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MEMORANDUM

To: EM Miller Jr.
Stephen Sepinuck

CC: William Henning
Bruce A. King
James Stewart
Cindy Squires

From: David McL. Williams

Date: March 18, 2011

Re: UCOTAV – March 9, 2011 Draft – Substantive Comments

Dear EM and Steve,

The recent memorandum from EM asked for substantive comments by today. I offer the following comments on the March 9, 2011 draft. In considering these I have been benefited greatly by Bruce King's memorandum of March 16. Although my role is as ABA Advisor, I have not had time to clear these comments with anyone in the ABA and thus they are solely my own.

Section 2(a)(4) – Certificate of Origin. This definition of “Certificate of origin” permits, but does not require, inclusion of evidence of the facts of build (a “Builder’s Certificate” under 46 CFR § 67.99) . There should be included a comment which should make clear that a Builder’s Certificate could be incorporated into a “certificate of origin” although it need not necessarily be included. This would permit the Coast Guard to someday authorize this combination of the documents of origin of a vessel.

Section 2(a)(27) – State of Principal Use. I understand the Committee’s intent to follow closely the requirements of 33 CFR § 173.3(h) and (i) in this revised definition of “state of principal use.” I of course regretted to miss the Committee’s discussion of this topic on March 5 and worry about enactability. But regardless of the decision to define “use” not to include “mooring and storage and readiness for use in the jurisdiction where stored,” because of the NPRM now underway, 75 Fed. Reg. 49869 (August 16, 2010), I believe the Coast Guard soon may revise Section 173.3(h) and (i) to reflect the use of the verb “operated” in 46 USC §

12301(a). Because that has not yet occurred, I would recommend the definition at 2(a)(27) use a reference to the definition “in 33 CFR § 173, as amended”, or language to that effect. If a definition by reference will work for the definition of “documented vessel” and “hull identification number,” a definition by reference should work here as well. Use of this device would underscore the relevance of the regulation of 33 CFR § 187.304 requiring all vessels required to be numbered in a state under 46 USC chapter 123 be titled only in that state, if that state issues title to that class of vessels. Also, it would accommodate the possibility that the current Coast Guard rule making is not the last word on the definitional issue.

Section 2(a)(30) – Intangible Property. Bruce is well schooled in both admiralty and the unique issues that arise in fishing law, but I still have concern with his recommendation to specifically exclude “intangible property” from the definition of a “vessel.” Perhaps this derives from the fact if not wrongly decided, the case in question, Gowen v. F/V Quality One, 244 F.3d 64 (1st Cir. 2001), holding that the vessel’s fishing permits were deemed an “appurtenance of the vessel” for purposes of an *in rem* foreclosure of wharfage and repair liens in admiralty, now should be strictly limited to its facts in view of the implementation of a statutory regime for perfection of security interests in such fishing permits. 16 USC § 1855 (h). I fear that inclusion of the term “intangible property” as excluded from the meaning of “vessel” for purposes of the Act might suggest that fishing permits ordinarily are included as an appurtenance of the vessel for other purposes. Since UCOTAV strictly does not involve admiralty, will rarely apply to commercial vessels at all, and even Gowen did not hold the fishing permit to be an appurtenance of the vessel for purposes of a preferred mortgage, I’m not sure we need to get into this. Other circuits may someday disagree with Gowen.

Excluding “intangible property” also may have some unexpected consequences. From a state law perspective, “intangible property” seems pretty clearly not within the meaning of “watercraft used or capable of being used a means of transportation on water,” in the ordinary sense of those words in 2(a)(30). Yet monies payable for the carriage of cargo on a vessel, known in admiralty as “freights,” have been considered by many courts to be appurtenances of the vessel subject to the reach of a preferred mortgage during foreclosure. It would seem anomalous for a traditional (46 USC § 31322(a)) to include the freights of a vessel in an *in rem* foreclosure action but for a “deemed” (46 USC § 31322(d)) state title “preferred mortgage” not to reach those same freights in an *in rem* foreclosure brought under 46 USC § 31325(b)(1).

So as to permit the state title “deemed” preferred mortgage to reach a vessel’s freights without perpetuating the holding in Gowen, I would suggest that the term “intangible property” not be included in the exclusion portion of the definition at 2(a)(30) but than an ample explanation be given in the Comment why the term is not intended to cover fishing permits subject to 16 USC § 1855(h). For those states such as Alaska that may feel the statutory exclusion is necessary for enactment, perhaps bracketed language could be included, so at least the issue is addressed by a uniform alternative.

Section 3 – Supplemental Law – Admiralty. Bruce and I discussed whether UCOTAV should be supplemented by the principles of admiralty. I conclude not. A “preferred mortgage” is

a combination of a chattel mortgage valid under principles of state law, reflected primarily in 46 USC § 31321, and the legislative expansion of the reach of Constitutional admiralty reflected primarily in 46 USC §§ 31322 and 31325. Nothing in UCOTAV actually affects the operation of federal law; rather, UCOTAV will define what state law security interest perfected by title notation is qualified to be “deemed” to be a preferred mortgage under existing federal law, 46 USC § 31322(d). Once the mortgage is “deemed” to be preferred, federal law will permit certain special processes of foreclosure without regard to the state law. This distinction is further reason, in my view, not to get into the issue of amending the definition of a “vessel” for purposes of UCOTAV to exclude intangible property.

Section 4(b) - Governing Law. I agree with Bruce on amending these provisions on governing law to insert the word “valid” in the first line of Section 4(b) in order to conform that section more closely to UCC Section 9-303(b).

Insertion of the word “valid” seems to help address the case of determining what law governs in the case where a certificate of title is canceled under Section 7(e)(1). I remain perplexed how the law of the issuing jurisdiction can continue to “cover” a certificate of title cancelled under Section 7(e)(2) as Section 4 (a) seems to suggest, but in regards to perfection, I would urge that a note such as is found in UCC Section 9-303, Comment note 4, be included.

Section 5(a)- “Owner.” I agree with the decision to refer in the first line of Section 5(a) to “the owner” rather than “an owner” of a vessel as required to apply for the certificate of title, but because of the ambiguity I would urge that the issue of agency among owners be addressed in a comment. Compare Section 6(a), using “an owner”.

Section 6(b)(2) – Addresses of Other Owners. The requirement for only the names of all “other owners” of a vessel and not the addresses of such other owners could be problematic in view of the new requirement of Section 7(f)(2) that “all owners” who are “indicated in the files of the office” be served notice of an opportunity of a hearing. I would recommend that each person to be identified as an owner of a vessel be required by 6(b)(2) to submit in the application an address at which they can be served.

Section 9(b) – Duplicate Certificates of Title after Branding. Bruce makes an excellent point concerning the disposition of an existing certificate of title in the event of the issuance of a new (replacement) certificate to reflect a brand. I would imagine that the requirements of Section 21, Replacement of Certificate of Title, would apply. I would recommend that fact be indicated in Section 9. This might include replacing the word “new” in Section 9(a)(1) with the word “replacement.” The same substitution should be made for the word “new” in the third line of Section 9(d). The point could be amplified in a comment.

Section 10(a)(3) – “File”. The use of the term “file” is perhaps ambiguous here. The “file” might or not include the application and the information submitted with the application as per Section 10(a)(2). Because this is such an important, and sensitive, issue, I would urge a comment to make clear the intention. In Section 10(b), I believe Bruce King is correct that the

files should be accessible by state boat number, as well as by HIN and the name of the owner of record. The state boat number is often only the only visible information available to one who does not know the owners name.

Section 14(g) - Vessels Excluded. I agree with Bruce King's point that the applicability of the various portions of Section 14 could be clarified. A documented vessel and a foreign documented vessel are different, however, from a barge, a vessel under construction, and inventory vessel because no certificate of title is permitted for the former. Certainly therefore those two types of vessels should not be subject to Section 14(a), but they also are not subject Section 14(b)-(f). I would suggest simply that Steve take a look at how best to simplify and clarify the inclusions and exclusions amongst the various vessel categories.

Section 14(h) – Deletion from Documentation. I agree that a vessel is “deleted from documentation” under 46 USC § 12105 or is “deleted” from documentation or a registry under the laws of a foreign country. I think it vague to speak of the “cancellation” of a certificate of documentation or a foreign certificate of registry, however. See 46 USC § 12136, which speaks of a certificate of documentation as being “invalid, “or “ surrendered,” or “surrendered with approval of the Secretary,” but with the documented vessel deemed to continue to be documented for purposes of “an instrument filed or recorded before the date of invalidation.”

I see problems with inserting the words “of an interest in the vessel” as Bruce has proposed. A mortgage need not “include the whole of the vessel” in order to be filed and recorded under Section 31321, but the mortgage must include “the whole of the vessel” in order to be preferred under Section 31322(a) or to be deemed to be a preferred mortgage under 31322(d)(1). I would suggest that subsection (h) could be written more simply as follows:

- (1) If a vessel is deleted as documented vessel, an unsatisfied security interest in the vessel which, immediately prior to the deletion, was valid against third parties as a result of compliance with 46 USC 31321 remains perfected until the earlier of four months after deletion of the vessel or the time the security interest becomes perfected under this act.
- (2) If a foreign-documented vessel is deleted from its registry as a foreign-documented vessel, an unsatisfied mortgage, hypothecation, or similar charge established as security on that vessel which is a preferred mortgage within the meaning of 46 USC § 31301(6)(B) immediately before deletion remains perfected until the earlier of four months after deletion or the security interest becomes perfected under this act.

I am thinking that it is not redundant to modify “security interest” and “mortgage” with the adjective “unsatisfied” because the security interest or mortgage might or might not be released of record from the NVDC or foreign registry and might be

paid down to zero but still intended to be valid at the time of the transfer into state titling.

Section 21(a) – Replacement for Branding I believe Section 21(a) should provide for a replacement certificate of title for purposes of branding under Section 9. This would tie the two sections together and more clearly help address the issue of duplicate certificates identified by Bruce.

Section 27(e) – Transition. I have some concern about the notion of giving a secured party the authority to apply for certificate of title on an owner's behalf of providing in a statute for acceleration of the debt. These seem to be substantive rights which may go lot beyond the scope of UCOTAV.