2010 Official Amendments to UCC Article 9

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2010 Official Amendments Adopted in Florida Ch. 679

- The Uniform Law Commission, in conjunction with the American Law Institute, created the 2010 Official Amendments to the UCC Article 9 (the "2010 Official Amendments").

- House Bill 483 (Senate Bill 1090) (2012) Adopts the 2010 Official Amendments to the UCC in Florida; codified in Chapter 679 of the Florida Statutes.

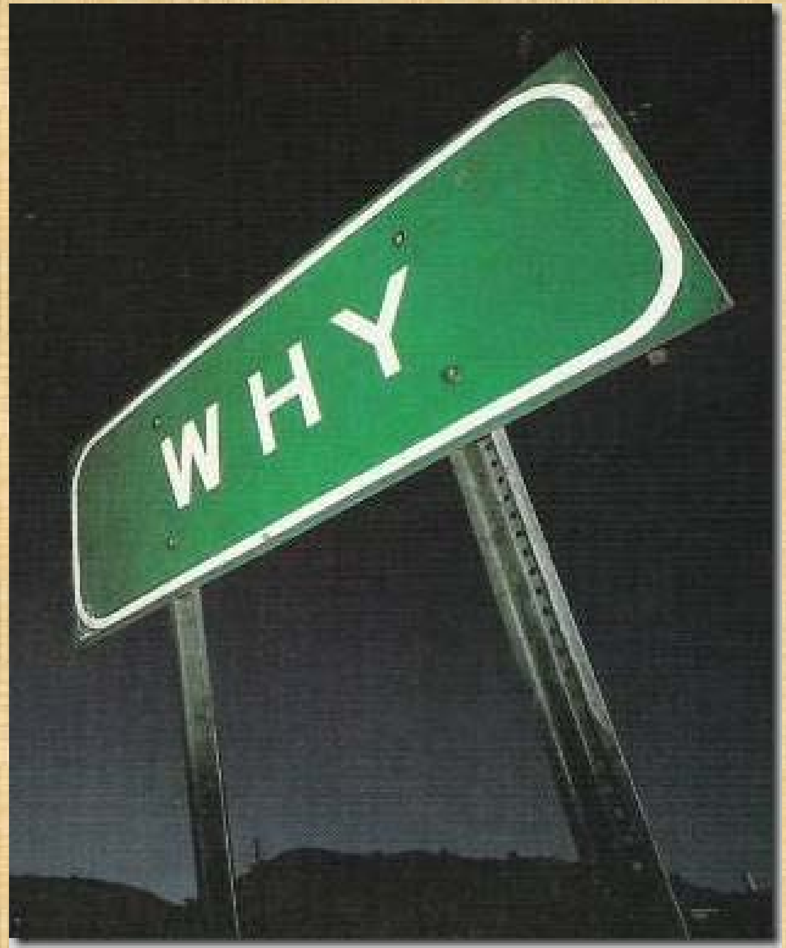
- Signed by Governor Rick Scott on April 6, 2012.

- Effective on July 1, 2013, but important transition rules already apply.

- Will not affect or be applied retroactively to litigation pending on July 1, 2013.

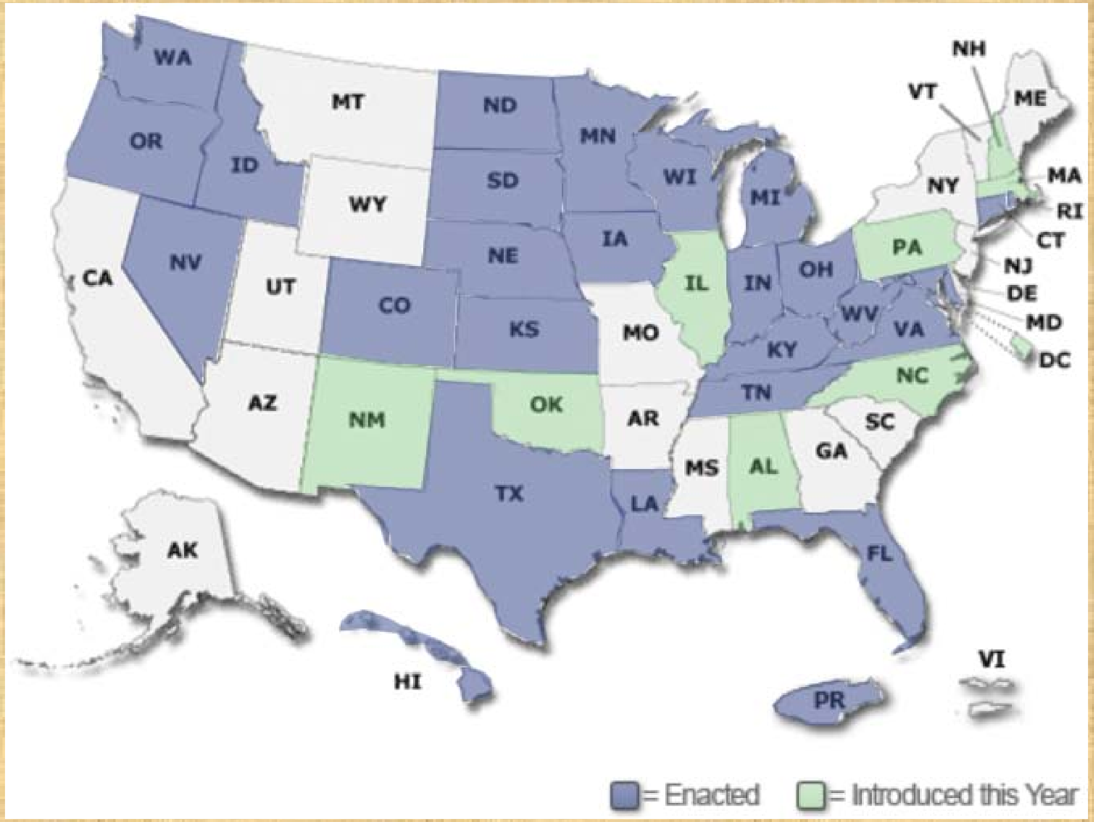
Why Amend the UCC?

The Uniform Law Commission created the 2010 Official Amendments to respond to inconsistent filing requirements throughout the jurisdictions and to increase protection for secured creditors against changes in jurisdiction of debtors.



How Uniform are the Jurisdictions?

Of the Fifty-Three Jurisdictions (Fifty States, D.C., U.S. Virgin Islands, and Puerto Rico), Twenty-Seven have Enacted the 2010 Official Amendments and Nine have Introduced them to their Legislatures this year.



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2010 Official Amendment Discussion Topics

1. What's in a Name? Identifying Debtors on Financing Statements
   - Individual Debtors
   - Registered Organizations
   - Trusts
   - Mortgages
2. Transition Rules and Practice Tips Related to the 2010 Official Amendments
3. Information Statements Replace Correction Statements
4. Additional Secured Party Protection with a Change in Jurisdiction

What's in a Name?

. . . Individual Debtor

The ULC provided the Jurisdictions with two options for identifying individual debtors on Financing Statements:

1) The Only If Rule, which most Jurisdictions, including Florida, have selected.

2) The Safe Harbor Rule, which, so far, only Colorado, Connecticut, Oregon, and Washington have selected.

. . . Individual Debtor

Current § 679.5031(1)(d)

A Financing Statement should provide the debtors Individual Name, (i.e., surname and first personal name).

Amended § 679.5031(1)(d)-(e)

A Financing Statement should provide the name on the debtor’s unexpired driver’s license or a personal identification card issued by debtor’s principal state of residence.

Only if the individual debtor does not have an unexpired driver’s license or personal identification card issued by debtor’s principal state of residence can the Financing Statement provide their individual name or surname and first personal name.

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Real Life: Bennie A. Miller,

2012 WL 32664 (Bankr. C.D. Ill. Jan. 6, 2012)

- Bank filed a Financing Statement to perfect a security interest on Power Plus, a business owned by Bennie and Debbie Miller, using the names "Bennie Miller" and "Debbie Miller." The Miller's then filed for Bankruptcy.
- Bennie's driver's license and social security card listed his name as "Bennie A. Miller."
- Bennie's birth certificate, which listed his Individual Name in this jurisdiction, listed his name as "Ben Miller."
- Because a search for "Ben Miller" would not locate the Financing Statement, the court found that the Financing Statement filed under "Bennie Miller" was seriously misleading and voided the bank's security interest in Miller's portion of Power Plus.
- The court noted that "various states have amended the Uniform Commercial Code to address the situation presented here." Had the 2010 Official Amendments been in effect in this jurisdiction, the name presented on Miller's driver's license, "Bennie Miller," would have been sufficient and Bank would not have been forced to forfeit its security interest.

. . . Registered Organization

Current § 679.5031(1)(a)

A Financing Statement should provide the name on the Public Record of the Debtor's jurisdiction of organization.

Amended § 679.5031(1)(a)

A Financing Statement should provide the name as stated on the Public Organic Record most recently filed.

. . . Registered Organization

Getting to the "root" of Records:

- A <u>Public Organic Record</u>, as required by the 2010 Official Amendments, is the publically available record filed with or issued by the state to form the organization or the most recent amendment filed to that record.

. . . Registered Organization

- Examples of <u>Registered Organizations</u> include Corporations, Limited Liability Companies, Partnerships, and Registered Trusts.

- Examples of <u>Public Organic Records</u> include Articles of Incorporation, Articles of Organization, and Limited Partnership Agreements.

CAUTION

There are many Public Records filed with or issued by the state that are not Public Organic Records, such as certificates of good standing or lists of domestic corporations. These documents do not sufficiently identify the debtor under the 2010 Official Amendments.

. . . Trust

- Some trusts are Registered Organizations (e.g., Registered Business Trusts). Any trust that is not a Registered Organization is a Common Law Trust.
- Under the 2010 Official Amendments, when identifying a Common Law Trust on a Financing Statement, provide the name as it appears in the organic record of trust (i.e., the initial Trust Agreement).
- When filing a Financing Statement, if no name is provided in the organic record of trust, provide the name of the settlor or testator and sufficient information to distinguish the trust from others in the settlor's or testator's name.
- A Financing Statement must indicate that the collateral is being held in trust.

Mortgages used as Financing Statements

- The 2010 Official Amendments no longer require that the record of mortgage indicate that it is to be filed in the real property records.

- Currently, the UCC does not direct the proper way to identify individual debtors when using a mortgage as a Financing Statement. The 2010 Official Amendments clarify by requiring that the debtor be identified by his or her individual name or surname and first personal name (i.e., the rule as it applied to Financing Statements prior to the 2010 Official Amendments).

Example: Steve, Stephan, or Stefano?

- A debtor's birth certificate lists his individual name as "Stephan Smith," his driver's license lists his name as "Steve Smith," and the Public Land Record shows title vested to the subject property in the name "Stefano Smith." How should a mortgage, when serving as a Financing Statement, identify the debtor?
- Best practice seems to indicate, erring on the side of caution, that a mortgage should utilize all three names:
  - "Stefano Smith a/k/a Stephan Smith a/k/a Steve Smith"
- When utilizing a Financing Statement as a opposed to a mortgage, the 2010 Official Amendments require the Financing Statement to provide debtor's name as it appears on his driver's license; but if this is inconsistent with the debtor's name in the Land Records, we recommend using both variations of the name as debtors on the Financing Statement. So in this example, file under Steve Smith (driver's license name) and Stefano Smith (record title name).
- **FINANCING STATEMENTS: FILE EARLY AND FILE OFTEN.**

Transition Rules and Practice Tips Related to the 2010 Official Amendments

Transition Rules

- **<u>Between now and July 1, 2013</u>**, Financing Statements can be filed in accordance with the provisions of the current UCC or the filing requirements as set forth in the 2010 Official Amendments.
- **<u>After July 1, 2013</u>**, Financing Statements filed prior to July 1, 2013 are not rendered ineffective, even if they do not meet the requirements as set forth by the 2010 Official Amendments. **<u>However</u>**, if amending or continuing a Financing Statement filed prior to July 1, 2013, the filing requirements as set forth in the 2010 Official Amendments must be followed.
- For an example of the Transition Rules, see the "Polonius Debtor" example in your materials.

CAUTION: Practice Tips

- Moving forward, UCC searches should include both the debtor's individual name and debtor's name as it appears on debtor's unexpired driver's license issued by the debtor's state of residence until June 30, 2018 (i.e., five years after the effective date of the 2010 Official Amendments).
- If an Amendment or Continuation Statement is filed after July 1, 2013, it must comply with the filing requirements as set forth in the 2010 Official Amendments.

Information Statements Replace Correction Statements

- What are currently called "Correction Statements" will be renamed "Information Statements" by the 2010 Official Amendments.
- Both the debtor and creditor will be able to file "Information Statements" after the 2010 Official Amendments become effective.

Information

~~Correction~~

Statements

- While these Correction Statements/Information Statements have no legal impact, they put the public on inquiry notice that the debtor or creditor believes the information on the record is inaccurate or that the record was wrongfully filed.

Additional Secured Party Protection with a Change in Jurisdiction

- The 2010 Official Amendments are much more favorable to secured parties when a debtor changes jurisdiction (e.g., by relocation or merger), especially regarding after-acquired collateral.
- After-acquired collateral is now afforded the same protection as ordinary collateral for up to four (4) months following a change in the jurisdiction of the debtor or following a merger of the debtor with a successor in a different jurisdiction.

Resources

- For a Copy of the 2010 Official Amendments to Article 9 and the Official Comments, see:
  - http://www.ali.org/00021333/UCC9%20amendments%202010%20-%20final%20text.pdf.
- For a text of the Enrolled Florida Statute as amended, see House Bill 483 (2012) or Senate Bill 1090 (2012).
- For a list of states which have adopted the 2010 Amendments, visit www.uniformlaws.org.
- For a copy of these presentation materials, please visit http://www.hwhlaw.com/About/News