

MEMORANDUM

State of Alaska

Department of Law

TO: Sharon Young
State Recorder

DATE: July 16, 1997

FILE NO.: 661-96-0115

TEL. NO.: 269-5240

SUBJECT: UCC Filings and Document
Examination

FROM: Linda L. Kesterson
Assistant Attorney General
Natural Resources - Anchorage

You have requested advice concerning the proper role of the State Recorder in processing documents filed under the Uniform Commercial Code (UCC) and of documents submitted for recording under AS 40.17. Some of these issues were addressed through legislative changes in 1996; your main concern is distinguishing the line between enforcing substantive legal requirements for various types of documents and determining whether a document meets the minimum acceptance criteria for filing or recording.

Your request states two specific questions.

1) Does the Uniform Commercial Code impose any responsibility on the filing officer to determine the legal sufficiency of statements which are presented for filing at a district or central filing office? What are the *minimum acceptance criteria* for each type of UCC filing (UCC-1, assignment, amendment, continuation, termination, partial/full release, termination)?

2) What is the recorder's responsibility when reviewing conveyance documents and other documents required to be acknowledged? If an acknowledgment clause is present on a document, are recorders required to also assess its compliance with AS 09.63 or other law? Are acknowledgments required for any document classifications (AS 40.17.110)(b) that do not specifically mention acknowledgments?

The short answer to question 1 is that the Uniform Commercial Code does not impose any responsibility on the filing officer for determining the legal sufficiency of statements which are presented for filing. The minimum acceptance criterion for each separate type of UCC filing is that it contain the elements required by the statutory requirement for each specific

document; the filing officer does not have responsibility to determine whether or not the elements required for the document have been properly completed.

The short answer to question 2 is that when reviewing conveyance documents that require an acknowledgment, it is the recorder's responsibility to determine that an acknowledgment statement is present. If an acknowledgment clause is present on the document the recorder has no responsibility to assess the acknowledgment clause's compliance with AS 09.63 or any other law. Under AS 40.17.110 as amended in 1996, acknowledgments are only required if the document to be recorded is a conveyance, power of attorney, contract for the sale or purchase of real property, option for the purchase of real property, or a subdivision plat. These conclusions are addressed more fully below.

I. UCC FILINGS

The particular issue of the scope of the duties of the recorder's office to examine documents for filing has not been directly addressed by the courts. The courts, not only in Alaska but nationwide, are called on frequently to determine whether a particular document filed under the provisions of the UCC is legally sufficient for its purported purpose; however, that is a conclusion of law and the recorder has no authority to render such conclusions. This does not mean, however, that any document provided for filing which states that it is a financing statement is to be filed and indexed as a financing statement pursuant to the UCC.

An extensive memorandum of advice was prepared on June 14, 1979, to Julius Brecht, who was then director of the Department of Commerce and Economic Development, Division of Banking, Securities and Corporations.¹ This memorandum of advice extensively documents various attorney general opinions and case law up to the date of the memorandum and the analysis reflected therein is still valid. Although the particular conclusion in that memorandum of advice is very specific and deals with the presence of an original signature on a financing statement, its analysis is a helpful background. A copy is attached for your reference.

In pertinent part, the conclusion of the above-referenced memo states:

Finally, we believe that the filing officer has the statutory responsibility to review documents offered for filing as financing statements. Only those writings that reflect the basic and simple

¹ *Alaska U.C.C. Requirement That Debtors Sign The Financing Statement*, Inf. Op. Att'y Gen., June 14, 1979, File J-66-086-79. At the time this MOA was written, the responsibility for the filing of UCC documents was within the Department of Commerce and Economic Development. These duties were transferred to the Department of Natural Resources in 1980. *See*, Exec. Order No. 47 (1980).

requirements of § 9-402 qualify as financing statements and only those that qualify may be filed and thus afforded the protection of the system. However, once a filing officer ascertains that the writing is a financing statement, § 9-403 unambiguously states that the “[P]resentation for filing of a financing statement and tender of the filing fee . . . constitutes filing under this Article.” It is thus clear that the filing officer’s discretionary authority to determine qualification for filing does not extend to the actual ministerial act of filing. At this stage the filing officer has ceased to be involved in the realm of discretion and serves only as a ministerial functionary. The document must be filed.

Inf. Op. Att’y Gen., June 14, 1979, File J-66-086-79, at 27.²

In your memorandum requesting advice on this issue it is clear that the major concern of the recorder’s office is that it not be put in a position of offering legal advice as to the legal sufficiency of documents provided for filing. This is an understandable concern and it is necessary to carefully distinguish between basic criteria which identify a document as one that is to be filed and those which are necessary for a legal determination of whether the document is sufficient to meet its legal purpose. This is the distinction you have made in your memorandum between the requirements for filing and the requirements for perfection.

The difficulty in drawing the line between the requirements for filing and the requirements for perfection is that one of the main purposes of the Uniform Commercial Code was to establish a system whereby there would be a notice of filing; that is, the act of filing a document would put others on notice that a security interest exists. It is, however, a legitimate concern that the recorder’s office not be placed in the position of determining for people who are filing various documents to perfect security interests whether or not those documents are actually sufficient for that purpose. In one of the standards texts concerning the law of secured transactions, the author has stated:

In addition to accepting payment of the proper fee, the filing officer must examine the financing statement or other document to make sure that it meets the minimal requisites of Article 9. Although some secured parties might call this the unauthorized practice of law, rejection by the

² At the time of the memorandum of advice the UCC provisions were found at AS 45.05. Subsequent to the memorandum of advice, the Uniform Commercial Code provisions were amended including adoption of the 1972 revised code and subsequent changes. The changes are not relevant to the current analysis on this particular issue. The provisions dealing with the filing of secured interests are now found at AS 45.09.401 through AS 45.09.408.

filing officer can often bring an error to the secured parties' attention before real harm occurs. Reasons for rejection, for example, might include a lack of the debtor's signature or address, or both; lack of the secured party's name or address, or both; failure to describe the collateral; lack of a necessary real estate description requiring cross-indexing (as with a fixture filing); absence of a required tax identification number as required in some states; or illegibility that could lead to indexing errors.

Barkley Clark, *THE LAW OF SECURED TRANSACTIONS UNDER THE UCC*, revised ed. (1993) at ¶2.17[2] at 2-177.

In practical terms this means that the recorder's office has a responsibility to determine whether a paper presented for filing meets the technical requirements set out in the statute for a document of that type. It does not mean that the recorder's office is to critically examine the information provided in the necessary elements; it means that the recorder's office is to determine that the necessary elements are there so that it meets the definition of the particular document as required in the statute. Once that determination has been made, the document is to be filed and indexed. If it is not clear from the face of the document the purpose for which it is to be indexed, it is the responsibility of the person filing it to inform the recorder's office what the document is.

The technical requirements for the various security interest documents that will be presented for filing are found in article 4 of the UCC; this has been enacted in Alaska as AS 45.09.401 through AS 45.09.408. At 45.09.402(c), the statute sets forth a form listing the required elements for a 402(a) statement. The financing statement need not be in the exact form presented, but the form gives an example of a form that would contain all the necessary elements. The department has the authority to provide a standard form that may be used by creditors to file their security interest. Creditors are not required to use a standard form provided by the department, but if they use a form other than one provided by the department, the department is authorized to charge an additional fee. *See* AS 45.09.403(e). The specific authority for the department to establish an extra uniform fee for statements not in the standard form prescribed by the department also exists for termination statements (AS 45.09.404(c)); for an assignment of security interest (AS 45.09.405(a)); and for a release of collateral (AS 45.09.406).

The recorder's office has no authority to determine whether or not a document presented by a creditor is legally sufficient. It has the duty and responsibility to file and index the documents presented for filing pursuant to the UCC provisions. If there is an "obvious error" this should be brought to the attention of the filer. As the recorder cannot make legal or judicial interpretations of a document, these "obvious errors" are limited to the absence of a necessary element or errors of the type that might lead to improper indexing. For instance, if more than one

version of the debtor's name appears on the form, the filing officer would need guidance as to which name the document should be indexed under.

While there is a distinction between the legal requirements a lender must meet in order to perfect a security interest and the duties of the recorder's office to accept documents for filing, the line is not as clear-cut as one might prefer. In order to be filed and indexed as a financing statement, a writing must meet certain requirements. While the recorder's office has no duty, indeed has no authority, to determine whether any document is legally sufficient to perfect a security interest, it must determine that an item is a financing statement before it may be indexed as one. At the present time requirements include a debtor's signature and a description of collateral.³ The recorder's office need only determine that those items are present; if either is missing, the document is not a financing statement and should not be indexed as one. Whether or not a description of collateral is adequate or legally sufficient is beyond the scope of the recorder's review of any document.

In your original request for advice on this issue, you stated

[W]e submit that the *minimum filing criteria* should include *only*: (1) tender the proper fee; and (2) name and address of the debtor and secured party, and assignee if applicable (information that is necessary to index any UCC document into the indexing system); and (3) an associated number of the original filing for all subsequent filings (an associated document number is necessary for proper operation of our automated indexing and search programs). We would like to be able to ignore all other requirements stated in the code for *perfection*, including whether or not the filing is properly signed, tendered in the proper location, has a legally sufficient collateral description, covers a proper type of collateral, is presented during the proper window period, or meets any or all of the other legal requirements stated in the code as requirements the secured party must meet for perfection.

(Memorandum from Sharon Young to Marty Rutherford, June 12, 1995 at page 3.) In addition to the items that you have listed for minimum filing criteria, the document must also be signed and contain a collateral description. The signature and collateral description are necessary

³ Colorado has recently revised its provisions for secured transactions. Their current law, effective since July 1, 1996, is no longer a part of the uniform law comprising the Uniform Commercial Code. They have amended their article 4 requirements substantially, including eliminating the need for signatures on financing statements and other documents. *See*, Colo. rev. stat. § 4-9-402 *et seq.* This trend is not yet widespread.

elements of a financing statement. However, the questions of whether the document has been tendered in a proper location or whether the description is “legally sufficient” or covers the “proper type of collateral” or is presented during the “proper window” are indeed legal requirements for sufficiency which need not and may not be addressed by the recorder’s office.

II. DOCUMENT EXAMINATION, ACKNOWLEDGMENTS

Your second question concerns the recorder’s responsibility when reviewing conveyance documents and other documents required to be acknowledged. As we have noted above, acknowledgments are required only for the specific classes of documents identified at AS 40.17.110(b).⁴

Historically, the recording of conveyance documents relating to real estate has been one of the primary functions of recording offices throughout the nation. The purpose of an acknowledgment is usually to allow an instrument to be recorded or to be introduced into evidence without further proof of execution. The acknowledgment does not necessarily affect the legal sufficiency of a conveyance document itself but rather affects whether the document is eligible for recording and whether it may be admitted into evidence without further proof of execution. *Smalley v. Juneau Clinic Building Corp.*, 493 P.2d 1296 (Alaska 1972). This means that the acknowledgment clause is necessary for a conveyance to be recorded in the real estate records as a conveyance. The recorder’s duty, therefore, is to determine whether a document presented to be recorded in the real estate records as a conveyance contains an acknowledgment clause.

In an analysis similar to that of reviewing documents for the presence of the required elements of UCC documents, the recorder’s office, in reviewing an acknowledgment statement, is again limited to looking at whether the essential elements of the acknowledgment statement are present, not whether the acknowledgment is actually legally sufficient. AS 09.63.080 (recognition of certificate of acknowledgment) states:

The form of a certificate of acknowledgment used by a person whose authority is recognized under AS 09.63.010 or 09.63.050 shall be accepted in this state if (1) the certificate is in a form prescribed by the laws or regulations of the state; (2) the certificate is in a form prescribed by the laws or regulations applicable in the place in which the acknowledgment

⁴ AS 40.17 was amended subsequent to your request for advice. In particular, AS 40.17.030 was amended and the prior requirement that “a signature, acknowledgment, seal, or witness is required for a document to be eligible for recording only when required for the specific document by this chapter or by other law” was eliminated. Under current law the specific documents that require acknowledgments are noted at AS 40.17.110(b).

is taken; or (3) the certificate contains the words “acknowledged before me” or their substantial equivalent.

If an acknowledgment statement on a document presented as a conveyance document appears to meet the requirements for an acknowledgment, that ends the recorder’s office review of the document. If the acknowledgment appears on the document and the document meets all other recording criteria as set forth at AS 40.17.030, the recorder’s office must file it. The recorder is specifically precluded from determining whether a document is legally sufficient to achieve the purposes of the document. AS 40.17.035(1). However, an initial determination must be made as to whether a document presented is eligible for recording. Hence, there is a need to determine that an acknowledgment clause is present if a document is presented for recording as a conveyance.

Subsequent to your initial request for advice on this matter, you submitted a second request in a memorandum dated February 8, 1996, asking for guidance in determining whether or not a document is a conveyance. Conveyance is defined at AS 40.17.090(3): “‘conveyance’ means a transfer of an interest in real property other than by will or operation of law.” This statutory definition has been judicially interpreted as being sufficiently broad to include a lease. *Smalley, supra*, at 1296.

Conveyance is also defined at AS 34.25.090:

In this chapter, “conveyance” includes every instrument and writing by which an estate or interest in real property is created, alienated, mortgaged, or encumbered, or by which the title to real property is affected, except a will.

These statutory definitions are consistent with the generally understood meaning for the term conveyance. For instance, *Corpus Juris Secundum* states that “conveyance” is generally understood to mean: “an instrument in writing whereby the grantor conveys to the grantee some right, title or interest in or to real property.” 26 C.J.S. *Deeds* §1. *Black’s Law Dictionary*, 6th edition 1990, defines the term:

In its most common usage, transfer of title to land from one person or class of persons, to another by deed. Term may also include assignment, lease, mortgage, or encumbrance of land. Generally, every instrument in writing by which an estate or interest in realty is created.

Smalley v. Juneau Clinic Bldg. Corp., Alaska, 493 P.2d 1296, 1299.

If a document purports to transfer an interest in real property from the grantor to the grantee, the grantor being the owner of the interest being conveyed, an acknowledgment is

required. If it is unclear from the document whether that is the purpose of the document, an inquiry must be made of the person presenting the document for recording. If it is intended as a conveyance, it needs an acknowledgment. If it is not intended as a conveyance or one of the other specific documents listed at AS 40.17.110(b), it does not need an acknowledgment.

In your February 8, 1996, memo you also list a number of documents that are referenced in a Document Reference Manual and request that we determine whether or not each individual document is or is not a conveyance. Of that list, the following are conveyances:

- Administrator's, Executor's (Trix) and Guardian's Deed
- Bill of Sale (Real Property Only)
- Deed of Reconveyance
- Deed in Lieu of Foreclosure
- Quitclaim Deed
- Trustee Deed
- Warranty Deed
- Mining Deeds
- Mining Leases
- Amendment to Lease
- Lease Termination
- Assignment to Lease
- Lease Extension
- Assignment of Interest (if the interest is in real property)
- Assignment of Rents
- Easements
- Lease
- Memorandum of Lease
- Option to Purchase
- Termination of Option to Purchase
- Party Wall Agreement
- Real Estate Contract/Assignment/Amendment/Termination
- Real Estate Contract of Sale
- Release of Easement
- Deed of Trust/Amendment/Assumption/Extension/Subordination
- Deed of Reconveyance/Partial
- Deed of Trust and Security Agreement
- Mortgage/Satisfaction/Release of

Please feel free to contact us as necessary as you continue the process of refining and clarifying the duties of the recorder's office.

Sharon Young
State Recorder
A.G. file no: 661-96-0115

July 16, 1997
Page 9

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Attachment

cc: Nico Bus
Div. of Support Services