

May 22, 2020

To: Article 9 Subgroup

From: Paul Hodnefield

Re: Supplementary Memo on Central Filing of Fixture Filings

This memo supplements item 2(a), on the Issues List provided by the Subgroup on Article 9 Filing System, Remedies, and Other Miscellaneous Issues for consideration by the Uniform Commercial Code and Emerging Technologies Committee (the “Committee”): *Amend UCC § 9-501 to Provide for Central Filing of Fixture Filings*.

Background

Since its adoption, Revised Article 9 of the UCC has provided much greater efficiency and substantially reduced the costs of the filing and search process, at least at the state level. The revision allowed central filing offices to use innovative technology that simplified the filing and search process and reduced costs. Today, nearly all state central filing offices have robust electronic filing capabilities and search systems that provide reliable results quickly at little or no cost. All stakeholders in the UCC filing and search process have benefitted as a result.

The fixture filing process, however, has not reaped the same benefits. Fixture filing with local real estate recording offices continues to be comparatively inefficient, more costly and provides greater uncertainty than the process for filing records in a state central index.

1. Local Filing Limits Innovation for Fixture Filings Using Emerging Technology

County offices primarily record real estate documents. The vast majority of all documents submitted for recording and searches conducted in these offices involve deeds, mortgages and related records. UCC fixture filings make up only a tiny fraction of the records processed by these offices. As a result, the county offices generally cannot develop any significant depth of experience with their Article 9 duties.

Innovation with emerging technology requires creativity based on understanding. With respect to fixture filings, the county offices simply lack enough experience with UCC records and see so few of them that they would recognize potentially valuable opportunities to innovate.

County land record management systems (“LRMS”) also limit innovation. These systems were not intended for use with notice filing. The LRMS systems were designed specifically for land records - document filing in the real estate chain of title used to establish ownership and encumbrances. In contrast, UCC records are mere notices. Filing UCC notices in the LRMS system is to a degree like the proverbial square peg in a round hole. It is very difficult for

counties to innovate with fixture filings when their LRMS systems were designed for a different purpose.

Finally, lack of development resources creates a nearly insurmountable obstacle for county offices, even if they wanted to innovate with the fixture filing process. Most counties in the country are small and don't have the money to invest in innovative use of technology for fixture filings. There are simply too few fixture filings to justify the cost.

In contrast, state central filing offices have in-depth experience with UCC records and the filing office duties under Article 9. These offices have systems designed specifically for UCC records. In addition, state central filing offices normally have access to greater development resources than do the much smaller county offices.

Considering all these factors, central filing offices are in the best position to innovate with the UCC process through emerging technologies. Innovation in the fixture filing process is severely restricted by the current local filing requirements.

2. Local Filing is Problematic Regardless of Technology

As described above, county recording offices generally do not have much experience with their duties under UCC Article 9 and use LRMS systems that were designed for a different purpose than notice filing. As a result, the county offices tend to apply real estate recording rules to UCC fixture filings. This leads to confusion, added costs and a much higher filing rejection rate.

County offices often lack access to knowledgeable authority on filing office duties with respect to fixture filings. Without guidance, county recording offices frequently adopt policies and procedures for fixture filings that run contrary to the requirements of Article 9. This situation has created a patchwork of legally-questionable filing requirements that cannot be effectively challenged. For example, some counties still require signatures on fixture filings because they consider them to be real estate instruments. County recorders in some states require tax clearances, special cover sheets or other preconditions for filing that are not permitted by § 9-520(a) and § 9-516(b). As a result, wrongful rejection of fixture filings is a common problem.

The situation makes it especially difficult to file UCC3 amendments in the real property records. Such records can fully comply with the Article 9 requirements for filing yet be rejected for any number of reasons, such as the authorizing secured party name not matching the secured party of record or failure to include all debtor and secured party names on the record. Consequently, amendments are often rejected and it can be difficult to get fixture filings terminated. In some cases, county recorders have even rejected a fully compliant UCC3 termination statement and instead required the secured party to file a real estate release with notarized signatures.

The county fixture filing process has not improved over time. County recorders generally receive too few UCC fixture filings for staff to develop the in-house knowledge of the Article 9 filing office duties. Many county recorders are acutely aware of this deficiency but have no outside resources to call on for guidance. In one state, the county recorders' association

approached the secretary of state about central filing because fixture filings were creating too many problems for them.

Central filing offices do not have the same issues with the UCC process. The central offices deal with hundreds, if not thousands of UCC filing and search transactions each date. Their systems and practices are specifically designed to fulfill the filing office duties under Article 9. The issues plaguing fixture filing at the county level would all but disappear if the filing location was moved to the central filing office.

The Solution: Central Filing of UCC Fixture Filings

The Committee should consider whether to amend § 9-501 to provide for central filing of fixture filings. Central filing will allow for greater innovation using emerging technology. State-level filing offices are more likely to have the experience and resources necessary to be creative with the and search process for all UCC records. Moreover, the systems are already designed specifically for UCC records and would easily accommodate fixture filings.

Central filing would also eliminate many, if not all the inefficiencies of fixture filing in the real estate records. Filers would receive the benefit of electronic filing, fewer rejections and reduced costs. Searchers would be able to receive faster and more reliable results while saving money in the process.

It is possible the real estate bar would object to the need to search another index. However, central index UCC searches are already commonly done for most real estate transactions. The burden on searchers would be minimal and be more than offset by the increased efficiency and reduced costs the process would provide. In fact, Louisiana enacted central filing of fixture filings in 2001 when it adopted Revised Article 9. Since then there have been few complaints about the need to conduct a central index search in that state.

At one time it made sense to require recording of fixture filings in the real estate records because in the world of paper documents each additional search was costly. Today, with central filing office technology and experience much more advanced and better suited to dealing with fixture filings, it makes more sense to file fixture filings in the state central UCC offices.