

## Opinion No. 62-01

January 3, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

**TO:** Robert H. Sprecher, Assistant District Attorney, Fifth Judicial District, Roswell, New Mexico

### QUESTION

#### QUESTIONS

1. Does the new Uniform Commercial Code, being Sections 50A-1-101, N.M.S.A., et seq., eliminate chattel instruments and conditional sales contracts as such and substitute in place thereof financing statements and security instruments and chattel papers?
2. Does Section 71-1-3, N.M.S.A., 1953 Compilation, as amended, require acknowledgment of financing agreements or security agreements before they may be filed for record?
3. Are termination statements and assignments of financing statements on security agreements, required to be acknowledged before filing?
4. Section 50A-9-404 (1) provides a filing fee of \$ .75 for the filing and indexing of an assignment or termination statement. Is this fee to be charged if there is an assignment and a termination statement?
5. In Section 50A-9-405 (2) of the Uniform Commercial Code, the filing fee for an assignment is listed as \$ 1.00. Is there a discrepancy between this Section and its filing fee, and Section 50A-9-404 (1) where the filing fee for an assignment is only \$ .75?
6. In Section 50A-9-404 (3) a filing fee of \$ 1.00 is set for filing and indexing the termination statement and returning the financing statement to the secured party. Is this the difference between the filing fee provided in this section and the filing fee provided in the preceding sub-section for the additional service of returning these instruments?
7. Is it mandatory that the County Clerk return these instrument, or should return of these instruments be made only upon request of the secured party?
8. What, if any, is the liability of the County Clerk in handling these matters?

#### CONCLUSIONS

1. See analysis.

2. No.
3. See analysis.
5. No. See analysis.
5. No. See analysis.
6. No. See analysis.
7. See analysis.
8. See analysis.

## **OPINION**

### **ANALYSIS**

Under the terms of the Uniform Commercial Code, the traditional distinctions among security devices such as Conditional Sales Contracts and Chattel Mortgages are not retained. The Uniform Commercial Code substitutes for such, a simplified statutory procedure which applies to all transactions intended to create security interests in personal property and fixtures.

In order to perfect a security interest in any personal property or fixtures, a creditor must file a "financing statement" complying with the form and requisites prescribed in Section 50A-9-402, N.M.S.A., 1953 Compilation.

The statutory provisions specifically relating to the procedure and requirements governing Conditional Sales Contracts and Chattel Mortgages (being Sections 50-11-1 through 50-11-4, and 61-8-1 through 61-8-14, N.M.S.A., 1953 Compilation, as amended) are expressly repealed and become supplanted by the terms of the Uniform Commercial Code upon the effective date of the act, midnight, December 31, 1961.

The scope and policy of the Uniform Commercial Code as it is applicable governs agreements relating to secured transactions and is set out in Section 50A-9-102, N.M.S.A., 1953 Compilation. This Section provides as follows:

"(1) Except as otherwise provided in section 9-103 [50A-9-103] on multiple state transactions and in section 9-104 [50-A-9-104] on excluded transactions, this article applies so far as concerns any personal property and fixtures within the jurisdiction of this state.

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, generally intangibles, chattel paper, accounts or contract rights; and also

(b) to any sale of accounts, contract rights or chattel paper.

(2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in section 9-310 [50A-9-310].

(3) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply."

The comments of the Commissioners on Uniform State Laws and the American Law Institute, interpreting Article 9, Secured Transactions of the Uniform Commercial Code, are indicative of the force and effect of the Commercial Code and its changes from the present practice relating to secured transactions. As stated in such comments under Section 9-101 thereof, such authority sets out:

"The aim of this article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty.

Under this Article the traditional security distinctions among security devices, based largely on form, are not retained; the Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term 'security interest' substitutes for the variety of descriptive terms which has grown up at common law and under a hundred-year accretion of statutes. This does not mean that the old forms may not be used, and Section 9-102 (2) makes it clear that they may be."

Under the Uniform Commercial Code, a secured party in order to perfect a security interest in personal property or fixtures as against third parties, must file a "financing statement" complying with the form and requisites prescribed in Section 50A-9-402, N.M.S.A., 1953 Compilation. This Section set out in part:

"(1) A financing statement is sufficient if it is signed by the debtor and the secured party, 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 or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties."

From the above, it is thus apparent that under the Uniform Commercial Code that the provisions of the Code do not in terms abolish existing security devices such as conditional sales contracts, chattel mortgages, and other contractual agreements intended to create a security interest in personal property or fixtures, but even though such traditional forms may be continued to be used, such must substantially comply with the requirements of the provisions of the Uniform Commercial Code which is now controlling.

The answer to your second question is governed by the provisions of Section 71-1-3, N.M.S.A., 1953 Comp. (P.S.), as amended. This Section expressly provides that "any financing agreement or security agreement required to be filed under the provisions of the Uniform Commercial Code is not required to be acknowledged in order to be filed and recorded."

In respect to your third question, regarding the necessity for acknowledging "termination statements" and "assignments of financing statements", it is apparent that under the terms of the Uniform Commercial Code, an effort has been made generally, to dispense with the requirement of acknowledgments to instruments. Under Section 9-402, relative to financing statements, the comments of the Commissioners on Uniform State Laws and the American Law Institute state as follows:

"This Section departs from the requirements of many chattel mortgage statutes that the instrument filed be acknowledged or witnessed or accompanied by affidavits of good faith. Those requirements do not seem to have been successful as a deterrent to fraud; their principal effect has been to penalize good faith mortgagees who have inadvertently failed to comply with statutory niceties. They are here abandoned in the interest of a simplified and workable filing system."

Under the wording of Section 71-1-3, N.M.S.A., 1953 Compilation, however, the statute provides that any instrument of writing which is not duly acknowledged and certified is not entitled to be filed and recorded, nor considered of record, though so entered, unless expressly excepted under the terms of such statute. This section sets out in full as follows:

"Any instrument of writing, duly acknowledged and certified, may be filed and recorded. Any instrument of writing, not duly acknowledged and certified, may not be filed and recorded, nor considered of record, though so entered; provided, however, that judicial decrees or certified copies, patents, land office receipts, certified copies of foreign wills duly authenticated, and instruments of writing in any manner affecting lands in the state, when these instruments have been duly executed by an authorized public officer, need not be acknowledged but may be filed and recorded; and, provided further, any financing agreement or security agreement required to be filed under the provisions of the Uniform Commercial Code [50A-1-101 to 50A-9-507] is not required to be acknowledged in order to be filed and recorded."

Section 71-1-3, N.M.S.A., 1953 Compilation, set out above, was amended by the provisions of the Uniform Commercial Code, to expressly exempt from the statute, the requirements necessitating an acknowledgment as a prerequisite to filing "financing agreements" and "security agreements".

The term "security agreement" is defined in Section 50A-9-105 (h) of the Code to mean: ". . . an agreement which creates or provides for a security interest." The term "financing agreement" is not defined in the Code as such, but the term "Agreement" is defined in Section 50A-1-201 (3) as follows: "'Agreement' the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act. Whether an agreement has legal consequences is determined by the provisions, of this act, if applicable; otherwise by the law of contracts."

Although the term "financing agreement" is not fully defined in the Uniform Commercial Code it is evident that such term was meant to be broadly employed to encompass the various instruments which may be filed under the Uniform Commercial Code in connection with secured transactions.

Under Article 9 of the Uniform Commercial Code relating to secured transactions, it is contemplated that seven different instruments may be filed thereunder. These instruments are: (1) financing statement (50A-9-402); (2) amendment to financing statement (50A-9-402); (3) continuation statement (50A-9-402); (4) termination statement (50A-9-404); (5) assignment or statement of assignment (50A-9-404); (6) statement of release (50A-9-406); (7) a copy of the security agreement (50A-9-402).

While the term "financing agreement" as used in Section 71-1-3, N.M.S.A., 1953 Compilation, is somewhat vague in its specific application, under the provisions of Section 50A-1-102, N.M.S.A., 1953 Compilation, establishing the rules of statutory construction for interpreting the Act, it is indicated that every reasonable construction in favor of carrying out the act's declared purposes should be employed. Section 50A-1-102, N.M.S.A., 1953 Compilation, provides in part:

"(1) This act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes of policies of this act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions."

In keeping with the declared purpose of the Uniform Commercial Code to simplify, clarify and modernize the law governing commercial transactions, and the rule of construction that the Code shall be liberally construed and applied so as to promote its underlying purposes and policies, it is our opinion that such instruments as are filed pursuant to the provisions of the Uniform Commercial Code are not required to be acknowledged as a prerequisite to being filed with the county clerks.

It should be noted, however, that due to the ambiguity and uncertainty resultant from the language employed in the provisions of Section 71-1-3, N.M.S.A., 1953 Compilation, relative to the requirements for acknowledgments, it is possible that a more narrow and technical interpretation might be employed by the courts in considering the necessity for acknowledgments under this act.

In previous decisions, **McBee v. O'Connell**, 16 N.M. 467, 120 P. 734, **Garcia v. Leal**, 30 N.M. 249, 231 P. 631; and **Kitchen v. Canavan**, 36 N.M. 273, 13 P. 2d 877, the New Mexico Supreme Court has held that an acknowledgment of a deed was a necessary prerequisite for the recording of such instruments. In **State v. Prince**, 52 N.M. 15, 189 P. 993, the Court also stated that:

"When in any enactment there appears an express modification or repeal of certain provisions in the former enactment, such express modification or repeal of the portions thereof thus affected will be held to disclose the full intent of the framers of the later enactment as to how much or what portion of the former it was intended to modify or repeal, this upon the principle 'expressio unius, est exclusio alterius.'"

It is our opinion that County Clerks should accept for filing all instruments filed pursuant to the provisions of the Uniform Commercial Code, with or without acknowledgments appearing thereon, however, due to the possibility of a more narrow and restricted interpretation of the language of Section 71-1-3, N.M.S.A., 1953 Compilation, we recommend that until legislative or action of the State Supreme Court definitely sets at rest the question of the necessity of acknowledgments upon such instruments, the better practice to follow for all persons filing instruments under the provisions of the Code would be to include acknowledgments upon such instruments. We recommend, also, that the County Clerks appraise persons filing instruments under the Uniform Commercial Code of the possible danger involved under Section 71-1-3, N.M.S.A., 1953 Compilation, if acknowledgments are not included upon such instruments when submitted for filing.

In answer to your fourth question, Section 50A-9-404 (1) specifies that a secured party must prepare a "termination statement" when requested by a debtor, and whenever there is no longer an outstanding secured obligation existing and no commitment to make advances, or to otherwise give value. This section requires that if the termination statement is signed by a person other than the secured party of record, it must either include or be accompanied by an "assignment or a statement thereof" indicating that the secured party has assigned the security interest to another party.

The fees chargeable under Section 50A-9-404 are \$ .75 for the filing of an "assignment or a statement of assignment", and \$ 1.00 for filing and indexing a "termination statement".

Under this section, it is contemplated that termination statement may be separately filed where the person making the termination statement is the secured party of record. However, where the termination statement is signed by a person other than the secured party of record, such termination statement must be accompanied by an assignment or a statement of assignment from the secured party of record, or the termination statement may include within such instrument, the assignment. Each instrument, if separately filed, is subject to the separate filing fee specified. If, however, both an assignment and a termination statement are contained in a combined instrument, the filing fee chargeable would be \$ 1.75, being the combined filing fee for both instruments.

In reply to your fifth question, a close study of Section 50A-9-405 (2), wherein a uniform fee of \$ 1.00 is stated, and Section 50A-9-404 (1), wherein a uniform fee of \$ .75 is stated as the fee chargeable for the filing of an assignment, indicates the instruments referred to in each of the sections are identical in nature and the service to be rendered by the clerk is the same. However, under Section 50A-9-404 (1) wherein a uniform filing fee of \$ .75 is stated, it is contemplated that the assignment or statement of assignment will accompany each termination statement. This section provides in part:

"A termination statement signed by a person other than the secured party of record **must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement.** The uniform fee for filing and indexing such an assignment or statement thereof shall be \$ 0.75." (Emphasis supplied).

Under the above section, the fee for filing an assignment or statement by the secured party of record, when accompanying a termination statement is \$ .75. Where, however, the statement of assignment is filed separately under provisions of Section 50A-9-405, N.M.S.A., 1953 Compilation, and does not accompany a termination statement, then the proper fee for filing such instrument is \$ 1.00. As provided in subsection (2) of Section 50A-9-405, N.M.S.A., 1953 Compilation, the proper fee for a separate assignment not accompanying a termination statement is slightly higher. Section 50A-9-405, N.M.S.A., 1953 Compilation, sets out in part:

"(2) A secured party may assign of record all or a part of his rights under a financing statement by the filing of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement. The uniform fee

for filing, indexing furnishing filing data about such a separate statement of assignment shall be \$ 1.00."

The above provision for the filing of an assignment of a security interest differs from the assignment accompanying a termination statement only in that the separate assignment is optional in respect to necessity for filing, and under Section 50A-9-404, N.M.S.A., 1953 Compilation, it is specified that termination statements when signed by a person other than the secured party of record, must be accompanied by an assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. Under the comments to Section 50A-9-405, it is indicated that this section was intended to provide a permissive device whereby a secured party who has assigned all or part of his interest may have the assignment noted of record.

From a careful reading of the above statutory provisions, we conclude that in each instance where an assignment or statement of assignment is filed together with a termination statement the proper filing fee for the assignment or statement would be \$ .75. Where, however, the secured party desires to assign of record all or part of his rights under a financing statement by the filing of a separate written statement of assignment and which does not accompany a termination statement, then the proper uniform filing fee is \$ 1.00.

In respect to your sixth question, you ask if the filing fee of \$ 1.00 specified in Section 50A-9-404 (2), N.M.S.A., 1953 Compilation, is more than the \$ .75 fee specified in the preceding paragraph because of the additional service of returning these instruments.

As indicated in our reply to your fourth question, the \$ .75 fee provided in Section 50A-9-404 (1) is the uniform fee for filing and indexing an assignment or statement of assignment. The fee of \$ 1.00 provided in Section 50A-9-404 (3) is the uniform fee for filing and indexing a "termination statement", including sending or delivering the financing statement to the secured party as provided in Section 50A-9-404 (2). The two fees relate to different instruments and to different services on the part of the filing officer.

Under your seventh question, you ask if it is mandatory that the county clerk return copies of instruments left with the clerk for filing, or should such instruments be returned only upon request of the secured party. Under the provisions of Section 50A-9-404, N.M.S.A., 1953 Compilation, express provision is made for the return of the original instruments required to be filed thereunder. This section provides in part:

"(2) On presentation to the filing officer of such a termination statement he must note it in the index. **The filing officer shall remove from the files, mark 'terminated' and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto.**" (Emphasis supplied).



We construe the above provision as directing the county clerks to return these instruments upon presentation to them of a termination statement accompanied by an assignment, if necessary, or upon presentation of the termination statement if signed by the secured party of record. Such language is mandatory and not permissive in effect. Insofar as any conflict may arise under the provisions of Sections 71-4-10 and 71-4-11, N.M.S.A., 1953 Compilation, relating to the preservation of public records for specified periods, and Section 71-6-1, et seq., relating to the preservation and disposition of state public records, these earlier enactments are repealed by the provisions of Section 50A-9-404, N.M.S.A., 1953 Compilation, requiring the return of such instruments to the secured party.

Regarding your eighth question concerning the liability of the County Clerk acting as a filing officer in handling matters relating to the Uniform Commercial Code, it specifically set forth under the provisions of Section 50A-9-403, N.M.S.A., 1953 Compilation, that the required duties of a filing officer are:

"(4) A filing officer shall mark each statement with a consecutive file number and with the date and hour of filing and shall hold the statement for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and address of the debtor given in the statement."

The general liability of County Clerks in connection with the performance of their duties in an improper manner or in failing to perform a duty in accordance with law, is set out in 20 C.J.S., "Counties", Section 141, at page 954:

"Liability. A county clerk is not liable for official acts when acting under instruments fair upon their face and issued from a superior tribunal or board, but whether he is liable to individuals injured by his neglect or failure to perform duties depends upon the person or body of persons in whom the corresponding right inheres; if the duty is owing to the public only, such as the duty of recording the proceedings of the county board, he is not liable to an individual specially injured thereby, but if the duty of filing chattel mortgages or articles of incorporation duly tendered him for filing, he is personally liable for neglect or failure to perform the duty."

As discussed above, a County Clerk may be personally responsible for damages to individuals incurring personal damage by reason of the neglect of the clerk or his failure to perform his required duties as set forth and prescribed under the provisions of the Uniform Commercial Code.

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