

U.C.C. FIXTURES FILINGS REQUIRE AN ACKNOWLEDGEMENT*

(By Kraettli Q. Epperson)

The proposition asserted herein is that current law in Oklahoma requires that Uniform Commercial Code fixtures filings financing statements must be acknowledged to give constructive notice to third parties. The current statutory law of the State of Oklahoma provides for specific steps to be taken to perfect a security interest in personal property, including fixtures. Article 9 of the Uniform Commercial Code (i.e., 12A O.S. 1981 § 101 et seq. sets out the detailed actions to be taken to ensure that such a security interest attaches and becomes perfected.

Such statutes provide that for perfection (i.e., giving constructive notice) as to fixtures (1 a party must file either a security agreement or a Uniform Commercial Code (hereinafter "UCC" financing statement with the county clerk in the county where the land on which the fixtures are or are to become affixed is located and (2) that when a UCC financing statement is used such financing statement must include an acknowledgement by the debtor.¹ In the absence of an acknowledgment the county clerk must reject the offered financing statement.²

*Hopefully this fact comes as no surprise to most practicing attorneys or county clerks. (Editor's Note: The topic for this article was suggested by Tony Boghetich, in-house counsel for Liberty National Bank and Trust Company of Oklahoma City, Oklahoma.)

Even if the unacknowledged financing statement is accepted and recorded, notwithstanding this fatal defect, the filing does not give rise to perfection and, consequently, does not give constructive notice to third parties, such as subsequent innocent purchasers or creditors for value acquiring an interest in the subject collateral. Such innocent purchasers or creditors would take their interest in the collateral free of such unacknowledged previously recorded security interest.³ This is assuming the later conveyance or encumbrance was otherwise valid and, more particularly, that the subsequent grantee did not have actual notice of the content of the prior unacknowledged recording.⁴

According to the Oklahoma Attorney General (hereinafter "Attorney General" in a 1970 Opinion, the statutes did not require the acknowledgement by either the debtor or the creditor on such a financing statement. The Attorney General concluded that the positive requirement in 16 O.S. 1961 § 26 for an acknowledgement on "a deed, mortgage, or other instrument affecting the real estate" was superseded by the later enacted UCC provisions. The Attorney General emphasizes in his 1970 Opinion that these later enacted UCC provisions require the county clerk to accept for recording fixtures filing financing statements while the same provisions contain no mention of a requirement for an acknowledgement.⁵

Without contesting or confirming in this article the correctness of the Attorney General's 1970 opinion, it is

indisputable that as of October 1, 1981, the Attorney General's holding was superseded by the state legislature's actions. The new statute provides, inter alia:

(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, 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, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like, including oil and gas, or accounts subject to subsection (5) of Section 7 of this act, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5) of this section. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state. (emphasis added) 12A O.S. 1983 Supp. § 9-402(1).

The referenced " . subsection (5) of this section." provides that

(5) When a writing constituting a mortgage upon lands, or interest in lands such as oil and gas leasehold estates, also covers minerals to be severed from such lands, equipment used in mining, storing, treating and marketing such minerals and the accounts

and proceeds to be derived from disposition of such minerals contains a legal description of such lands sufficient to comply with Sections 287, 291 and 298 of Title 19 of the Oklahoma Statutes, as amended, has been validly executed, acknowledged and recorded in the office of the county clerk for the county in which such lands are located, such mortgage shall constitute a financing statement covering such collateral and no other filing or recording shall be required to perfect the security interests in such collateral covered by the mortgage. The mortgage shall remain effective to perfect such security interests until it shall be released or satisfied of record or its effectiveness as to the lands or interests in lands described therein shall be otherwise effectively terminated. (emphasis added)
12A O.S. 1983 Supp. § 9-402(5).

It should also be noted that (1 there are other minimum requirements to meet in order for a valid financing statement to create a perfected security interest in fixtures (e.g., adequate legal description, description of collateral, execution by debtor, and filing) and (2) these minimum requirements for perfection also apply to other types of property (e.g., timber to be cut, and minerals including oil and gas). Another recent change made in the execution requirements for the UCC financing statements in general, which should be noted, is that only the debtor's signature needs to be on the financing statement.⁶ According to the Attorney General if a party files a fixtures filing financing statement in the county clerk's real estate records, the same instrument can also be filed by the county clerk in its chattel records, if requested by the filing party⁷

In conclusion, for a fixtures filing financing statement (1 to be accepted by the county clerk and (2) to constitute constructive notice after being filed to subsequent purchasers and creditors, it must include, inter alia, the acknowledgment of the debtor

To avoid inconvenience and possible losses to their clients, prudent attorneys will ensure that their clients' past and future fixtures filing financing statements have the necessary debtor's acknowledgement. It should be noted that--assuming the above Attorney General's Opinion was correct--a fixture filing financing statement executed and filed before the effective date of the amended statute (i.e., October 1, 1981), is effective without an acknowledgement if otherwise valid.

FOOTNOTES:

¹ 12A O.S. 1983 Supp. §§9-402(1,5)

² 16 O.S. 1981 § 26:

No deed, mortgage or other instrument affecting the real estate shall be received for record or recorded unless executed and acknowledged in substantial compliance with this chapter; and the recording of any such instrument not so executed and acknowledged shall not be effective for any purpose. (emphasis added) Also see: Oklahoma Attorney General Opinion No. 79-337 (Dec. 31, 1979), and 19 O.S. 1982 § 298.

³ 16 O.S. 1981 § 26:

No deed, mortgage or other instrument affecting the real estate shall be received for record or recorded unless executed and acknowledged in substantial compliance with this chapter; and the recording of any such instrument not so executed and acknowledged shall not be effective for any purpose. (emphasis added) Also see: 12A O.S. 1981 § 9-103; 46 O.S. 1981 §§6-7.

⁴ 12A O.S. 1982 Supp. § 9-401(2):

A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement. (emphasis added)

12A O.S. 1981 § 1-201(25):

(25) A person has "notice" of a fact when:

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this act. (emphasis added)

Oklahoma Attorney General Opinion No. 70-261:

RECORDING OF STATEMENTS CONCERNING REAL
ESTATE IN COUNTY SITUATED

* * *

"This is to request an opinion advising us whether Senate Bill No. 232 amending 12A O.S. 1961 § 2702 [9-401] has the effect of impliedly repealing 16 O.S. § 26 to the extent that a Financing Statement, Continuation Statement, Termination Statement or Assignment or Release of a Financing Statement containing an adequate legal description shall be recorded by the County Clerk without being acknowledged in substantial compliance with Title 16."

* * *

It is therefore the opinion of the Attorney General that insofar as the provisions of 16 O.S. 1961 § 26 and O.S.L. 1970, ch. 246, may be in conflict, O.S.L. 1970, ch. 246, should prevail. Therefore county clerks should accept and make filings involving real estate under the Uniform Commercial Code even though such filings may not be acknowledged.

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⁶ 12A O.S. 1983 Supp. §§ 9-402(1,5)

⁷ Oklahoma Attorney General Opinion No. 70-307