



MEMORANDUM

To: Ed Smith, Chair Joint Review Committee for Article 9
From: Professor Stephen L. Sepinuck
Date: February 13, 2009
Re: The Definition of "Certificate of Title" § 9-102(a)(10)

Section 9-102(a)(1) defines a "certificate of title" to mean "a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." The suggestion has been made that this definition may be too narrow and inadvertently exclude the statutes of several states. In other words, some state statutes may not require notation of the security interest on the COT "as a condition or result of the security interest's obtaining priority over the rights of a lien creditor." I volunteered to review the motor vehicle COT statute in each state and report back.

It is worth noting that, if the definition is too narrow, the problem can manifest itself in several ways. First, it is relevant to how to perfect a security interest in a motor vehicle for which the state has issued a certificate of title. Section 9-311(a)(2) in each state is supposed to expressly list and defer to that state's COT statute(s). However, as indicated in the first chart reproduced below, eleven states did not expressly list their COT statutes in their version of § 9-311(a)(2). Instead, they simply included a general reference to certificate of title statutes (or, in one case, stated incorrectly that there are no such statutes). If the definition is too narrow, then those states may not really be deferring to their own COT statute(s).

Second, Article 9 references COTs in sections 9-303(a)–(c), 9-313(b), 9-316(c)–(e), 9-337, and 9-619(b). If the definition is too narrow, these references would not include the COTs of some or several other states. This could present a significant problem, particularly with respect to the references in sections 9-303 and 9-316, which deal with choice of law and maintaining perfection when the collateral moves from one state to another. For example, even if a state properly references its own COT statute in its own § 9-311(a)(2), it may not recognize another state's statute as qualifying as a COT statute, thereby making § 9-316(d) inapplicable.

To evaluate whether there really is a problem and, if so, how serious it is, I reviewed the motor vehicle COT statute in each state and in the District of Columbia. I did not review the COT statutes for other goods, such as manufactured homes or vessels. In conducting the review, I looked

to see: (i) if the COT statute expressly or impliedly references priority over lien creditors;¹ and (ii) if actual notation of the COT was necessary to obtain perfection. Making the latter determination is difficult. Eleven states have enacted the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act,² which provides that perfection occurs upon delivery of the application and required fee to the relevant department, § 20(b), without any express requirement that the COT actually be issued or be issued correctly. That Act does also require the department to list the lienholder on the certificate, § 9(a)(3), however, it remains unclear what happens if the department fails to issue the certificate at all or issues it without noting the lienholder's interest.

As indicated on the second chart, the statutes of seven states appear to say nothing at all about priority over lien creditors. The vast majority of the remainder provide that perfection of a security interest in a certificate motor vehicle occurs upon delivery of the required paperwork and accompanying fee to the agency that issues the certificate. Although many of these states also require the agency to note the lien on the certificate, the statutes date perfection from the time of delivery and imply that perfection occurs even if the agency fails either to issue a certificate or to note the lien on the certificate. Only the statutes of Nebraska, Ohio, South Dakota, Utah, Wyoming and the District of Columbia seem clearly within the definition in Article 9.

One possible solution to the problem would be to modify the definition of "certificate of title" as follows:

a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate or on the documentation provided to the issuer of the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

This deals with the bulk of the problem, although it still arguably does not encompass the statutes of those states that seem to say nothing about perfection or priority in their COT statutes. Another possible solution – one that removes the problem entirely but risks being overly broad – would be the following:

a certificate of title with respect to which a statute ~~provides~~ requires the security interest in question to be indicated on the certificate or on the documentation provided to the issuer of the certificate ~~as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.~~

I hope this memorandum provides the information that you need. Please let me know if I can be of any further assistance.

¹ I treated a reference to "perfection" as a reference to priority over lien creditors.

² Alabama, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Rhode Island, and Vermont.

Chart One			
State	Version of § 9-311	Motor Vehicle Statute(s) Listed	Does Not List Statutes
Alabama	§ 7-9A-311		✓
Alaska	§ 45.29.311	§ 28.10	
Arizona	§ 47-9311	§ 28-2153	
Arkansas	§ 4-9-311	§§ 27-14-801 – 27-14-807	
California	Com. Code § 9311	Vehicle Code	
Colorado	§ 4-9-311		✓
Connecticut	§ 42a-9-311	various	
Delaware	6 Del. Code § 9-311	Tit. 21, ch. 23, subch. II	
D.C.	§ 28:9-311	§ 50-1201, et seq.	
Florida	§ 679.3111		✓
Georgia	§ 11-9-311	Tit. 40, ch. 3	
Hawaii	§ 490:9-311	Chapter 286	
Idaho	§ 28-9-311	§ 49-510	
Illinois	810 ILCS 5/9-311	Illinois Vehicle Code	
Indiana	§ 26-1-9.1-311		✓
Iowa	§ 554.9311	Chapter 321	
Kansas	§ 84-9-311	§ 8-135*	
Kentucky	§ 355.9-311	Chapter 186A	
Louisiana	§ 10:9-311		✓**
Maine	§ 9-1311	Tit. 29-A, ch. 7	
Maryland	Com. Law § 9-311		✓
Massachusetts	106 § 9-311	Chapter 90D	
Michigan	§ 440.9311	§§ 257.201 – 257.259	
Minnesota	§ 336.9-311	168A.01 – 168A.31	
Mississippi	§ 75-9-311	§§ 63-21-1 – 63-21-77	
Missouri	§ 400.9-311	§§ 301.600 – 301.661	
Montana	§ 30-9A-311	Title 23 or 61	
Nebraska	UCC § 9-311	§ 60-164	
Nevada	§ 104.9311	§§ 482.423 – 482.431	

Chart One			
State	Version of § 9-311	Motor Vehicle Statute(s) Listed	Does Not List Statutes
New Hampshire	§ 382-A:9-311	Title 261	
New Jersey	§ 12A:9-311	§ 39:10-1 et seq.	
New Mexico	§ 55-9-311	Chapter 66	
New York	UCC § 9-311		✓
North Carolina	§ 25-9-311	§ 20-58	
North Dakota	§ 41-09-31	§ 35-01-05.1	
Ohio	§ 1309.311	Chs. 1547, 1548, 4505, 4519, 5309	
Oklahoma	12A § 1-9-311	Tit. 47, § 1110	
Oregon	§ 79.0311	Ch. 830, Or. Vehicle Code	
Pennsylvania	13 § 9311		✓
Rhode Island	§ 6A-9-311	Tit. 31, ch. 3.1; Tit. 46, ch. 22.1	
South Carolina	§ 36-9-311	Tit. 56, ch. 19	
South Dakota	§ 57A-9-311		✓
Tennessee	§ 47-9-311	Tit. 55, ch. 3	
Texas	Bus. & Cm. § 9.311	Chapter 501	
Utah	§ 70A-9a-311	§ 41-1a-601	
Vermont	9A § 9-311	23 V.S.A. chapter 36	
Virgin Islands	11A § 9-311	Tit. 20, ch. 32	
Virginia	§ 8.9A-311		✓
Washington	62A.9A-311	§ 46.12.095	
West Virginia	§ 46-9-311	Chapter 17a	
Wisconsin	§ 409.311	§ 342.19	
Wyoming	§ 34.1-9-311		✓†

* Noted in connection with a statement about perfection, but not expressly identified as a qualifying certificate of title statute.

** State seems to have omitted § 9-311(a)(2). However, § 32:701 et seq. is referenced in state's version § 9-311(b).

† The state's § 9-311(a)(2) expressly states that "there are no statutes" but in fact title 31 does provide for certificates of title for motor vehicles.

Chart Two			
State	COT statute	Does Not Refer to Perfection or Lien Creditors	Seems to Require Only Submission
Alabama	§§ 32-8-1 – 32-8-88		✓ § 32-8-61(b)
Alaska	§ 28.10.371 et seq.		✓ § 28-10-391(b)
Arizona	§ 28-2153	✓ ³	
Arkansas	§§ 27-14-801–27-14-807		✓ § 27-14-805(b)
California	Vehicle Code		✓ §§ 6300–6303
Colorado	§ 42-6-101, et seq.	✓	✓ § 42-6-121(5)
Connecticut	§§ 14-165 – 14-211		✓ § 14-185(a)
Delaware	Tit. 21, ch. 23, subch. II	✓ ⁴	
D.C.	§ 50-1201, et seq.		
Florida	§ 319.001, et seq.		⁵
Georgia	§§ 40-3-1 – 40-3-95		✓ § 40-3-50(b)
Hawaii	Chapter 286	✓ ⁶	
Idaho	§ 49-501, et seq.		✓ § 49-510(1), (2)

³ Indicates that the department shall issue certificates “with space for notation of liens and encumbrances,” § 28-2055(a), but says nothing about priority and does not appear to require that liens be noted on the certificates.

⁴ Provides for the priority of liens “set out in the application for a certificate of title,” § 2337, but does not expressly refer to lien creditors or others whose claim would not normally appear on the application.

⁵ Section 319.27 requires that the lien be noted on the certificate but then says it shall be effective when notice has been filed with the department.

⁶ Does not appear to require notation of liens on certificates of title.

Chart Two			
State	COT statute	Does Not Refer to Perfection or Lien Creditors	Seems to Require Only Submission
Illinois	Illinois Vehicle Code		✓ 65 ¶ 5/3-202(b)
Indiana	§ 9-17-1-1 et seq.	✓ ⁷	
Iowa	Chapter 321		✓ § 321-50 ⁸
Kansas	§ 8-135		✓ § 8-135(5), (6)
Kentucky	Chapter 186A		✓ § 186A.195(5) ⁹
Louisiana	Tit. 32, ch. 4		✓ § 710(a) ¹⁰
Maine	Tit. 29-A, ch. 7		✓ § 702(2), (3)
Maryland	§ 13-101, et seq.		✓ § 13-202(b)
Massachusetts	Chapter 90D		✓ § 21
Michigan	§§ 257.201 – 257.259		✓ § 257.217(10) ¹¹

⁷ Requires an application for a certificate to indicate all liens, § 9-17-4-4, but does not appear to contain any priority rules or to indicate when perfection occurs.

⁸ Expressly provides that “[t]he date of delivery shall be the date of perfection of the security interest in the vehicle, regardless of the date the security interest is noted on the certificate of title.” § 321-50(1). However, also mandates “that county treasurer shall note the security interest and the date of perfection of the security interest on the certificate of title.” § 321-50(3).

⁹ “The security interest noted on the certificate of title shall be deemed perfected at the time the security interest attaches if the secured party tenders the required fees and submits a properly completed title lien statement and application for first title or, in the case of property previously titled in the name of its debtor, the certificate of title to the appropriate county clerk within twenty (20) days of attachment. Otherwise, the security interest shall be deemed perfected at the time that such fees are tendered and such documents are submitted to the appropriate county clerk.”

¹⁰ Provides for perfection “as of the time the financing statement is received by the Department . . . so long as such receipt is subsequently validated by the secretary of the Department.”

¹¹ “Receipt by the secretary of state of a properly tendered application for a certificate of title on which a security interest in a vehicle is to be indicated is a condition of perfection of a security interest in the vehicle and is equivalent to filing a financing statement . . . with respect to the vehicle.”

Chart Two			
State	COT statute	Does Not Refer to Perfection or Lien Creditors	Seems to Require Only Submission
Minnesota	§§ 168A.01 – 168A.31		✓ § 168A.17(2)
Mississippi	§§ 63-21-1 – 63-21-77		✓ § 63-21-43(2)(a)
Missouri	§§ 301.600 – 301.661		✓ § 301.600(2) ¹²
Montana	Title 61		✓ § 61-3-103(1)(c)
Nebraska	§ 60-164		
Nevada	§§ 482.423 – 482.431	✓	
New Hampshire	Title 261		✓ § 261.24(II)
New Jersey	§ 39:10-1 et seq.	✓ ¹³	
New Mexico	Chapter 66		✓ § 66-3-202(a) ¹⁴
New York	§§ 2101 – 2135		✓ § 2118(b)
North Carolina	§ 20-58		✓ § 20-58.2
North Dakota	§ 35-01-05.1		15

¹² Section 301.620(4) mandates that the director of revenue “issue a new certificate of ownership containing the name and address of the new lienholder.”

¹³ Several provisions require that security interests be noted on the certificate, *see* §§ 39:10-9; 39:10-11(b), (c), but none seems to deal with priority or perfection.

¹⁴ “[T]he filing of an application with the division and the issuance of a new certificate of title by the division as provided in § 66-3-201 constitute constructive notice of all security interests in the vehicle *described in the application*” (emphasis added). It is unclear whether the lien that is identified in the application but not noted on the certificate is perfected.

¹⁵ Section 35-01-05.1 provides for perfection if “the security interest is clearly indicated upon the certificate of title to the vehicle or . . . such certificate of title is in the possession of the secured party.”

Chart Two			
State	COT statute	Does Not Refer to Perfection or Lien Creditors	Seems to Require Only Submission
Ohio	Ch. 4505		
Oklahoma	Tit. 47, § 1105 et seq.		✓ § 1110(a)(1)
Oregon	Ch. 830, Or. Vehicle Code		✓ § 803.097(1)
Pennsylvania	Tit. 75, § 1101 et seq.		✓ § 1132.1(a)
Rhode Island	§§ 31-3.1-1 – 31-3.1-38		✓ § 31-3.1-19(b)
South Carolina	Tit. 56, ch. 19		✓ § 56-19-630
South Dakota	§ 32-3-1, et seq.		
Tennessee	Tit. 55, ch. 3		✓ § 55-3-126(b)
Texas	Chapter 501		✓ § 501.113(a)
Utah	§ 41-1a-601		¹⁶
Vermont	23 V.S.A. chapter 21		✓ § 2042(b)
Virginia	§ 46.2-600 et seq.		✓ § 46.2-639 ¹⁷
Washington	§ 46.12.005 et seq.		✓ § 46.12.095
West Virginia	Chapter 17a		✓ §§ 17A-4A-3 & -4(a)

¹⁶ Perfection requires compliance with sections 41-1a-602 through 41-1a-606. These in turn require submission of information about the lien to the division and issuance of a certificate. Issuance of the new certificate then constitutes perfection for “all liens and encumbrances against the vehicle.” The statute does not mention what happens if the certificate fails to identify a lien.

¹⁷ Section 46.2-637 requires a security interest to be noted on the certificate of title. Section 46.2-639 provides that “[i]f application for the registration or recordation of a security interest to be placed on a motor vehicle . . . is filed with the Department, it shall be deemed perfected as of the date of filing.” This suggests that actual notation of the certificate is not required to perfect.

Chart Two			
State	COT statute	Does Not Refer to Perfection or Lien Creditors	Seems to Require Only Submission
Wisconsin	§ 342.01 et seq.		✓ § 342.19(2)
Wyoming	Tit. 31, Ch. 2		¹⁸

¹⁸ Section 31-2-801(a) requires both filing a financing statement and notation of the lien on the certificate of title to perfect.