trust Co. v. Blaze Oil Co.**, 463 P.2d 495 (Wyo. 1970); **Evans Products Co. v. Jorgensen**, 421 P.2d 978 (Ore. 1966); **In Re Thomas**, 310 F. Supp. 338 (N.D. Cal. 1970). See generally, 1 Gilmore, Security Interests in Personal Property § 15.2 (1965); Annot., 30 A.L.R.3rd 9 (1970).

For the foregoing reasons, we advise you that small loan companies are no longer required to file termination statements and new financing statements merely because a loan has been refinanced.

By: Mark B. Thompson, III
Assistant Attorney General