

Project Charter

For the National Association of Secretaries of
State (NASS) and International Association of
Commercial Administrators (IACA)

Joint Task Force

“Bogus” UCC Documents

Revised 6/2004

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CONTEXT

Bogus filings in general are a problem for any public record series. This issue has arisen over the last century both in the old Uniform Commercial Code (UCC) and Revised Article 9 (RA9) and in other record systems such as mortgages or other liens filed on real estate at county recorders'. Bogus filers also file phony lawsuits.

In addition to the remedies provided by NCCUSL/PEB, there are criminal laws already in place against a variety of bogus filings within and outside of UCC. Prosecutors, regulatory agencies and bar associations should review these laws to determine whether enforcement of existing laws is sufficient or if new laws need to be created to combat these "crimes". Even a non-UCC remedy, however, requires guidance so that there is some uniformity of approach rather than having numerous jurisdictions taking wildly different directions.

REASON FOR TASK FORCE

UCC filing offices have seen increased filings or attempted filings of documents purporting to be legitimate financing statements under the Uniform Commercial Code. In fact, some of these documents are intended either to:

- a) defraud third parties into providing value for worthless instruments ('strawman' filings); or
- b) to harass individuals through the placement of what appear to be 'holds' on their assets to inhibit those individuals in obtaining future credit.

The purpose of this Task Force is to provide member jurisdictions in the two sponsoring organizations with effective, viable options for future legislation or rules and regulations, which can be used to mitigate the effects of filing.

Filings such as these have been the cause of:

- A 1999 FDIC alert letter
- FBI, state, and local police investigations
- Court orders for expungement of filings
- Correspondence from threatened members of the law enforcement and judicial systems expressing concern
- State legislative proposals that attempt to resolve the problem

It is essential that the options produced by the Task Force do not:

- Add excessive administrative burden
- Impose large costs on the administrative agencies involved in the filing process
- Impose costs on the victims of these “bogus” filings
- Compromise the reliability of the UCC system
- Impede or interfere with legitimate filers or filings.

Formal action by legislative or rule-adopting bodies may be essential to put the recommended solutions into place.

Failure to provide a solution in any particular jurisdiction will expose blameless individuals to the risk of monetary or opportunity loss. Failure to adopt a solution recommended by NASS or IACA may cause concern for secured interests, who may not be clear about the effect of a local, non-standard remedy on their financing statement.

OBJECTIVES

The objectives of the Task Force are to:

- Define a “bogus” filing
- Summarize and evaluate existing remedies
- Summarize the issues surrounding “bogus” filings
- Produce proposed solutions to the separate problems caused by:
 - “Strawman” filings; and
 - “Harassment” filingsfor recommendation to the executive committees and general memberships, respectively, of NASS and IACA, to consider for acceptance and distribution to the states
- Preserve to the extent possible, the uniformity created with the passage of Revised Article 9 in the various jurisdictions.

WORK PRODUCT

The tangible work product of the Task Force will be a document or documents with:

- Complete options for handling the effects of “bogus” UCC filings
- Proposed statutory or regulatory language that may be adopted by jurisdictions
- Explanations of the options suitable for presentation to legislative or other formal policy-making groups and a listing of the types of legitimate stakeholders likely to be affected by each option
- For each option, there will be an analysis of volumes, nationwide impact, and cost – benefit.

FACTORS

The following limitations and constraints have been identified for this project:

- The limited amount of time available for review and development of solutions
- The lack of any institutional budget for travel, meeting time or space, or other similar logistical costs

ASSUMPTIONS

The following assumptions were made when developing this Project Charter:

- That the filing of these documents may present questions for those named in the filings
- That there is an interest in providing remedies to these filings to the states
- That there is a diversity of approaches that should be represented on this Task Force
- That there is a diversity of interested parties who should be represented on this Task Force
- That existing approaches will be considered by the Task Force, but that the Task Force will not be limited to those approaches in fashioning options
- That the existing language of Revised Article 9 will be recommended to be left unchanged
- That NASS and IACA will receive presentations from this Task Force on these recommendations at their next regularly scheduled meetings
- That substantial progress will be made prior to the next regularly scheduled Executive Committee meetings of both NASS and IACA
- That member states will be able to take these approaches to their legislatures, if they so choose, at or before the 2005 legislative sessions
- That remedies for strawman and harassment are treated as separate issues in the product.

TASK FORCE MEMBERS

The task force consists of 15 experts from the specialties of the Uniform Commercial Code (UCC) as filing officers and attorneys. Members of the Task Force, listed below, were selected from nominations, based on recognized expertise in the area of UCC.

Honorable Mary Kiffmeyer (Sponsor)

Minnesota Secretary of State
NASS President

Honorable Ron Thornburgh (Co-Chair)

Kansas Secretary of State

Bonita Harvieux (Co-Chair)

Minnesota UCC Director
IACA President

Trish Bogenrief

Manager, Corporation Service Company

Carl Ernst

Publisher, Ernst Publishing Co., LLC

Bruce Gallo

Attorney, UCC Direct

Greg Lemon

Nebraska Chief Deputy Secretary of State

Robert Lindsey

Virginia Assistant Deputy Clerk

Rodney Maddox

North Carolina Chief Deputy Secretary of State

Tim Poulin

Maine UCC and Corporations Director

Joe Ross

Michigan Office of Customer Services Director

Kathy Sachs

Kansas Deputy Assistant Secretary of State

Harry Sigman

Attorney in Private Practice

Peter Threlkel

Oregon Corporations Division Director

Trish Vincent

Missouri Deputy Secretary for Business Services

Lorna Wassdorf

Texas Director of Business & Public Filings

OUTSIDE PARTNERS

In its work of evaluating the effectiveness of new legislation and recommendations, the Task Force will obtain the support of outside experts. Outside experts will be asked to provide extensive review of the charter and supply commentary.

Permanent Editorial Board (PEB), NCCUSL, National Public Records Research Association (NPRRA)

Document 1: PRINCIPLES FOR SOLUTIONS OF BOGUS LIENS

The Task Force identified specific principles used in considering solutions for each bogus lien type (harassment and strawman). Below is a table showing those principles and an indication of the principles by type (X).

PRINCIPLE	HARASSMENT	STRAWMAN
Impose only reasonable or minimal costs on filing officers or other government agencies	X	X
Impose costs, if any, only upon the appropriate parties	X	X
Impose only minimal costs, direct or indirect, on victims	X	N/A
Not reject filings except for reasons under 9-516 of the Uniform Commercial Code; remedies would be post filing	N/A	X
Ask states to identify their own unique approach to enforcement funding and funding sources.	X	X
Provide a simple, expedited process for review of the alleged 'bogus' filing, preferably without requiring legal representation, with a step-by-step process for both the parties and the finder of fact, and a standard result	X	N/A
Reduce the utility to the filer of the strawman filing through whatever means agreed upon in this process	N/A	X
Discourage the filing of such bogus documents through civil and/or criminal penalties or other means	X	X
Provide that the bogus filing has no legal force and effect, is no longer operative and will not appear on a search of the debtor name, but may be accessible to the filing officer only for authorized retrieval purposes	X	N/A
Provide an implementation strategy for states and national quasi-governmental or trade associations that includes the education of and outreach to filing officers, lenders, law enforcement and other legitimate users of secured financing systems with respect to bogus filings, the ramifications of bogus filings and the remedies thereto	X	X
Recognize that the filing of a financing statement is a claim that an underlying security agreement exists or will exist and the filing officer makes no independent verification of that claim at the time of filing.	X	X
Apply equally whether the alleged bogus filing is filed on paper or electronically	X	X
Apply equally regardless of the location of the filing whether local or state.	X	X

II.

On _____ (date), in the exercise of the filing

officer's official duties as _____

(filing officer's position)

the filing officer received and filed or recorded the Financing Statement or other record, a copy which is attached hereto, that purports to perfect a security interest against the obligor, the person named as debtor or against the owner of collateral described or indicated in the Financing Statement or other record.

III.

Movant alleges that the Financing Statement or other record is fraudulent or otherwise improper, as defined by subsection (e) and amendments thereto, and that this court should declare the Financing Statement or other record ineffective.

IV.

Movant attests that assertions herein are true and correct.

V.

Movant does not request the court to make a finding as to any underlying claim of the parties involved and acknowledges that this motion does not seek review of an effective financing statement. Movant further acknowledges that movant may be subject to sanctions if this motion is determined to be frivolous.

PRAYER

Movant requests the court to review the attached documentation and enter an order finding that said Financing Statement or other record is ineffective together with such other findings as the court deems appropriate.

Respectfully submitted,
(Signature and typed name and address)

(a) (2) The completed form for ordinary certificate of [acknowledgment] must be as follows:

AFFIDAVIT

THE STATE OF)
)
COUNTY OF)

BEFORE ME, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over 18 years of age, of sound mind, with personal knowledge of the following facts, and fully competent to testify.

I further attest that the assertions contained in the accompanying motion are true and correct."

Further affiant sayeth not.

SUBSCRIBED and SWORN TO before me, this ____ day of _____.

NOTARY PUBLIC, State of [state name]

Notary's printed name: _____

My commission expires: _____

(a) (3) [The clerk of the [insert court type] court shall not collect a filing fee for filing a motion as provided in this section.]

(b) The court's finding may be made solely on a review of the documentation attached to the motion and without hearing any testimonial evidence. The [court type] court's review may be made ex parte without delay or notice of any kind. Review of the court's findings shall be made on an expedited basis.

(c) After review, the [court type] court shall enter an appropriate finding of fact and conclusion of law in a form as provided in subsection(d) regarding the Financing Statement or other record filed under the Uniform Commercial Code, an attested copy of which shall be filed or recorded and indexed in the same filing office in the appropriate class of records in which the original Financing Statement or other record was filed or recorded. The filing officer shall not collect a filing fee for filing a [court type] court's finding of fact and conclusion of law as provided in this section. A copy of the finding of fact and conclusion of law shall be sent by the court to the movant and the person who filed the Financing Statement or other record at the last known address of each person within seven days of the date that the finding of fact and conclusion of law is issued by the [court type] court.

(d) The findings of fact and conclusion of law shall be in substantially the following form:

MISC. DOCKET No. _____

In Re: A Purported
Financing Statement

In the _____ [court type]

Against

In and For _____

(Name of Movant)

County, [state name]

**Judicial Finding of Fact and Conclusion of Law Regarding a Financing Statement or Other
Record Filed Under the Uniform Commercial Code-Secured Transactions**

On the (number) day of (month), (year), in the above entitled and numbered cause, this court reviewed a motion, verified by affidavit, of (name) and the documentation attached thereto. No testimony was taken from any party, nor was there any notice of the court's review, the court having made the determination that a decision could be made solely on review of the documentation as provided in [insert reference to this statute] and amendments thereto.

The court finds as follows (only an item checked and initialed is a valid court ruling):

- The documentation attached to the motion IS filed or recorded with the implied or express consent or agreement of the obligor, person named as debtor, or owner of collateral described or indicated in such Financing Statement or other record, or by consent of an agent, fiduciary or other representative of that person.
- The documentation attached to the motion IS NOT filed or recorded with the implied or express consent or agreement of the obligor, person named as debtor, or owner of collateral described or indicated in such documentation, or by consent of an agent, fiduciary or other representative of that person, and, IS NOT an effective Financing Statement or other record under the Uniform Commercial Code-Secured Transactions of this state.

This court makes no finding as to any underlying claims of the parties involved and expressly limits its finding of fact and conclusion of law to the review of a ministerial act. The filing officer shall, upon receipt of this finding of fact and conclusion of law, remove the subject Financing Statement or other record from the index so that the records are not reflected in or obtained as a result of any search, standard or otherwise, conducted of those records, but shall retain them and this finding of fact and conclusion of law in the filing office for the duration of the period for which they would have otherwise been filed.

SIGNED ON THIS THE _____ DAY OF _____

 _____ [court type] Judge
 _____ [court type]
 _____ County, [state name]

(e) As used in this section, a Financing Statement or other record is fraudulent or otherwise improper if it is filed without the implied or express authorization or agreement of the obligor, person named as debtor, or owner of collateral described or indicated in such Financing Statement or other record, or by consent of an agent, fiduciary or other representative of that person.

(f) As used in this subsection, filing office or filing officer refers to the office or officer where a Financing Statement or other record is appropriately filed or recorded as provided by law, including, but not limited to the register of deeds (or county recorder, etc.), and the secretary of state (or other name for that office), and other filing officers related thereto.

Document 3: CRIMINAL PENALTY – Harassment and Strawman

1) A person commits an offense if the person knowingly causes to be presented for filing, or promotes the filing of, a record as defined in Section 9-102 of the Uniform Commercial Code that the person knows:

- a) contains a material false statement;
- b) is neither;
 - i) related to a valid security agreement, nor
 - ii) filed pursuant to section 9-502(d) of the Uniform Commercial Code;
- c) contains a forged signature or is based upon a document containing a forged signature; or
- d) is presented for filing or caused to be presented for filing with the intent that it be used for an improper purpose or purposes, such as to harass, hinder, defraud, or otherwise interfere with any person.

2) An offense under this section is a [insert felony penalty here], unless it is alleged and shown at the trial of the offense that the person had previously been convicted under this provision on two or more occasions, in which event the offense is a [insert enhanced felony penalty here].

Document 4: CIVIL PENALTY – Harassment

Definitions

In this chapter:

- (1) “Financing statement” has the meaning assigned by Article 9-102(a) of the Uniform Commercial Code.
- (2) “Exemplary damages” has the meaning assigned by [citation].
- (3) “Filing officer” is defined as [UCC filing officer in each jurisdiction].

Liability

- (a) A person shall not knowingly cause to be presented for filing or promote the filing of a financing statement that the person knows:
 - (1) is forged;
 - (2) contains a material false statement;
 - (3) is neither:
 - i) related to a valid security agreement, nor
 - ii) filed pursuant to section 9-502(d) of the Uniform Commercial Code; or
 - (4) is for an improper purpose or purposes, such as to harass, hinder, defraud, or otherwise interfere with any person.
- (b) A person who violates subsection (a) is liable to each injured person for:
 - (1) The greater of:
 - (A) [\$10,000]; or
 - (B) the actual damages caused by the violation;
 - (2) court costs;
 - (3) reasonable attorney’s fees;
 - (4) related expenses of bringing the action, including investigative expenses; and
 - (5) exemplary damages in the amount determined by the court.

Cause of Action

- (a) The following persons may bring an action to enjoin violation of this chapter or to recover damages under this chapter:
 - (1) the obligor, the person named as the debtor, any person who owns an interest in the collateral described or indicated in the financing statement, or any person harmed by the filing of the financing statement;
 - (2) the attorney general;
 - (3) a district attorney;
 - (4) a criminal district attorney;
 - (5) a county attorney;
 - (6) a county attorney with felony responsibilities; and
 - (7) a municipal attorney.
- (b) A filing officer may refer a matter to the attorney general or other appropriate person for filing the legal actions under this chapter.

Venue

An action under this chapter may be brought in any district court in the county in which the financing statement is presented for filing or in a county where any of the persons named in [Cause of Action (a)(1)] resides.

Filing Fee

- (a) The fee for filing an action under this chapter is \$[x]. The plaintiff must pay the fee to the clerk of the court in which the action is filed. Except as provided by subsection (b), the plaintiff may not be assessed any other fee, cost, charge, or expense by the clerk of the court or other public official in connection with the action.
- (b) The fee for service of notice of an action under this section charged to the plaintiff may not exceed:
 - (1) \$[X] if the notice is delivered in person; or
 - (2) the cost of postage if the service is by registered or certified mail.
- (c) A plaintiff who is unable to pay the filing fee and fee for service of notice may file with the court an affidavit of inability to pay under the [jurisdiction] Rules of Civil Procedure.
- (d) If the fee imposed under subsection (a) is less than the filing fee the court imposes for filing other similar actions and the plaintiff prevails in the action, the court may order a defendant to pay to the court the differences between the fee paid under subsection (a) and the filing fee the court imposes for filing other similar actions.]

Other remedies

- (a) An obligor, person named as a debtor, or owner of collateral described or indicated by a financing statement in violation of subsection (a) also may request specific relief, including but not limited to terminating the financing statement and removing the debtor named in the financing statement from the index such that it will not appear in a search under that debtor name.
- (b) This law is cumulative of other law under which a person may obtain judicial relief with respect to any filed or recorded document.

Document 5: CIVIL PENALTY – Strawman

Definitions

In this chapter:

- (1) “Financing statement” has the meaning assigned by Article 9-102(a) of the Uniform Commercial Code.
- (2) “Exemplary damages” has the meaning assigned by [citation].
- (3) “Filing officer” is defined as [UCC filing officer in each jurisdiction].

Liability

(a) A person shall not knowingly cause to be presented for filing or promote the filing of a financing statement that the person knows:

- (1) is forged;
- (2) contains a material false statement;
- (3) is neither:
 - i) related to a valid security agreement, nor
 - ii) filed pursuant to section 9-502(d) of the Uniform Commercial Code; or
- (4) is for an improper purpose or purposes, such as to harass, hinder, defraud, or otherwise interfere with any person.

(b) A person who violates subsection (a) is liable to each injured person for:

- (1) The greater of:
 - (A) [\$10,000]; or
 - (B) the actual damages caused by the violation;
- (2) court costs;
- (3) reasonable attorney’s fees;
- (4) related expenses of bringing the action, including investigative expenses; and
- (5) exemplary damages in the amount determined by the court.

Cause of Action

(a) The following persons may bring an action to enjoin violation of this chapter or to recover damages under this chapter:

- (1) the obligor, the person named as the debtor, any person who owns an interest in the collateral described or indicated in the financing statement, or any person harmed by the filing of the financing statement;
- (2) the attorney general;
- (3) a district attorney;
- (4) a criminal district attorney;
- (5) a county attorney;
- (6) a county attorney with felony responsibilities;
- (7) a municipal attorney; and
- (8) a person who has been damaged as a result of an action taken in reliance on the filed financing statement.

(b) A filing officer may refer a matter to the attorney general or other appropriate person for filing the legal actions under this chapter.

Venue

An action under this chapter may be brought in any district court in the county in which the financing statement is presented for filing or in a county where any of the persons named in [Cause of Action (a)(1)] resides.

Filing Fee

- (a) The fee for filing an action under this chapter is \$[x]. The plaintiff must pay the fee to the clerk of the court in which the action is filed. Except as provided by subsection (b), the plaintiff may not be assessed any other fee, cost, charge, or expense by the clerk of the court or other public official in connection with the action.
- (b) The fee for service of notice of an action under this section charged to the plaintiff may not exceed:
 - (1) \$[X] if the notice is delivered in person; or
 - (2) the cost of postage if the service is by registered or certified mail.
- (c) A plaintiff who is unable to pay the filing fee and fee for service of notice may file with the court an affidavit of inability to pay under the [jurisdiction] Rules of Civil Procedure.
- (d) If the fee imposed under subsection (a) is less than the filing fee the court imposes for filing other similar actions and the plaintiff prevails in the action, the court may order a defendant to pay to the court the differences between the fee paid under subsection (a) and the filing fee the court imposes for filing other similar actions.]

Other remedies

- (a) An obligor, person named as a debtor, or owner of collateral described or indicated by a financing statement in violation of subsection (a) also may request specific relief, including but not limited to terminating the financing statement and removing the debtor named in the financing statement from the index such that it will not appear in a search under that debtor name.
- (b) This law is cumulative of other law under which a person may obtain judicial relief with respect to any filed or recorded document.

**Resolutions Adopted and Approved
by the**

**International Association of Commercial Administrators (IACA)
at its 2004 Conference in Minneapolis, Minnesota**

AND

**National Association of Secretaries of State (NASS)
at its 2004 Summer Conference in New Orleans, Louisiana**

1. Resolution to add an Additional Section to RA9:

IACA's Secured Transaction Section resolves to recommend to NCCUSL/PEB to adopt additional language in Section 9-625 (h) of RA 9 that reads:
"Notwithstanding any provisions in this Article, the state may provide any additional civil and criminal remedies, penalties and procedures against a person that files a record that the person is not entitled to file under Section 9-509 (a)." as recommended by the NASS/IACA Bogus Filing Task Force.

2. Resolution to change the UCC 5 Correction Statement:

IACA's Secured Transaction Section resolves to recommend to NCCUSL/PEB to change the name of the Correction Statement to Inaccurate or Wrongfully Filed Record Statement and that if NCCUSL/PEB agrees to change the name; the name can be changed on the UCC-5 form without additional authorization from the membership of IACA.

Be it further resolved, that IACA's Secured Transaction Section resolves to amend the existing statement on the UCC-5 form to read: "The filing of this Statement does not amend any UCC Record. This Statement is for informational purposes only."

3. Resolution on the Uniform Expedited Judicial Review Process Statute:

IACA's Secured Transaction Section resolves to recommend to NCCUSL/PEB to adopt the Uniform Expedited Judicial Process statute for harassment type bogus filings as recommended and developed by the NASS/IACA Bogus Filing Task Force.

4. Resolution on the Uniform Criminal Penalties Statute:

IACA's Secured Transaction Section resolves to recommend to NCCUSL/PEB to adopt the uniform criminal penalties statute for harassment and Strawman type bogus filings as recommended and developed by the NASS/IACA Bogus Filing Task Force.

5. Resolution on the Uniform Civil Penalties Statute for Harassment type bogus filings:

IACA's Secured Transaction Section resolves to recommend to NCCUSL/PEB to adopt the uniform civil penalties statute for harassment type bogus filings as recommended and developed by the NASS/IACA Bogus Filing Task Force.

6. Resolution on the Uniform Civil Penalties Statute for Strawman type bogus filings:

IACA's Secured Transaction Section resolves to recommend to NCCUSL/PEB to adopt the uniform civil penalties statute for Strawman type bogus filings as recommended and developed by the NASS/IACA Bogus Filing Task Force.

7. Resolution to amend language in the Context Section of the Bogus Filing Task Force Report: (changes have been incorporated into this document)

IACA resolves to delete from the Report of the BFTF the second paragraph on page 3 of the report and add the following language to the beginning of the third paragraph: "In addition to the remedies provided by NCCUSL/PEB..."

Additional Recommendations by the Task Force

1. Internal Programs to Find Filings that have been Removed/Deleted per court order

IACA members on the Task Force will be establishing a protocol to deal with the court ordered removal of bogus filing within the UCC Management System as well as to notify purchasers of bulk data to remove it from those records.

2. Education Process for Lending Community

Create a uniform education process for:

- a. the lending community
- b. Revenue Department or similar agency in each jurisdiction
- c. Treasury Department
- d. IRS
- e. Attorney General
- f. County and City Attorneys
- g. ABA
- h. County Recorders
- i. State and Federal Penitentiary Wardens

National Associations to target:

IACREOT: International Association of Clerks, Recorders, Election Officials and Treasurers (www.iacreot.com)

NACRC: National Association of County Recorders, Election Officials and Clerks (www.nacrc.org/nacrc.htm)

FBI: www.fbi.gov

NAAG: National Association of Attorney Generals (www.naag.org)

NPRRA: National Public Records Research Association (www.nprra.org)

REIPA: Real Estate Information Professionals Association (www.reipa.org)