

Memo

To: EM Miller, Ch DC UCOTA-Vessels; cc: David c.
William, ABA Adv

From: Robert S. Fisher, Esq.

Date: May 1, 2009

Re: Updated Issues List for May 6 Conference Call

EM:

Here is my updated list, as promised. It does not purport to be complete but it covers issues in addition to my earlier lists. I suspect we will discover more of them as the project progresses.

1. Should NCCUSL propose only a stand-alone Uniform Certificate of Title Law for Vessels ("UCOTA-V")?
2. Which vessels should any State's ultimate UCOTA-V cover? Factors: Model year, form of propulsion, length, nature of owner; any national security exclusions? Motors?
3. If the decision is taken to cover all, at least insofar as age is a consideration, how flexible a phase-in should be allowed or should NCCUSL merely announce an intent to cover all of a certain size and then use registration renewal or a similar device to space out the volume of conversions?
4. Treatment of security interest perfections under pre-title laws?
5. If vessel's state of principal operation ("SOPO") changes from title state to non-title state, but owner still resides in titling state which will only title a vessel registered in its state, should title remain alive or must lender file UCC-1 in titling State? Effect of computer programs already in effect that will not let the second or subsequent year's registration issue without a title?

6. Should NCCUSL adopt a Uniform Boat Registration Act ("UBRA") as well as the Uniform Boat Title Act ("UCOTA-V")?
7. What should be done with boats with improper HINs? Correct on registration renewal or before titling?
8. Should there be a uniform practice for issuing a new HIN and renumbering with State numbers a boat that has sunk, been reclaimed and had to be virtually rebuilt? Should there be a brand for this?
9. Should NCCUSL offer a rationalized set of title brands so that all States enacting UCOTA-V operate on the same branding basis?
10. Should pre-enactment brands be left in place?
11. Can you furnish the MLA with a list of all of the brands currently in use? Is there a subset of brands which every State uses? If they are collected in a public file, perhaps you could give us the link but I want to be sure we have them all so we can consider them more carefully. Then we may have some further questions or rationalization to suggest.
12. UCOTA-Vehicles got to the point of requiring States to pick up the brands on incoming title certificates. How is this being handled at present? Does doing a half-way job on this tend to suggest that the only problems are the ones you see on the title? Is a disclaimer needed before all States get on the same page?
13. Should State acceptance or rejection of an application for a certificate of title on a vessel be required within a specific number of days? In the absence of a response, should the application be deemed accepted? (At present, the CG 1258 application for federal documentation asks if the vessel is titled or not titled in a State. Should we add a category for pending? If we have a pending category, which seems to make sense, how would an owner know what to check, if he has filed an application for a State title but has not received a response? Would the words issued, pending and not sought adequately describe the process?) We just found out that CG was planning to move quickly on this now that they had OMB approval. I am not sure if or when we could change it. But the form is one for NCCUSL to keep in mind.
14. Should an application for certificate of title be effective to perfect a security interest noted in the application when received by the State filing office or only after acceptance by the State? (A preferred mortgage is

effective when filed, even though a certificate of documentation has not been issued.) The essential difference between the federal vessel process and the motor vehicle process in UCOTA-Vehicles is that, under the Vehicles process, a filing is deemed never effective for any purpose if the title is never issued; whereas, under the federal vessel process, the mortgage at least is effective unless the Coast Guard issues a 90-day deficiency letter and the applicant fails to cure the deficiency. Should we try to align the State vessels process more closely with the federal vessel process at least as to the effectiveness of the lien entry? Do you recall whether the vehicles drafting committee ever considered this issue? Perhaps not because there is no federal vehicle filing, as there is for vessels.

15. If an owner fails to apply for a certificate of title for a vessel being financed, should the secured party be able to file a record statement of its security interest which describes the vessel and have it treated like an application for certificate of title as well as a means of security interest filing?

16. Should the UCC concept of being able to title a product in any State that will issue the title be applied to vessels in UCOTA-V or should a vessel have to be titled in the State that numbers because state of numbering is federally controlled—state of principal operation ("SOPO")? If the latter more restrictive approach is taken, how should the titling issue be handled if the numbering State does not have a title law? (There are still 15 non-title States). There is a middle position that could work, e.g., make that restriction so long as the numbering State has a title law. Otherwise the title already issued would still work. Again, we would have to fix any conflicting State computer programs.

17. If a vessel is numbered in State A where the owner resides and where the vessel is principally operated and titled in such State as well, what happens when the SOPO is changed to a non-title State but the owner's residence remains in State A? If State A's law says the state which numbers must be the state that titles, does that change the answer? The UCC would carry over the State A title. So would the VIS regulation, if State A were participating in VIS and its title law had been approved by the Coast Guard. But don't we need a general provision in UCOTA-V? If the State A title is not carried over, does it remain in effect in State A when State A ceases to be the numbering state? Since the new SOPO is not the residence of the owner, if the State A title is in doubt,

could a lender file a UCC-1 in State A , even though its title law probably says notation on the title or the filing of the application for the title are the only means of perfection of a security interest in a vessel ? The NCCUSL UCC Revision Committee felt this is an issue that the drafting committee for UCOTA should resolve.

18. To better legitimize the current process whereby an owner surrenders his State title to the issuing State and notifies or has his documentation service notify Coast Guard that this has been done, should UCOTA-V contain a provision that specifically authorizes the surrender of a State title to obtain federal documentation of a vessel when the documentation will be in the name of the person named on the title certificate and the use will be exclusively recreational ? (We will have to see how Congress deals with current requests to modify 46 USC sec. 12106 on title surrender and whether it limits surrender to the Coast Guard.)

19. Should NCCUSL follow the efforts on sec. 12106 and consult with Congress and the Coast Guard on this?

20. If surrender is made to the Coast Guard, should the State that issued the title require notice of surrender? From the Coast Guard?

21. Should UCOTA-V in such case require the State to establish a dedicated e-mail site to receive such notice from the Coast Guard? Should a State's right to receive such notice from the Coast be contingent on establishing such a site? Should notice to one State site constitute notice to any State agency in the same State which is involved with numbering or titling vessels?

If NCCUSL is going to work on a UBRA, as well as a UCOTA-V, should it ask Congress to clarify the definition of SOPO? Specifically, should it say that principal operation includes any time the vessel is in the water, except when under or awaiting repairs? (This is a slightly different query than when does a vessel cease to be a vessel. at question is dealt with in a string of admiralty cases which is constantly evolving. However, so long as the product remains a vessel, the SOPO question remains.

22. We have been asking the Coast Guard for years to combine the Builder's Certificate used to document a vessel with the Manufacturer's Certificate of Origin used to title a vessel or obtain State number and registration in a non-title State. Should UCOTA-V allow for the possibility of such a consolidation in case Congress or Coast Guard finally start to

move forward? A consolidated form presumably would be filed wherever a first application is filed—whether for title or documentation. Federal and State law then would have to deal with recognition of some notification from the office where filing first occurs. Coast Guard has been reluctant to do this, despite its obvious benefits in deterring fraud, until States express an opinion. Consolidated forms have been drafted for some time and the drafts are available.

23. In view of the above, should States finally decide to prescribe a uniform form of MCO in advance of the formal consolidation? And, should even the UBRA require States to demand an MCO or a consolidated BC-MCO before numbering? States have been leery about getting so precise because they seem to always want to provide for the owner who does not have an MCO for whatever reason. Some States are not that flexible.

24. On transfer of a vessel from federal documentation to state titling, pursuant to a sale, gift or bequest, should the titling State require proof that: (a) a copy of the bill of sale or other transfer instrument is filed with the Coast Guard, (b) that the vessel has been deleted from the Coast Guard registry and (c) that the seller's certificate of documentation has been surrendered to the Coast Guard? Coast Guard regulations require the certificate of documentation to be surrendered to the Coast Guard. Often this is not done. Should the titling State in such a case demand it and return it to the CG or notify the CG of its surrender? If (a) and (b) should be required, what level of proof? There is a question of when a vessel documented becomes de-documented and what rights creditors of the seller may continue to have against the vessel if the Coast Guard record still shows the seller as the owner.

25. Should NCCUSL, as an interim measure, consider legitimizing the Delaware procedure of printing the secured party on the back of its certificate of registration? Would this be worthwhile to protect security interests? Should the VIS regulation recognize such a measure?

26. Should NCCUSL consider establishing one certificate of title form for the whole country to use? Would the current differences in size of the respective forms in current use make such a conversion impractical?

27. Should a UBRA or UCOTA-V require that the State acquire computer software that can tell whether a title surrendered to

the State is genuine? Such software exists for vehicles and States which have joined NMVETIS have access to such software.

28. Should States make such software available to vessel documentation agencies so they can do the checking on transactions in which they are involved?

29. If Coast Guard rejects an application for documentation of a state titled vessel, what should it do with the certificate surrendered to it? Return it to the issuing State? Advise of the rejection? Destroy the certificate but notify the State to issue a duplicate?

30. Should a buyer-in-the-ordinary-course-of-business be able to prime the holder of a duly perfected security interest on a certificate of title? Even if such perfection makes the State Security Agreement a deemed preferred mortgage?"(Note: A preferred mortgage can be used on inventory as well as on a recreational vessel owned by the consumer.)

31. If a vessel is being constructed for a consumer, at what point should the consumer be able to title it? If the builder holds title until the vessel is completed? If the builder gives title in sections to the consumer is the result any different? Compare with putting a preferred mortgage on a boat being built.

32. What effect should State privacy laws have on reporting of boat data by States to the Coast Guard?

33. Should UCOTA-V or UBRA refer to any need for the State to perform an OFAC check before registering or titling a vessel? Should that hold up security interest perfection?

34. Should States grandfather in title surrenders to States for purposes of federal documentation that were made in the past in light of the absence of specific state legislation to such effect?

35. What arrangements should NCCUSL make with Coast Guard to insure that the lines of communication remain open on all NCCUSL UCOTA-V and UBRA matters, direct or related? I have asked Rear Adm. Charles (Chuck) D. Michel, head of the Regulatory and International Branch of the Coast Guard, to chat with us on that issue, especially in view of a recent NVDC offer to consider further regulations if the MLA drafts them in the first instance. Chuck is aware that yours is a 3-year project.

36. What should we say about assignment of security interests? For vehicles, we wanted something specific, not just to rely on the UCC. However, here, if there is a deemed preferred

mortgage, there will be original jurisdiction in federal court to foreclose. Will that cover the related suit for the balance/deficiency? Does the deemed preferred status eliminate the application of the federal consumer law on collection of debt, the Fair Debt Collection Practices Act?

37. A more basic question: Are the federal and State laws on the need to file assignments the same?

38. If a vessel is used as collateral for a commercial loan, is it still a recreational vessel? Under federal law? Under State law?

39. Who should have the obligation to file a discharge of security interest? Secured party? Seller? Buyer? How soon after payment in full should it be filed?

40. Could we set up enactment of UCOTA-V to operate as acceptance of the VIS?

41. On various issues, will NCCUSL have to consider whether Congress/CG or NCCUSL should take the lead on a given issue?

42. How should a State treat a Temporary Certificate of Documentation ("TCOD"), if CG begin to issue them,?

Dave Williams and other colleagues at the MLA and I may have additional questions or issues. Also, I am sure you will address the 13-item list posted by AAMVA and negotiated down some what by Bill Henning.

Respectfully submitted:

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