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Memo

Date: August 11, 2009"

To: Article 9 Drafting Committee and Observers

From: Mark F. Clark

Regarding: Comment of Mark F. Clark on letter dated July 9, 2008, of the Uniform Commercial Code Committee of The State Bar of California

The unanimous endorsement by the UCC Committee of The State Bar of California of alternative B-2 ("form of name"), potentially as a "stand-alone," raises starkly (if implicitly) a value judgment that I have not heard addressed explicitly: is it the purpose of a financing statement to identify a unique and recognizable debtor or to facilitate lending? When "push-comes-to-shove," the form-of-name rule sacrifices the former in favor of the latter.

Three examples, two taken from the California letter, will illustrate what I mean. Footnote 41 of the California letter cites *In re Stewart*, and assumes that adoption of the form-of-name rule would obviate the suffix "IV." The resulting financing statement could refer to any one of four men (granted they might not all be alive at any one time). Footnote 31 of the California letter uses the names of our 41st and 43rd presidents to illustrate another point, and characterizes "George W. Bush" as "incorrect" for "George H.W.. Bush." If the form-of-name rule is in effect, does the secured party get to choose which middle initial to use? If the H, the result is a fictitious debtor (George H. Bush); if the W., an ambiguity (George W. Bush).

My third illustration invokes another of the post-Civil War presidents whose name story does not fit the convenient pattern that the law yearns for -- not that he is going to take out a loan but people will recognize the point. The birth records of our 30th president indicate that he was John Calvin Coolidge. (It's a good bet that if one has the name Calvin that John is lurking about somewhere.) His father was named "John" also. Cal eventually dropped "John" altogether. The form-of-name rule notwithstanding, I doubt that many would recognize that John C. Coolidge played an important part in the Boston police strike.

Having recognized the issue, it is not clear to me how this should come out. I think the safe harbor driver's license will take care of the vast majority of cases, and stamp out the

dreaded nickname.¹ Only a very small number of cases will drop down to the form-of-name rule. Perhaps it is better to be certain about perfection and priority than to be accurate, precise or informative. (I do know of at least one Massachusetts driver's license that is in the form "M. Jane Doe" rather than "Mary J. Doe" so there will be a few cases in which a secured creditor will not be able to rely on both the license safe harbor and the form-of-name rule.)

I have asserted in the past that Anglo-American name law and practice is messy. No amount of clever drafting will obviate that completely. The goal should be to devise a workable system that minimizes the uncertainty of perfection and priority while avoiding the creation of a separate name law that only vaguely is related to the way the rest of life is lived. Perhaps a time comes for a bit of arbitrariness; perhaps a time comes for cutting the Gordian knot with a decisive stroke but I would make the form-of-name rule a safe harbor that ranks below the license safe harbor. (I think the license safe harbor is more likely to result in names people recognize. It won't in every case. I know someone who is universally known by the form "D. John Doe" -- even on his credit cards. Yet, his Massachusetts driver's license is in the form "David J. Doe.") I also think that the "substantial minority" of the California committee is on to something in its footnote 1.

¹ Here is a bit of name trivia: what prominent figure is known to American history by a nickname of his nickname? Hint: his first name was Denton.