

**LETTER OPINION
2003-L-56**

December 1, 2003

The Honorable Alvin Jaeger
Secretary of State
State Capitol Dept 108
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your letter asking whether a fixture-related financing statement under Article 9 of the Uniform Commercial Code may be recorded in the county real property records without the signature of an owner of the real property.

A financing statement under Article 9 of the Uniform Commercial Code is “a record composed of an initial financing statement and any filed record relating to the initial financing statement.” N.D.C.C. § 41-09-02(oo). A financing statement covering property that is or may become attached to real estate is called a “fixture filing.” N.D.C.C. § 41-09-02(pp). Among other requirements, in order to secure an interest as a fixture filing, a financing statement must indicate that it is to be filed for record in the real property records and either provide the name of the debtor or, if the debtor does not have an interest of record in the real property, the name of the record owner. N.D.C.C. § 41-09-73(2)(b) and (d).

A financing statement is not required to provide the signature of the debtor, but rather is only required to provide the name of the debtor. N.D.C.C. § 41-09-73(1)(a).¹ The adoption of revised article 9 to the Uniform Commercial Code in 2001 was intended to eliminate the requirements in previous law for the debtor’s signature to appear on the financing statement:

In perhaps its most dramatic change, Revised Article 9 does away with the requirement that the debtor sign the financing statement. Rev. §9-502

¹ Prior law required a financing statement to contain the debtor’s signature. See former N.D.C.C. § 41-09-41(1). This law was repealed by the 2001 Legislature. 2001 N.D. Sess. Laws ch. 361, § 36.

[N.D.C.C. § 41-09-73], Official Comment 3. This will facilitate electronic filing of financing statements and electronic searches.

A secured party can file a financing statement without the debtor's signature only if authorized by the debtor to make the filing. Rev. § 9-509(a)(1) [N.D.C.C. § 41-09-80(1)(a)]. Revised Article 9 provides for automatic authorization to file a financing statement consistent with the security interest granted by the debtor in the security agreement. Rev. § 9-509(b) [N.D.C.C. § 41-09-80(2)]. A secured party will need express authorization (or subsequent ratification) to pre-file a financing statement if the debtor has not yet authenticated a security agreement. This change should not increase the filing of fraudulent financing statements. Under current law and procedures, filing offices have no way of checking the validity of a signature.

American Bar Association, The New Article 9 Uniform Commercial Code, 8 (2d ed. 2000) (North Dakota statutory citations added).

While a financing statement acting as a fixture filing need not contain the debtor's signature, the fixture filing must be recorded in the real property records to be effective. N.D.C.C. § 41-09-73(2)(b). An instrument generally must be executed by signature and either acknowledged or proved before it can be recorded in the real property records. N.D.C.C. § 47-19-03. However, instruments that "belong[] to a class provided for in section 47-19-02" are not subject to the requirements found in N.D.C.C. § 47-19-03. Id. "[F]inancing statement[s] as defined in section 41-09-02" are "provided for in section 47-19-02," specifically N.D.C.C. § 47-19-02(12), and are therefore not subject to the requirements found in N.D.C.C. § 47-19-03. Accordingly, it is my opinion that a financing statement is not subject to the requirements of N.D.C.C. § 47-19-03. A fixture filing can be recorded in a county recorder's real property records without the debtor's signature or the acknowledgement of that signature.

In your letter, you specifically noted an example where a fixture financing statement must be filed in the central indexing system of the state where the debtor is located, but the real property recording must be made in the state and county where the real property is located. A county recorder may accept for recording a financing statement that does not contain the debtor or landowner's signature under N.D.C.C. § 47-19-02(12) without regard to whether the central indexing filing is made in North Dakota or some other state which has enacted Article 9 of the Uniform Commercial Code.

You also question whether a county recorder may require a filer to include on the financing statement a notation of the state in which the original "governing UCC document is

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recorded.”² A filing office, including a county recorder’s office, may refuse to accept a record for filing only for one of the reasons set out in N.D.C.C. § 41-09-87(2). N.D.C.C. § 41-09-91(1). The filer’s failure to indicate on the financing statement where the original UCC document is recorded is not one of the reasons a filing office can refuse to accept a record for filing. See N.D.C.C. § 41-09-87(2). Accordingly, it is my opinion that a county recorder may not require a filer to include on a fixture filing the state in which the original financing statement is recorded. See N.D.A.G. 2002-L-39 (a recorder may not require notarization of signature where no requirement for notarization is contained in the governing statute).

Sincerely,

Wayne Stenehjem
Attorney General

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² Your question presupposes the filer to be recording a UCC financing statement with the real property records. You should note that there is no requirement that a fixture filing be filed anywhere other than in the real property records. See N.D.C.C. § 41-09-72(1)(a) and (b). It is only if a filer also wants the protection of a UCC filing that a fixture filing must also be filed under revised Article 9.