

New Uniform Legislation You Should Know About

By Jack Burton,
on behalf of New Mexico's Uniform Law Commissioners¹

This is a belated “heads-up” about legislation enacted in the 2013 session of the New Mexico Legislature and signed into law by Gov. Susana Martinez.² Belated because some laws have already taken effect, while others just became effective at the beginning of this year.

Four acts or sets of amendments took effect on July 1, 2013. The first is the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, codified at §§ 40-13A-1 to -9 of the New Mexico Statutes Annotated.³ This law establishes uniform procedures to allow New Mexico courts and law enforcement officers to recognize and enforce valid domestic violence protection orders issued in other states. More information about this act and most other uniform acts can be obtained from the website of the Uniform Law Commission at www.uniformlaws.org. (The sole exception is the Uniform Commercial Code, but more about this exception later.)

The Official Comments, including the Prefatory Notes, to uniform acts are probably the most useful materials on the ULC website. Comments are “persuasive,” although not “controlling authority.” *First State Bank v. Clark*, 1977-NMSC-088, ¶ 5, 91 N.M. 117, 570 P.2d 1140 (interpreting the UCC). Official Comments are especially helpful in New Mexico because of its complete lack of legislative history and relative lack of reported cases. When using an Official Comment, the reader should make sure that the section of the statute to which the comment refers was adopted uniformly or, if it was not, that the non-uniform amendment does not affect the application of the comment to the section.

New Mexico tries to adopt all uniform acts uniformly. Our legislature departs from uniformity only in exceedingly rare instances, and then only for truly exigent reasons and only after obtaining the approval of the non-uniform amendment from the national ULC. The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act was amended slightly at the request of Attorney General Gary King to provide even greater protection for the location of victims of domestic violence.

Three other acts amending the UCC or relating to the UCC took effect on July 1, 2013. The most numerous, and most significant, amendments are to Article 9 of the UCC.⁴ Article 9 deals with security interests in or liens on personal property. The UCC bill was 90 pages long, but most of the changes are technical in nature. These amendments are codified at §§ 55-9-102 to -809.

There are simplified forms for filing financing statements and related filings. They can be downloaded from the New Mexico Secretary of State's website.⁵ The simplified rules for the names of the borrowers to use on these filings are found in § 55-9-503. The main types of borrowers are individuals and entities, usually called organizations in Article 9.⁶ The following are some highlights of the very detailed rules about the names of individuals and some types of organizations. The statute, comments, and instructions on the back of the downloadable filing forms must be read to understand the new amendments. If you do not do enough filings on a regular basis to develop and maintain a sufficient level of confidence and expertise, you might consider whether it makes sense to hire a UCC filing service to prepare and file your UCC filings for you. Also, UCC lien insurance, somewhat similar to real estate title insurance, is available from some

underwriters that historically have issued title insurance.

Consumer borrowers are still not a real issue in filing financing statements because, as under the former law: (1) by far the biggest category of consumer collateral is motor vehicles, where the liens are noted on the title, and (2) most other consumer lending is for purchase money financing, where the liens are automatically perfected without a financing state-

ment. This leaves the small business person operating as a sole proprietor as the most common type of individual borrower.

Under the former law, the courts went “in all directions”⁷ in deciding which name of an individual should be used on a financing statement. Under the new law, the name on the unexpired driver's license is used, even if the name is misspelled. If the debtor has no unexpired driver's license, the debtor's individual name or surname and first personal name is used. If the debtor has more than one unexpired driver's license, it is the name on the most recent one.

The rules also have been changed for the names of registered organizations, (e.g., a corporation, LLC, or limited partnership), whether those entities are for profit or nonprofit. The name of the registered organization that goes on the financing statement or other Article 9 filing is the name that appears on its public organic record. If the name on the public organic record has been amended or otherwise changed, it is the name on the most recent amendment. “Public organic record” is defined in Section 55-9-102(a)(67).⁸

The amendments also address changes in the debtor's name or location and the debtor's merger, consolidation, or conversion.

The Official Comments are especially important with the Article 9 amendments for three reasons. First, the drafting committee tried to make only those changes to Article 9 that were necessary to solve real-world problems. Second, the drafting committee decided, as a matter of policy, to make the changes to Article 9 by way of amendments to the comments, as a matter of interpretation, whenever possible, and to the text of the statute, only when necessary. Third, the drafting committee amended the comments to some sections of Article 9 even when it did not amend the statutory text of those sections. This means that there is much significant material in the comments.



So one must review the comments to understand the new amendments. The best thing is to have a redlined version of the new comments. You can then spot exactly what was added and what was deleted. Another reason for a redline is that the drafters did not publish a prefatory note that summarizes or even identifies all of the changes. For that, you need Ed Smith's article cited in note 4 referenced above. Redlined versions of the comments were published by the drafters and are available in hard copy and probably on the Internet.

For most uniform acts, the comments may be obtained at no charge from the Uniform Law Commission's website. The comments to the UCC are a different story. For historical reasons, the UCC is a joint product of the Uniform Law Commission and the American Law Institute. The comments are copyrighted by both organizations and a fee is normally charged for their publication. (The revenue generated by the fees goes to support the work of the Permanent Editorial Board of the UCC. The PEB issues commentary on the UCC and otherwise keeps the UCC up to date.) New Mexico One Source of Law provides a great service by publishing the comments to the UCC at no additional charge to its subscribers. New Mexico One Source of Law has the new statutes, including the amendments to the UCC, on its website, but not the new comments, probably because I neglected to tell them about the updated comments! At any rate, they are working on the problem now. In the meantime, you can probably get the updated comments on the Internet or from your law library.

Section 55-4A-108 of Article 4A of the UCC, concerning wire transfers, also was amended. It was the subject of a technical amendment to conform to the federal Dodd-Frank Act.

Section 14-16-3 of the Uniform Electronic Transactions Act was changed to conform it to amendments of Article 1 of the UCC that were made several years ago. The UETA is a foundation of New Mexico's electronic commerce. Enacted more than a decade ago, it establishes the legal equivalence of electronic records and signatures with paper records and manually signed signatures. Professor Fred Hart of the University of New Mexico Law School noticed the need for this amendment and called it to our attention. Thanks to Professor Hart, we are the only state in the country with an up-to-date UETA law.

Two uniform acts just took effect on Jan. 1. The first is the Uniform Child Abduction Prevention Act, codified at §§ 40-10C-1 to -12. This act fills the gaps in existing state law. While current state laws address initial child-custody determinations and the criminal repercussions of child abductions, they generally provide

inadequate prevention mechanisms. Because abduction situations likely will involve more than one state, it is vital that courts have the ability to communicate effectively. The act accomplishes this goal by building on the interstate jurisdiction and enforcement mechanisms of the Uniform Child Custody Jurisdiction Enforcement Act, commonly known as the UCCJEA, including provisions on temporary emergency jurisdiction.

By giving courts a means to identify risk factors for child abduction and a system for imposing appropriate abduction prevention measures, the UCAPA will provide New Mexico with a powerful tool to combat the threat of child abduction. The bill contains non-uniform amendments drafted at the request of Rep. Mimi Stewart, with the assistance of local child-abuse-prevention advocates, and vetted by the national Uniform Law Commission. These amendments are designed to keep abusers from taking advantage of the act.

The second act that just took effect is the Uniform Real Property Transfer on Death Act, with optional forms of deed and revocation. It is codified as part of the Uniform Probate Code at §§ 45-6-401 to -417 (2013). This act replaces our present Uniform Transfer on Death Deed statute and form of deed. § 45-6-401 (2001).

The act does just what its name implies. It allows an individual to transfer his or her real property to someone else, without going through a full probate. Although the deed must be recorded during the transferor's lifetime, the transfer does not take effect until the transferor's death. It is revocable until then, and the transferor is not required to deliver the deed to the transferee or even to tell the transferee about it. The transferor can mortgage or sell the property during the transferor's lifetime, without consent or even knowledge of the transferee, and the mortgage or sale is binding on the transferee. In most of these ways, the TOD deed is like a self-settled revocable trust for a person with modest means, without the expense of a trustee.

With these enactments, New Mexico maintains its position as the state with the largest number of modern uniform laws on its books.

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¹ Raul Burciaga, Jack Burton, Representative Zach Cook, Robert J. Desiderio, Senator Daniel A. Ivey-Soto, Representative Antonio "Moe" Maestas, Senator Cisco McSorley, Philip P. Larragoite, Senator William H. Payne, Al Park, Raymond G. Sanchez, and Paula Tackett.

² Gov. Martinez vetoed one act passed by the legislature, the Uniform Collateral Consequences of Conviction Act.

³ All statutory citations below are to the NMSA, 1978 Compilation, but for the sake of brevity only the section numbers are stated.

⁴ See generally, Edwin E. Smith, A Summary of the 2010 Amendments to Article 9 of the Uniform Commercial Code, 42 Uniform Commercial Code Law Journal, Number 4 (2010). Ed was chair of the UCC Article 9 drafting committee.

⁵ http://www.sos.state.nm.us/Business_Services/UCC_Forms.aspx

⁶ § 55-9-503 also provides new rules for the name of the debtor when collateral is held in a trust and for when it is administered by a personal representative.

⁷ Barkley Clark and Barbara Clark, 29 Clark's Secured Transaction Monthly 2 2013 (collecting cases); *Bloom v. Behles Law Firm, P.C.* (In re Green), 2012 Bankr. Lexis 5347 (Bankr. D.N.M. Nov. 14, 2012) (Judge Jacobvitz determines debtor's "legal name" is name on birth certificate, "Ronnie Jackson Green," and rejects driver's license name, "Ron Green").

⁸ The rules for the name of an organization that is not a registered organization (e.g., a general partnership) are unchanged. They are also stated in § 55-9-503.