

Memo

To: E. M. Miller

From: Robert S. Fisher, Esq.

CC: John Sebert and Stephen Sepinuck

Date: May 22, 2009 (Rev. 6-7-20089)

Re: Limited Modifications for State Boat Registration Laws
in Support of UCOTA-Vessels and federal title surrender
bill

EM:

I am pleased that you are willing to consider whether we might have reacted too quickly to giving up the possibility of any changes to state vessel registration laws. While I agree that a broad revision of such laws, in addition to UCOTA-Vessels, might be too big a project, there are, on rethinking, limited changes which, if made uniformly, would close many of the loopholes to title fraud that would otherwise continue to exist, primarily in non-title states. The power point presentation put out by NMMA at last week's vetting meeting, was already publishing the quick conflicting conclusion from the May 6 conference call. This is like having news coverage of each vetting session. At this juncture, I should think that panelists should be discussing items and not putting out reports on conclusions purportedly made by NCCUSL.

Such uniform modifications could dovetail with the federal title surrender bill MLA is considering, if the MLA adopts my ideas with respect to boats located in non-title states, and would also work well with UCOTA-Vessels. It may also spur Coast Guard to fix some of the problems which its forms and procedures either create or fail to address and thereby help accomplish a smooth path between federal and state processes.

While the VIS contains some positive provisions, it does not cure all problems we have identified, in part because the

assumption was that all states would join VIS in due course, if not right away. This assumption appears to have been premature, but that should not mean we are relegated to waiting for reform until all 50 states have joined the VIS. Such waiting likely will delay real progress for another 20 years or more.

I think that, whenever anyone says we have procedures to cover something, we have to question them about what those procedures are or at least get a citation to the procedures to which the speaker is referring. It is very difficult to get into this kind of discussion on the telephone.

Your idea of having David and me present as many of these issues as we can in some organized way with a chance to have the drafting committee ask questions and fully understand the unique maritime ramifications was a good one. Were you thinking of having this as a separate event or at the start of the first in-person meeting? I could see this consuming at least half a day. You should have us discuss each of the points we are to raise both with each other and then with the committee. Despite all of the discussion that a limited group of us have had and all of my memos, I do not have the feeling that all of us are starting on the same page.

We also have a tendency to forget that a certain amount of politics enters into the comments that parties make. Often, they are thinking of how much the final product will cost them to implement even before they have taken the time to work out with us all of the elements of a really useful program. Funding is always a factor. We all realize that. However, if we start discounting elements from the start, we may never develop a clear view of how the program ideally should be crafted.

I am not going to try to deliver a polished draft of a statute, regulation or compact at this stage but I will discuss the registration act items that should be considered and why:

1. For a new vessel never registered, titled or documented previously, a non-title state should require the presentation of an original manufacturer's certificate of origin, the Builder's Certificate, for a documentable vessel, or a combined BC-MCO. Such certificate(s) should be retained by such state and not returned to the owner. Depending on its retention processes, the state might store the original or

scan it and destroy the original. Existing law of the state on document retention and VIS rules should be considered.

It has been suggested by one state which returns the MCO to the owner that such practice is justified because the owner may need the MCO to title the vessel in another state. It strikes me that this is a not a legally sufficient reason.

If the owner needs to title the vessel in another jurisdiction because that is where he resides or where the owner entity was formed, he would have to present the MCO in the titling state first anyway (although some states seem not to allow this) and the owner then would have to rely on a scan of the title certificate in order to register it. Presumably, the titling state would send it directly by e-mail to the registration state which would have the means to receive a scan by e-mail. Later we could do this digitally.

We have no real statutory or regulatory procedures authorizing such a practice yet. If he registers the vessel in the state of principal operation first, and his state of residency or formation will title a vessel, even though it is registered in a different state, he should be able to rely on a scan of the MCO which he can request the registration state to e-mail to the titling state. The state sending either the MCO or title by e-mail should be able to mark it certified copy and non-negotiable or words to that effect. The title state might mark its records to show the registration in another state. If it finds out before it issues the title, it could add something to the title saying "Registered in State of ."

The registration state can mark its records to show where the vessel is titled and, if it finds out about the state of titling first, mark the certificate of registration it issues to show titling in the title state. This process can be enhanced if the titling and registration states both ask on their respective applications where the vessel is to be titled or registered, as the case may be.

As indicated, communication of such documents between titling and registration states should be between them and not through the owner. This will reduce the possibilities of fraud.

Further, an owner planning to register a vessel in a non-title state and then apply for federal documentation (whether the vessel is new or used) should be required to tell the registration state that he plans to federally document the vessel. This would alert the registration state to look for a notice from the NVDC. If CG revises its CG 1258 to call for

State of Numbering if the vessel is not to be titled in a state, NVDC would be alerted to notify the state that an application for federal documentation had been filed and provide the official CG number for the state to use on the certificate of registration instead of state numbers. The state registration law could require this process to the extent that the CG official number is available before registration, a cost-offset for sure. Some states use this process when parties are quick enough to invoke it before titling the vessel. In a title state, such process could lead to not having to obtain and surrender a title. Although more efficient, this process could be objectionable to banks which are often concerned that the COD may not issue and that, in such case, they would be without security interest perfection. One possible answer I can see to such an objection is to keep the preferred mortgage that would have been filed with the federal application alive for a reasonable period of time until a state certificate of title could be issued and treat the title as effective from the date of issuance of the certificate of registration. The only other solution might be to get a certificate of title from another state and surrender that. This requires discussion because there is no easy perfect answer. If a registration certificate issues with the state numbers, when would you correct it and substitute the official federal number? This might be handled by using the state numbers on a temporary certificate of registration good for 60 days and using the official federal number on the permanent certificate of registration issued subsequently. If the state registration process is initiated first, CG might have to rely on a scan of the Builder's Certificate, unless the state were willing to mail the original BC to the CG.

2. Previously documented, registered or titled vessel entering state registration/titling:

a. From a foreign national registry: A certificate or letter of deletion from registration or a closed abstract of title marked "vessel deleted" at the end.

b. From a foreign provincial, state or local registry: To be added.

c. From U.S. federal documentation:

(1) if the owner of the vessel is remaining as owner, a deletion letter from CG or an abstract marked closed and vessel deleted. Since this may take 5-10 days to issue, parties may have to settle for requesting a letter from NVDC

acknowledging receipt of the request for deletion which could be faxed back the same day or the next. Presumably, no financing will hinge on such a move so the delay should be inconsequential. The only reasons I can see for this, are if the owner changes his nationality and becomes an alien or wants to achieve some temporary state tax exemption or intends to perpetrate credit or other fraud.

(2) if the documented owner is transferring ownership to another person who cannot own a documented vessel or wishes to state title or register it, one of the parties should file a duplicate original of the bill of sale with the NVDC so that creditors and others dealing with the documented owner will know that he no longer owns the vessel. Such filing is optional under federal law and rules. If neither Congress nor the CG will make this mandatory, states through their registration or title laws, as appropriate, should require it as part of their practices to prevent the use of the federal filing to make creditors and others believe that the seller remains the owner of the vessel. This can hurt the buyer and his creditors in case the sale subsequently is found to be fraudulent under state law and the seller goes bankrupt.

Not filing the bill of sale and not requiring a deletion certificate enables the seller to keep any mortgage of record, even if it has been paid off by the buyer. This is a notorious practice which should be eliminated to the extent possible. In such case, while some might argue that a deletion letter is unnecessary, if there is a preferred mortgage still recorded against the vessel and it has been satisfied, a deletion letter would force the seller to obtain a discharge from the mortgagee, file it and thereby clear up the record. The deletion certificate will not be issued while a mortgage remains outstanding of record. The only circumstance under which the record at CG should remain open on a sold vessel to be state titled is if the buyer assumes a mortgage on record against the vessel or somehow becomes a substitute for the seller, as debtor on a mortgage to secure a line of credit or guarantee entered into by the seller.

(3) In (1) or (2) above, proof of filing with the NVDC should be submitted to the registration state. This might save time and expense for a potential purchaser searching the records of the registration state with respect to the vessel. (Note: as indicated above, the state of principal operation is not necessarily the primary residence or place of formation of the debtor, so that there may be a disconnect between where one

must register(number) and where a UCC-1 might have to be filed to perfect a security interest.

Also note: the MLA has written to the Commandant of the Coast Guard as far back as 2002 asking for a rule to obligate the mortgagee whose mortgage has been fully satisfied to file a discharge directly and just notify other parties with a need to know, such as the debtor, the buyer and closing counsel or documentation service if the payoff is the result of a sale of the vessel. No action was ever taken on this but I lobbied several large banks which did much of the recreational boat financing to initiate the process on their own. Initially, there was a pretty robust response but the supplying of copies to persons with a need to know was not so good. This has to be made mandatory to work smoothly. The same issue arises on state discharges. But those would have to be treated in UCOTA for title states and in the UCC for non-title states. I have discussed the state politics on this in other memos to NCCUSL.

(d) From state title to non-title (registration only) state:

(1) Due to change of state of principal operation. The same issues discussed above for a new registration and titling of a vessel arise when the owner moves the vessel to a lake or other site in another state but continues to reside in a title state where the vessel presumably is already titled. If the new state of principal operation is a registration only state, what proof of ownership should the new state of principal operation require? Presumably the same scanned copy of the certificate of title certified by the issuing state to be genuine and in full force and effect. Certainly, the owner should not be pulling out of his pocket a copy of the MCO foolishly returned to him. Again, the same certificate of registration/title marking issues arise as in the original residence-formation vs. SOPO split. If the owner both resided or was formed in the title state and operated the vessel there, then we are only talking about splitting out the registration in such case. Should we add a requirement to present the registration certificate of the former registration state so that the new registration state can hold it or scan and destroy it? What happens if the vessel is already documented when the SOPO changes? We certainly have the federal official number so it should be no problem to give that to the new registration state.

Whether the registration law amendments I am proposing will need to cover a title state to title state transfer will depend on whether the state's law provides that only the state which numbers may title the same vessel. We already know we

must address this issue. Also, not all states title the same vessels. This also must be taken into account in drafting.

In the case of a vessel covered by an electronic certificate of title, the certified electronic scan concept should work. Otherwise, the electronic title would have to be converted to a paper title which could be a mess, especially in a state where the title is mailed to the owner not the secured party. The current policy of the CG is that in such case any electronic certificate of title must first be converted to a paper title before it can be surrendered.

To get the process of limited modifications to vessel registration acts started, I think we first have to move forward with UCOTA and the title surrender bill and see if we are going to include non-title states in the process or do what the CG did with VIS and ignore them, except for letting them report what data they do collect. If we decide to include them to the extent proposed above, then we should set forth the basic points we would make mandatory and see if they conflict with anything that currently exists in state registration laws, regs or policies would just require a change in procedures which could be made more forceful by statutory change coterminous with UCOTA.

Cordially,

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