

Final Report and Recommendations

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

Joint Task Force

“Bogus” UCC Documents

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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.

The 2004 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

Document 2: EXPEDITED JUDICIAL PROCESS - Harassment

**Recommended Language for
Expedited Judicial Processing**

**EXPEDITED REVIEW AND DETERMINATION OF THE AUTHORIZATION OF
FINANCING STATEMENT RECORDS FILED UNDER THE UNIFORM
COMMERCIAL CODE**

[Statute Number Reference] Expedited process to review and determine authorization of filing of financing statement records.

(a) (1) Any individual who asserts that the filing of a financing statement record that provides that individual’s name as a debtor is not an authorized filing may file, at any time without any time limitation, a motion for a judicial declaration that the financing statement record is not an authorized filing under Uniform Commercial Code section 9-509 and thus is not effective with respect to such individual under Uniform Commercial Code section 9-510. Such motion shall be filed with the {insert court type} court of the county in which the financing statement record has been filed or of the county of principal residence of the movant. Such motion shall be supported by the affidavit [or declaration] of the movant setting forth a concise statement of the facts upon which the claim for relief is based. Such motion shall be in substantially the following form [the form that follows and all other forms should be conformed to civil procedure requirements of the particular state]:

MISC. DOCKET No. _____

In Re: A Purported
Financing Statement
Against
(Name of Movant)

In the _____ [court type]
In and For _____
County, [state name]

Motion for Judicial Review of the Authorization of a Financing Statement Record Filed Under the Uniform Commercial Code-Secured Transactions

Now Comes _____
(name)

(“Movant”) and files this motion requesting a judicial determination of whether the financing statement record filed in the office of the _____ (filing office and location thereof), a copy of which is attached hereto, is not an authorized filing with respect to Movant under Uniform Commercial Code section 9-509 or 9-708 and in support of the motion would show the court as follows:

I.

_____ (Name), movant, herein is an individual whose name was provided as an individual debtor in a financing statement record filed under the Uniform Commercial Code, a copy of which is attached hereto.

II.

"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: _____

Notary's signature: _____

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, the responses, if any, of the person named as a secured party in the financing statement record, and without hearing any oral testimony if none is offered by the secured party. The [court type] court's review may be made only upon not less than [twenty] days notice to each person named as a secured party in the financing statement record. Notice shall be given to each secured party. Notice may be given to each secured party at the address given in the financing statement record as an address of that secured party by mail or personal service as provided in [refer to notice provisions of civil procedure law]. Each party will respond to discovery requests timely. Each person named as a secured party in the financing statement record may respond to the motion based on pleadings, depositions, admissions, and affidavits. The court's review of the pleadings, depositions, admissions, and affidavits shall be made on an expedited basis.

(c) The court shall enter judgment in favor of the movant only if the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) After review, the [court type] court shall enter an appropriate finding of fact and conclusion of law in a form as provided in subsection (e) regarding the financing statement record, an attested copy of which shall be filed and indexed under Movant's name in the same filing office in which the original financing statement record was filed. 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, to each person named as a secured party in the financing statement record at the address of each person set forth in the financing statement, and to the filing office. The copy shall be sent within seven days following the date that the finding of fact and conclusion of law are issued by the [court type] court. The secured party may appeal the finding of fact and conclusion

SIGNED ON THIS THE _____ DAY OF _____

[court type] Judge

[court type]

County, [state name]

(f) As used in this section, “financing statement record” means (i) an initial financing statement, (ii) an amendment that adds collateral covered by a financing statement, and (iii) an amendment that adds a debtor to a financing statement as such terms are used in [Article 9] of the [Uniform Commercial Code].

(g) As used in this section, “debtor” means a natural person whose name was provided in a financing statement record as (i) an individual debtor or (ii) one of the types of persons listed in [Uniform Commercial Code] section 9-505(a).

(h) As used in this section, “authorized” when used with reference to a financing statement record means that the financing statement record was filed by a person authorized to do so as provided in [Uniform Commercial Code] sections 9-509 and 9-708.

(i) As used in this section, “filing office” or “filing officer” refers to the appropriate office or officer where a financing statement record is to be filed as provided by Uniform Commercial Code section 9-501, including the register of deeds (or county recorder, etc.), the secretary of state (or other name for that office), and other designated filing officers.

Other remedies

(a) This law is cumulative of other law under which a person may obtain judicial relief with respect to any filed or recorded document.

Document 3: CRIMINAL PENALTY – Harassment and Strawman

Definitions

In this chapter:

- (1) As used in this chapter, “financing statement record” means (i) an initial financing statement, (ii) an amendment that adds collateral covered by a financing statement, and (iii) an amendment that adds a debtor to a financing statement as such terms are used in [Article 9] of the [Uniform Commercial Code].
 - (2) As used in this chapter, “debtor” means a natural person whose name was provided in a financing statement record as (i) an individual debtor or (ii) one of the types of persons listed in [Uniform Commercial Code] section 9-505(a).
 - (3) As used in this chapter, “authorized” when used with reference to a financing statement record means that the financing statement record was filed by a person authorized to do so as provided in [Uniform Commercial Code] sections 9-509 and 9-708.
 - (4) As used in this chapter, “filing office” or “filing officer” refers to the appropriate office or officer where a financing statement record is to be filed as provided by Uniform Commercial Code section 9-501, including the register of deeds (or county recorder, etc.), the secretary of state (or other name for that office), and other designated filing officers.
- 1) A person commits an offense if the person knowingly causes to be presented for filing in a filing office, or promotes the filing in a filing office, of a financing statement record that the person knows:
- a) not to be authorized under Uniform Commercial Code section 9-509 or 9-708 by the natural person whose name was provided as an individual debtor in the financing statement; and
 - b) was filed or presented for filing with the intent that the financing statement record be used to harass or hinder the natural person whose name was provided as an individual debtor in the financing statement record without that person’s authorization.
- 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 AND INJUNCTION – Harassment

Definitions

In this chapter:

- (1) As used in this chapter, “financing statement record” means (i) an initial financing statement, (ii) an amendment that adds collateral covered by a financing statement, and (iii) an amendment that adds a debtor to a financing statement as such terms are used in [Article 9] of the [Uniform Commercial Code].
- (2) As used in this chapter, “debtor” means a natural person whose name was provided in a financing statement record as (i) an individual debtor or (ii) one of the types of persons listed in [Uniform Commercial Code] section 9-505(a).
- (3) As used in this chapter, “authorized” when used with reference to a financing statement record means that the financing statement record was filed by a person authorized to do so as provided in [Uniform Commercial Code] sections 9-509 and 9-708.
- (4) As used in this chapter, “filing office” or “filing officer” refers to the appropriate office or officer where a financing statement record is to be filed as provided by Uniform Commercial Code section 9-501, including the register of deeds (or county recorder, etc.), the secretary of state (or other name for that office), and other designated filing officers.
- (5) “Exemplary damages” has the meaning assigned by [citation].

Liability

- (a) A person shall not knowingly cause to be presented for filing in a filing office or promote the filing of a financing statement record in a filing office that the person knows:
 - (1) not to be authorized under Uniform Commercial Code section 9-509 or 9-708 by the natural person whose name was provided as an individual debtor in the financing statement record; and
 - (2) was filed or presented for filing with the intent that the financing statement record be used to harass or hinder the natural person whose name was provided as an individual debtor in the financing statement record without that person’s authorization.
- (b) A person who violates subsection (a) is liable to each such debtor 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 natural person whose name was provided as an individual debtor in the financing statement record filed without that person’s authorization under Uniform Commercial Code section 9-509 or 9-708, or any guardian, conservator, executor, administrator or other legal representative of that person, any person who owns an interest in the collateral described or indicated in the financing statement record, or any person directly harmed by the filing of the financing statement record;
 - (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 record 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) 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) As used in this chapter, “financing statement record” means (i) an initial financing statement, (ii) an amendment that adds collateral covered by a financing statement, and (iii) an amendment that adds a debtor to a financing statement as such terms are used in [Article 9] of the [Uniform Commercial Code].
- (2) As used in this chapter, “debtor” means a natural person whose name was provided in a financing statement record as (i) an individual debtor or (ii) one of the types of persons listed in [Uniform Commercial Code] section 9-505(a).
- (3) As used in this chapter, “authorized” when used with reference to a financing statement record means that the financing statement record was filed by a person authorized to do so as provided in [Uniform Commercial Code] sections 9-509 and 9-708.
- (4) As used in this chapter, “filing office” or “filing officer” refers to the appropriate office or officer where a financing statement record is to be filed as provided by Uniform Commercial Code section 9-501, including the register of deeds (or county recorder, etc.), the secretary of state (or other name for that office), and other designated filing officers.
- (5) “Exemplary damages” has the meaning assigned by [citation].

Liability

- (a) A person shall not knowingly cause to be presented for filing in a filing office or promote the filing of a financing statement record in a filing office that the person knows:
 - (1) not to be authorized under Uniform Commercial Code section 9-509 or 9-708 by the natural person whose name was provided as an individual debtor in the financing statement record; and
 - (2) was filed or presented for filing with the intent that the financing statement record be used to defraud 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 natural person whose name was provided as an individual debtor in the financing statement record filed without that person’s authorization under Uniform Commercial Code section 9-509 or 9-708, or any guardian, conservator, executor, administrator or other legal representative of that person, any person who owns an interest in the collateral described or indicated in the financing statement record, or any person directly harmed by the filing of the financing statement record;
 - (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 record.
- (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 record 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) This law is cumulative of other law under which a person may obtain judicial relief with respect to any filed or recorded document.

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)