

UCC Fixtures: Perfection, Priority & Lapse Dates

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Secured parties sometimes get confused about the different options for perfecting a UCC Article 9 security interest in fixtures. Any confusion in the process can have significant repercussions. The secured party's choice of perfection method has an impact both on priority of the security interest and the lapse date of the filed record.

This article explains the different methods available for perfecting a security interest in fixtures under Article 9, the priority rules applied to each and how to correctly calculate the applicable lapse date. Finally, it will address special considerations for perfecting a security interest in the fixtures of a transmitting utility.

Fixture Perfection Options

“Fixtures,” is defined by UCC Section 9-102(a)(41) to mean goods that have become so related to particular real property that an interest in them arises under real property law. Under this definition, fixtures have characteristics of both personal property and real property.

The perfection methods for a security interest in fixtures under Article 9 reflect the combination of real and personal property characteristics. A security interest in fixtures can be perfected by filing a financing statement or record of

mortgage. The record may be filed in the Article 9 index, real property records or both.

A secured party has three specific options for perfecting a UCC security interest in fixtures under Article 9. The first is simply to file a financing statement that covers fixtures in the office designated by UCC Section 9-501(a)(2). In most jurisdictions that is the central UCC index maintained by the Secretary of State.

A “filing on fixtures” should not be confused with a “fixture filing,” which is the second method for perfecting a UCC security interest in fixtures. Under Section 9-102(a)(40), a “fixture filing” is the filing of a financing statement covering goods that are or are to become fixtures and satisfying the requirements of Section 9-502(a) and (b).

Section 9-502(a) contains the basic requirements for sufficiency applicable to all financing statements. Subsection (b) provides additional requirements for real-property-related financing statements, including fixture filings. The additional requirements include an indication that it covers the type of collateral, an indication that it is to be filed in the real estate records, a description of the affected real property and the name of the record owner, if the debtor does not have an interest of record in the real property. The Subsection (b) information is necessary to

properly index the fixture filing in the land records.

Under Section 9-501(a)(1), a fixture filing must be filed in the office designated for the filing or recording of a mortgage on the related real property. Louisiana is the only exception. A fixture filing in Louisiana must meet all the requirements of Section 9-502(a) and (b), but it is filed in the regular UCC index, not real property records.

The final method for perfection of a UCC security interest in fixtures is by recording a record of mortgage that covers fixtures. A record of mortgage is commonly used if the collateral consists primarily of the land and buildings, rather than just fixtures. If a record of mortgage satisfies the requirements of Section 9-502(c), then it is effective as a financing statement filed as a fixture filing. The Section 9-502(c) requirements are similar to those for a fixture filing.

Priority of Security Interests in Fixtures

The choice of perfection method has important ramifications for priority of the security interest. The priority of conflicting security interests in fixtures is determined under Section 9-334.

The general rule in Section 9-334(c) is that a security interest perfected by a filing on fixtures will be subordinate to the conflicting interest of an owner or encumbrancer of the real property, other than the debtor. In other words, almost

any recorded real estate interest will take priority over a filing on fixtures in the state central UCC index. If the secured party perfected its interest in fixtures by filing in the Article 9 index, then it has priority over conflicting security interests that were also filed only in the Article 9 index. However, it will be subordinate to a conflicting interest in fixtures recorded in the real property records by any person other than the debtor, regardless of when it was recorded.

There are some limited exceptions to the general fixtures priority rule. In Section 9-334(e)(2), for example, a filing on fixtures can take priority over a recorded interest if the fixtures are certain types of readily removable machines, equipment or replacements of appliances that are consumer goods. Likewise, Subsection (f) contains an exception if the conflicting owner or encumbrancer has consented to the security interest or if the debtor has the right to remove the goods.

In most cases, the secured party must file its financing statement as a fixture filing to obtain priority over conflicting real property interests in fixtures. By definition, a “fixture filing” is recorded in the real property records. Subject to the exceptions mentioned above, a security interest perfected by a fixture filing will always take priority over a conflicting interest perfected by a filing on fixtures.

A security interest in fixtures will take priority over conflicting real property interests if it was

perfected by a fixture filing before the conflicting interest is of record. In this regard Section 9-334 generally ranks priority of security interests in fixtures and other real estate interests by the time of recording.

As with other types of goods, there is an exception to the general priority rules for a purchase-money security interest in fixtures. Under Section 9-334(d), a security interest in fixtures can take priority over the earlier-recorded interest of an owner or encumbrancer if: the debtor has an interest of record or is in the possession of the real property; the secured party has a purchase-money security interest; and the security interest is perfected by a fixture filing before the goods become fixtures, or within twenty days thereafter.

The same priority rules for a security interest perfected by a fixture filing also generally apply to a record of mortgage that perfects a UCC security interest in fixtures. Under Section 9-502(c), a record of mortgage is the equivalent effect of a fixture filing for purposes of perfecting a security interest in fixtures.

Fixture Lapse Dates

The lapse date of a record that perfects a security interest in fixtures should be easy for the secured party to determine. The lapse date, if any, is determined by the type of record involved.

Under Section 9-515(a), a filed financing

statement is effective for five years after the date of filing. The secured party may extend the effectiveness of the financing statement for additional five-year periods by filing a continuation statement within six months before the lapse date of each five-year period.

There are narrow exceptions to the five-year effectiveness rule in most states if the record indicates the debtor is a transmitting utility or that it was filed in connection with a manufactured-home or public finance transaction. In all other cases, a financing statement is only effective for five years.

The five-year effectiveness rule does not apply to a record of mortgage. Under Section 9-515(g), a record of mortgage filed as a financing statement filed as a fixture filing is effective until it is released, satisfied or its effectiveness otherwise terminates. As a record of mortgage does not have a lapse date, there is no need for the secured party to ever file continuation statements.

Even though Section 9-515 is clear, it is not unusual for secured parties to confuse the lapse date rules for financing statements and real property records. Some mistakenly believe that a financing statement filed as a fixture filing does not lapse if it was recorded in the real property records. The five-year effectiveness rule in Section 9-515(a) applies to all financing statements, regardless of whether they were filed in the UCC index or real property records. Conversely, some secured parties have filed

continuation statements to a record of mortgage under the assumption that the financing statement continuation rules apply. This reflects a misunderstanding regarding the nature of a record of mortgage. A record of mortgage may be filed as a financing statement, but it is not a financing statement. Different rules apply to each type of record.

Even real property recording offices are not immune from confusing the two different types of records. Most of the documents real property recording offices deal with on a daily basis do not lapse. They are effective until satisfied. Recording office personnel sometimes don't realize that different rules apply to UCC records and, consequently, they may provide unintentionally misleading answers to lapse date questions.

Transmitting Utilities

There are special considerations for the secured party when perfecting a security interest in the fixtures of a transmitting utility. Different rules apply for determining the filing location and duration of the security interest.

The filing office for a financing statement to perfect a security interest in the collateral of a transmitting utility is designated in Section 9-501(b). The designated filing office for transmitting utilities is usually the state central UCC filing office. A record filed in the Section 9-501(b) office also serves as a fixture filing on the collateral indicated in the financing

statement which is or is to become fixtures. Section 9-501(b) can be read to suggest that the proper filing location to perfect a security interest in the fixtures of a transmitting utility is the designated central filing office of the state where the debtor is located. Neither the text, nor Official Comment indicate otherwise.

However, under Section 9-301(3)(A), while goods are located in a jurisdiction, the local law of the jurisdiction governs perfection of a security interest in the goods perfected by a fixture filing. The result is that a fixture filing must be made in the location of the fixtures. Thus, if the debtor is a transmitting utility, the secured party must file its fixture filing in the Section 9-501(b) office of the state where the fixtures are located.

Like a record of mortgage, a financing statement that indicates the debtor is a transmitting utility does not lapse. Under Section 9-515(f) the record is effective until a termination statement is filed. The only exception to this rule is in Georgia, which adopted a non-uniform version of Section 9-515. In Georgia, all financing statements are effective for five years.

Conclusion

Secured parties need to be aware of what effect the choice of perfection method for a security interest in fixtures will have on priority. The best practice to ensure the highest priority is to file a fixture filing or record of mortgage in the real property records. Relying on a state central

UCC index filing alone may result in the security interest being subordinated to a recorded real estate interest. That doesn't mean there's no need to ever file at the state-level. It is a good idea to also file on goods that may become fixtures in the state's central UCC index.

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A secured party should have no trouble determining the correct lapse date of a record that perfects a security interest in fixtures. If perfected by the filing of a financing statement, the record is effective for five years. If perfected by a record of mortgage, the record does not lapse.

The exceptions to the five-year rule are few. If the financing statement indicates the debtor is a transmitting utility, the record does not lapse. Likewise, if the record indicates it was filed in connection with a manufactured home or public finance transaction, it may be effective for thirty years. A number of states enacted non-uniform versions of Section 9-515 that do not recognize extended effective periods for these transactions. It is important for the secured party to verify the particular state law before setting the lapse date in its continuation tracking system.

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