

Memo- Redit

To: Stephen L. Sepinuck
From: Robert S. Fisher
CC: EM Miller
Re: RSF Final Comments - Redit
Date: March 18, 2011

Steve and EM:

This redit corrects the errors in my 3/17 draft to EM with CC Steve. I addressed this one to Steve so I could keep both separate easier.

1. In my view, the words "...compromised the integrity of the hull" still require a clear, plain language definition. As a full-time attendee of the March 4-5 Chicago meeting, Bruce King tried to explain why a clearer definition was not required. He said that the insertion of the requirements (1) that the record owner ("RO") as the only person who could brand (aside from the insurer under certain circumstances) and (2) the need for the RO to file an insurance claim would cause the RO to define the words practically in the way that he decided when an insurance claim would net him more than keeping the event off the insurer's radar screen and repairing and selling the vessel himself without having to face a loss in value due to branding.

I still do not see where this obviates the need to have a clear, plain language definition of compromised hull integrity. Absent such a definition, the carrier might argue that the compromise was caused mainly by manufacturer hull defect, prior maintenance failure, or even prior casualties that should have been reported and were not or occurred before the branding law became effective. This has nothing to do with the intuitive pressures on the RO. You can solve this problem by defining the cause as the relevant final cause which results in the compromise of the integrity of the hull of the vessel. I made this kind of suggestion previously but nobody seems to have taken it to heart because all attention was directed at the psyche of the RO. This small change allows for the fact that there might have been other causes of damage to the hull but spotlights the specified one as the final cause that pushed the hull into the compromised state and that it creates the branding duty, irrespective of what went on before. We have to also not confuse prior acts that might destroy coverage under the insurance policy with acts that should excuse the RO from branding.

2. In this connection, I also asked Bruce whether the RO would still be required to brand if the insurer denied the claim. He said yes. This will certainly give the RO pause to file a claim, if he will incur the branding duty irrespective of whether the carrier agrees to consider his claim and not start a declaratory judgment action to avoid paying it at all. Of course, this could be for many reasons, separate and apart from violation of a prior duty to brand.

3. My thought was to use a plain language definition of compromised hull integrity, e.g., "...damaged so as to make it risky to leave in the water or return to the water..." Bruce thought that was too tight a definition. In rethinking it, I thought of adding that a compromised hull might be one thing, if the vessel is

in a calm area tied to a dock temporarily plugged and awaiting permanent repair or is being sailed out to sea with the temporary plug to risk high waves and stormy weather. This could be noted in the Comments to the section, like the swamping example. This would tend to deal with Jim Coburn's example of the nail hole in the hull three feet above the water line. At some stage, ROs must use good judgment. Various factors would determine whether such a nail hole is subject to a baling remedy, if necessary or could result in sinking, thus compromising the hull. There is no one answer. In the end courts and arbitrators will give the answers, unless the CG is able to expand on the Comments with an Industry Standard for recreational boats. By compromise do you also mean, besides breach of the hull, a hit that ruins the balance of the vessel (i.e., causes it to nosedive in a following sea) or environmental compromise of some kind. It seems as if we have been discussing breach of the hull only so far.

Note, also, that there are different techniques for permanently fixing hulls, depending on the material out of which the hull is made. Each of these may lend itself to a different method of testing to see whether a repair was successful. Fiberglass and resin have to be mixed and spread or inserted and sealed; steel and aluminum have to be welded and wood may require a search for the same wood and re-planking. Composites or pure plastic may require other techniques. Any of these may take a while. During that time, the status of the hull may well depend on how strong the temporary plug is. In the case of commercial vessels, especially those with load line requirements, the CG will advise on whether a vessel is in shape to move. I am not sure who is available to do this for recreational vessels. Consequently, the RO may have to rely on his insurer, if he has insurance. Otherwise, he may have to rely on a surveyor. If the definition in the Act is clear, such parties will have a better guide as to what to do, although in the end their advice will depend on how likely they feel the vessel is to sink. In the case of the insurer, it will also be thinking whether it wants to commit itself, in case of a loss, and therefore may elect to take the conservative position of deeming the hull compromised and advise branding the title and leaving the vessel in port until it is permanently fixed. Some national registries which do not have big staffs work just like this—even with big steel barges. I should point out that even the CG, which tries to be accommodating, is not inclined to allow any vessel with too many deep dents in its steel to go any distance from the shore if they let it move at all. The same or greater care may have to be exercised if there is an actual opening in the hull, whether or not temporarily plugged. It could be deemed compromised, too, and forced to undergo permanent repairs before it can be used away from shore.

4. If the RO wants to take the vessel into a repair yard, get it fixed and resell it without branding, will the yard be open to a charge of collusion under the Act if it fails to find out whether the RO plans to brand the title before he sells the vessel? Presumably, he would have to tell the yard there is no insurance, if he was not going to brand the hull.—Something we learned the other day might come into play here. On the vehicle side, auto repair shops often report the damage and their repairs to central data bases, such as Car Fax or an insurance company or insurance association. Do we know whether any marine yards are doing this? There is a Boat Fax but I do not know how widespread or reliable it is. Would NICB know? Boat/US reviewed it some time ago. If this is the case, it might be very dangerous for an RO to do this and try to hide the loss from the carrier or the next buyer and his carrier.

Earlier I thought that the filing of boat accident reports with states or CG might prove a deterrent to fraud in branding. CG accident summaries for documented commercial vessels are available on P-6 at the CG website. They do not give personal data. This may not be the case for state reports. From brief research online, the state privacy laws vary. NY lets you see it and Nebraska does not. Wisconsin does not even give you a copy of your own report so you have to be sure to make a copy before you file it. CG says none of these reports can be used in a trial. This is because they try to encourage the ROs or operators of boats to file the reports. Thus, you cannot rely on these reports at the state level to confirm whether an RO is fraudulently not branding his boat.

5. Bruce also said you wanted to know whether there were other ways an RO could game the system and not brand. The most obvious would be to backdate a transfer to a date prior to the calamity. Presumably, an RO who means to file an insurance claim would not do this. He also might not do this if he has financing and there is a secured party on his title. Once the calamity date has passed, however, if the RO is still the RO, even though the documents would no longer show him as equitable owner, who would have the duty to brand? The old RO who otherwise would not seem to

have been the owner any longer on the day of the calamity? If so we have to be careful. If someone buys a vessel but takes his time getting the title transfer work done, who is the party to brand if the buyer cracks up the boat? Will we have to advise buyers not to use the vessel until the title transfer work is done? If the title is issued immediately prior to the registration, the process should ensure that both are issued before the buyer starts to use the boat. But what if this takes some time? Is the buyer OK once he knows that the transfer docs have hit the counter at the state office? Not all states are so swift, unless you walk it through. In fact, the Act allows 20 days for the state to issue the new title--- and presumably the registration. The old RO also would not want the new buyer to use the vessel until he becomes the new RO. This way the new buyer would be responsible for his own branding. This is a new wrinkle on current procedures in which the new buyer would have been treated as the owner after the closing..I think we should clear this up.

5A. Another problem could arise if the RO is an entity. If the sole member of an LLC, e.g., sells or gives his membership interest, would the buyer or donee then have the obligation to see that the LLC branded the vessel? Would the estate of the RO on his demise be required to brand, as the O's representative or would it be treated as a different owner? If an RO transfers the vessel to a secured party in a short sale routine, the seller would have to brand since he is the registered owner. The only way branding could be avoided is if the secured party involuntarily repossessed the vessel. One policy of the new routines might be to discourage voluntary surrenders when the hull is compromised and branding is required. Had NCCUSL meant to exempt this voluntary turn- in practice from branding before transfer? Had NCCUSL discussed the estate problem? If a corporation or LLC owns the vessel at the time of the calamity and the principal dies, the entity will still have a duty to brand. Estates will have to know this. How could an estate with limited funds dispose of the vessel without branding it?

6. Another way of gaming the system would be more complicated. It is possible that the engines and upper portion (superstructure) of the vessel and furnishings could be destroyed or ruined and they in the aggregate might have a larger value than the damage to the hull. If the RO files an insurance claim for everything but the hull and is satisfied with the sum, does he have to brand the title? He has not filed a hull claim. If it is a total loss claim, the insurer might insist that the hull must bear its proportional value in the settlement. But the RO still might not be claiming for damage to the hull and the insurer might not be selling it either. This probably should be straightened out too. Bruce says this could only occur in law school but I am not convinced. This analysis as a possibility is permitted by our focus solely on the integrity of the hull and no other part of the vessel.

7. The result I want to avoid by having a better definition of compromised hull integrity is a possible judicial determination that the definition is constitutionally vague and ambiguous or violates the equal protection clause of the Fourteenth Amendment. I have won cases on the above basis in the past. It is not that hard to win these matters. A industrial psychologist might love the intuitive push in the definition but a Justice Scalia might be another story. Also we would be more in the spirit of plain language laws, if we used simple words.

8. I am not sure what you meant by "...if the branding is prohibited by the security agreement." So far, security agreements may prohibit sale, lease or other transfer of the collateral. Are you anticipating that, after the Act, security agreements will prohibit branding, until the balance is paid? There is no law to the effect that the issuing state should be able to reflect changes to the title without affecting the security interest of the secured party. DMVs sometimes ask the lender to send in the title and they will make the changes and send it back to the lender. Some lenders try to avoid this but I am not sure what they accomplish. In our case, they will merely block branding for no good reason. Of course, lenders can make a sale, lease or other transfer a default, but if they do not repossess, the registered owner still has the duty to brand, I would think. When does protecting the collateral turn into evading branding? In the case of the eight states which give the title to the owner, the practice becomes a bit more dangerous. Especially, if the bank feels secure with its notice of recorded security interest but for some reason was never listed on the title. I understand this is why we are going to try to induce the eight states to change back to giving the title to the secured party.

9. Bruce indicated that the insurance and RO requirements were inserted in part to protect innocent post-calamity buyers knowing nothing of the calamity on a prior owner's watch. I agree with that. However, it sounds like the justification for exempting the RO without insurance is based on another policy. Typically, parties would be more suspicious of an RO who does not carry insurance than they would of one who does. Is NCCUSL just trying to make it easier for an uninsured party to wheel and deal? Is NCCUSL assuming that lack of insurance these days is a question more of hardship than carelessness?

10. If a state-titled vessel is in a foreign country when its hull is damaged, does it have to file to brand the title in the state which issued it if it sells the vessel to a foreign buyer before it transfers title?

11. Would branding properly apply to a replaced hull as well as to a repaired hull? I am thinking of a multi-hull vessel, e.g., a catamaran or tri-maran. You could replace one of the hulls fully.

12. Will an RO still be able to use As-IS WHERE-IS for everything but the hull, if it is damaged?

13. Does NCCUSL mean to suggest that NVDC should demand for filing copies of the bill of sale when there is a sale out of federal documentation of a boat headed for state titling? I am not sure how could give you the record you want that the new buyer is the owner without doing this? Have you discussed this with NVDC?

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14. I can only assume the idea of a dealer providing a record to go with an inventory item that should be branded because it has been hull damaged was rejected. But nobody has said a word to me about it.

15. Have you heard whether there will be a problem with insurers covering branded vessels?

16. We need to know for sure whether the software layered certificates of title in use today will be able to take check-off boxes for whether the vessel has a damaged hull. And, will state computers read the checks.

17. Is there no general damages penalty for collusion, just a \$1,000 administrative penalty? Who would have to sue for that, the state?

18. Some documentation services still favor the NY-FL procedure on state registering in advance of federal documentation. They issue registration decals but not titles, if informed that a vessel ultimately is to be documented. I forgot that they instituted such system pretty early on. I believe it was in recognition of the fact that neither they nor any other states had title surrender laws allowing surrender of a title to facilitate federal documentation. Without a good federal or state surrender laws, parties did all kinds of things which we aim to grandfather in no matter what the practice. However, since we

are to get good surrender laws, we should not need such NY-FL procedures once UCOTAV and the parallel federal surrender bill are enacted.

19. Do the lines in the Act on agency allow for the use of powers of attorney? We did not discuss, so far as I am aware, the dichotomy between use of powers for individual applicants and corporate or other entity applicants. At one point we had a problem with this in admiralty cases with respect to the preferred mortgage and an affidavit of citizenship. I believe these are still widely used in securitizations and portfolio sales to authorize action on behalf of lenders or investors. Signing statements under penalties of perjury may also be a problem, if by power of attorney.

20. Do you agree that we need a uniform disclosure describing UCOTAV, especially branding, that can be issued by the adopting states? I understand there could be some state variations but by and large it seems a vanilla form would do the best job.

Before we are done, we should prepare a list of the benefits of the Act for each party group in the industry. Steve's comments are a useful base but they have to be bulletized if enough folks are going to read them. I have tried to convince parties who are prone to react in hollow generalities (branding gives me a headache) (states will never do it) (we will not comment until we know the bill is going to pass) etc. I have said my opinion is that such remarks will just be ignored. If commenters want to be noted, they should get substantive and discuss the real daily mechanics of the industry and how filing of all sorts is handled. Demanding that all commenters draft specific statutory changes that they wish to be considered is a little much, considering the experiential level of many of the commenters. Instead, time with them should be spent questioning them about their practices and procedures and why given sections of UCOTAV concern them. As you seem to have realized, it may make more sense at this point to have separate telephone discussions with such persons so they can describe their concerns and you can discuss with them what leeway we have to oblige. If we reply to them in terms such as this will not create additional workload of any significance, without being particular, they will get just as aggravated as we become when they do the same to us in reverse. This is not yet a lobbying session where people are running for election.

Overall, the committee has made tremendous progress and is to be congratulated, despite all of the internecine battling over concepts. Hopefully, we can finish on an even more upbeat note after dispatching the remaining issues.

Cordially,

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