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Alvin C. Harrell, Professor of Law
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Dear Mr. Harrell,

The National Consumer Law Center will be unable to attend the January 23 through 25, 2004 COTA meeting, but we have just received your January 12, 2004 draft, and continue to have significant concerns about the fundamental approach being taken in the COTA. Consequently, we ask that you distribute this letter to the Committee *in advance* of the meeting. If this is not possible, we would appreciate your providing us with the contact information for Committee members so that NCLC can send these comments out to individual members in advance of the meeting.

General

We have commented on prior drafts by letters of March 31, 2003 and May 7, 2003. We are distressed that the thrust of our comments in both letters has been ignored, and believe that this Committee is creating a seriously flawed and unbalanced Act. The January 12 COTA ignores law enforcement concerns and the rights of motor vehicle purchasers, and appears drafted solely for the convenience of automobile lenders. The fact that automobile lenders may predominate in the audience at your meetings is no reason for NCCUSL to enact a model that ignores many of the fundamental goals of a certificate of title act.

We believe that the Committee must fundamentally change the way it is approaching this model act. The Committee should further educate itself as to the law enforcement functions of a certificate of title act, and should address the concerns of law enforcement and motor vehicle purchasers, whether or not such parties attend your meetings.

This is not a new concern of ours. Our March 31 and May 7 letters also complained that earlier drafts demonstrated an imbalance favoring creditor concerns, while virtually ignoring the fundamental purposes of a certificate of title act to address the needs of law enforcement and vehicle purchasers. In fact, an April 11 letter from the Committee's Reporter gives the impression that the federal Odometer Act is an obstacle that your Committee must find a way to accomodate. We will not reiterate the specific comments found in NCLC's earlier letters, but only touch on two examples of COTA failings.

Existing Draft Continues to Ignore Law Enforcement Concerns

As we have pointed out concerning prior drafts, the Janaury 12, 2004 draft is far weaker on a law enforcement scale than <u>any</u> of the 50 existing certificate of title laws. As found by NHTSA, odometer fraud is in the billions of dollars a year. Salvage fraud is even more extensive. Other types of title fraud are too many to list here. It is common knowledge among those in law enforcement that used cars with

troubled histories are laundered through multiple transfers, involving auction sales and sales from one wholesaler or dealer to another, across state lines, back again to the original state, and the like. Central to law enforcement is the ability to track transfers and representations concerning a vehicle on the title itself, reviewing the original of title documents for alterations and forgeries, and following the chain of title. Fraudulent dealers often attempt to avoid this law enforcement scrutiny through the creative use of reassignment forms and powers of attorney. Every state certificate of title statute creates some kind of limits on the use of reassignment forms or powers of attorney (as explained in our prior comments). The one certificate of title statute that provides no such protection for the integrity of the chain of title is the NCCUSL draft.

Even more damning, the NCCUSL draft creates no safeguards for electronic titling. Obviously, an electronic titling system will create new avenues of fraud, and complicate law enforcement investigations. For starters, every state uses a secure printing process for all paper title documents, but the COTA requires no secure process for electronic titling. Nevertheless, many in law enforcement are excited about electronic titling for one fundamental reason: it will mean that every reassignment of title, with the information that must be disclosed on that reassignment, can be reported immediately to the DMV, and easily captured on an electronic database. The major flaw of any motor vehicle database in use today is that it relies on initial information found on title documents and not that found on subsequent reassignments of that title. Electronic titling provides a way to fix this problem.

But surpisingly, the COTA has no requirement that electronic reassignments be reported to the DMV. This is particularly surprising since page 4 of the January 12 draft quotes at length concerning the National Motor Vehicle Title Information System. But the biggest loophole in the NMVTIS system will be the COTA's failure to require the reporting of electronic reassignments to a government agency and hence to that system. If the Committee's view is that this requirement should be left up to the individual states, this flies in the face of the Committee's desire to assist the NMVTIS, since data will thus be inconsistently provided and incomplete.

Reporting of electronic reassignments will be invaluable not just to the NMVTIS. A number of databases available only to law enforcement or insurance companies are now in operation, as are a number of databases that are used extensively by the public, such as Carfax. These databases are relied upon to indicate odometer, salvage, and other types of title fraud. But an essential failing of every one of these databases is their inability with a paper titling system to capture information from reassignments.

The COTA comments (at pages 4 and 5) appear to dismiss the notion that the COTA should respond to consumer protection concerns. But a fundamental function of a vehicle title system is to prevent fraud related to vehicle titles. The best way to ferret out that fraud is through the use of vehicle title databases and investigation of the original title chain. COTA has a responsibility to be responsive to those needs.

COTA should not reject this requirement that electronic reassignments be reported, by resorting to the fallacious argument that electronic titling should be treated the same as paper titling. And it surely makes no sense to insure equal treatment by totally ignoring law enforcement concerns for both paper and electronic titles. The obvious solution is for COTA to provide for law enforcement concerns as applicable to paper titles and provide for other, but similar concerns whenever electronic titles are used.

Existing Draft Changes Article 9 To Allow Creditors to Engage in Undue Coercion of Debtors

The Comments to Section 20 state the section is based on § 9-619 and "largely follows the language of that section." No explanation is given why the COTA alters § 9-619 to allow transfer of title before repossession, where § 9-619 clearly allows transfer only after repossession. This is not a small change, and is another indication of evident bias in favor of creditors.

The COTA draft allows a transfer of title after "default," as long as the creditor intends to repossess the vehicle. "Default" includes any violation of the terms of the credit agreement, including one payment two weeks late. The draft even allows transfer of title before the debt is accelerated. No provision is made for a right to cure statute, so title transfer could occur before the right to cure period has expired. Often consumers make late payments just before repossession, staving off repossession. But, under the COTA draft, the creditor may already have title even before the repossession, even though the consumer is now current on payments.

Nor is there any reason the creditor must rush to transfer title. After repossession, the creditor must provide notice to the consumer and cannot sell the vehicle too soon. This provides ample time for the creditor to seek a new title. In fact, in the typical auction sale not involving a repossession title, the actual title catches up to the buyer some time after the auction. There is no justification for a creditor to obtain title while the consumer still possesses the vehicle, other than for a creditor to use this title change as undue leverage on the consumer. And there is certainly no justification provided in the draft to change the clear language of § 9-619.

Section 9-619 also applies to transfers of record other than certificates of motor vehicle title. For these other transfers of record, it may be justified to skip over the secured party and transfer record directly from the debtor to the secured party's transferee. But for motor vehicle titles, federal law requires that the transfer from the secured creditor to a subsequent transferee be provided for on a certificate of title. That is, the secured creditor cannot be skipped over in the chain of title. In addition, skipping the secured creditor in the chain of title abets various forms of fraud on subsequent purchasers. Despite our past comments on this issue, Section 20 continues to enable vehicle title skipping, a practice generally abhorred under existing law.

In summary, we are gravely concerned that the COTA continues to ignore the needs of law enforcement and vehicle purchasers, and focuses instead on the self-interest of vehicle lenders. We hope some way can be found for the COTA to include these other needs, or the COTA drafting process should be abandoned.

Thank you for the opportunity to present these views.

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