

MEMORANDUM

TO: Lee McCorkle, Chair, NCCUSL Study Committee on Certificate of Title Laws

FROM: Alvin C. Harrell, Reporter

RE: Certificate of Title issues

DATE: October 11, 2001

Pursuant to our telephone conversation of September 18, 2001, here are some preliminary thoughts concerning the subject of the Study Committee.

I. Status of the Law

As you know, the ABA UCC Committee Task Force on State Certificate of Title Laws compiled a compendium summarizing state certificate of title (CT) laws. This compendium reflects considerable state law non-uniformity with respect to issues that affect common transactions nationwide. Revised Article 9 addresses and resolves a number of CT issues, but this effect is limited by the traditional Article 9 deference (confirmed at revised sections 9-303 and 9-311(a)) to state CT laws. In addition, Article 9 is limited to secured transactions, and many CT issues are outside this limited scope.

Therefore it appears that the only way to modernize, clarify and unify state CT laws is by a uniform CT statute. There are a number of reasons why it may be timely to attempt such a project at this time. First, the modernization of Article 9 serves to emphasize the need for corresponding reform of CT laws, which in a sense are companion statutes. Second, the advent of electronic filing under Article 9 suggests a need to address related issues with regard to CT laws. Third, federal initiatives by Congress and the Coast Guard with regard to boat titles need to be addressed by the states. Fourth, many of those with needed expertise, who participated in the Article 9 revision process, may now be available for this project as a next logical step. Fifth, there appears to be an opportunity to develop a community of interests among the many affected parties (*e.g.*, state administrators, dealers, manufacturers, creditors, and lawyers interested in these issues). Sixth, some of the problems and uncertainties that exist under current law (see discussion of issues below) are creating unnecessary impediments to commerce and to desirable commercial practices.

II. Enactability

Presumably, the broad social goal of CT law is to provide clear, workable and uniform rules to facilitate CT transactions. One would not expect significant opposition to this goal, and hopefully the basic project would be uncontroversial. There does not appear to be a substantial divergence

between the broad interests of consumers, dealers, manufacturers and creditors with respect to this goal, though of course disagreements on the best means to achieve it are inevitable.

State administrators should also have an interest in improving and maintaining the viability of state CT laws, though of course there may be resistance to outside help. It will be important to bring these administrators and their organizations (as well as dealer organizations and creditor organizations) into the process as much as possible. The Coast Guard may have an interest with respect to boat titles. Consumer groups should be invited, of course, though it seems to me that CT issues are not traditionally a controversial issue from the consumer perspective.

Hopefully any concerns of these parties could be addressed within the NCCUSL process, so as to avoid enactability problems. There does not seem to be any reason why any of these interests would have an inherent or irreconcilable conflict with the traditional goals of the uniform law process.

Taxation issues may be different. There may be some inherent tension between the traditional need to reify legal rights in a CT, creating something like a negotiable document of title, and the desire of some agencies or jurisdictions to levy taxes based on the situs of tangible property and to collect it via CT systems. This may result in laws seeking to tie the CT to the situs of the vehicle, boat, etc., or taxing mobile homes as real property. This runs counter to the Article 9 revisions, which codify case law rejecting the need for a nexus between the CT and such a situs. *See* revised section 9-303(a). The Article 9 rule works well, but is limited to security interest issues and therefore operates in a limited sphere that does not necessarily conflict with other rules. But a broader CT project may not be able to so easily avoid the tax issues. Moreover, these issues are somewhat different for vehicles, boats, and manufactured homes, suggesting some need for separate chapters or parts within a CT law to separately address such issues. Still, revised Article 9 provides an attractive model to serve as a basis for considering these issues.

No doubt many differences of opinion will arise if such issues are considered, but there do not appear to be insurmountable conflicts between interested parties that would prevent enactment.

III. Issues

Some of the broad issues the Study Committee may wish to consider include (in random order):

1. The relation between real property law and CT issues for manufactured housing.
2. The relation between CT laws, Article 9, and federal laws governing boats (*e.g.*, the Ship Mortgage Act and Coast Guard regulations).
3. Tax and situs issues (as noted at Pt. II. above).

4. The relation between CT laws and Article 9 (*e.g.*, the need to correlate CT laws to the Article 9 revisions, and perhaps confirm the effects of revised Article 9 within the CT law).
5. Repossession title and disposition of collateral issues. Should the CT law provide for pre-disposition title transfers to facilitate repossession sales? *See* revised Article 9 section 9-619 (“transfer statements”). What documentation should be required for issuance of a post-disposition repo title? What about notice? *See* Leslie v. Lacy, 91 F.Supp.2d 1182 (S.D. Ohio 2000) (*ex parte* repo title violated due process).
6. Priority issues relating to competing claims to title arising outside of Article 9 (*e.g.*, should the CT law resolve priority disputes for claims arising outside of Article 9, as Article 9 does for security interests?). Could UCC Articles 2 and 7 serve as a model for such rules?
7. The relation of CT laws to UCC Article 2, *e.g.*, section 2-403 (good faith purchasers; buyers in the ordinary course of business), and consignments.
8. The scope of CT laws, *e.g.*, as regards off-road equipment, non-motorized vehicles, trailers, small water craft, etc.
9. The grace periods for perfection of purchase money and non-purchase money security interests in CT collateral, and their relation to Article 9 and the Bankruptcy Code. (*See, e.g.*, the Legislative Note following revised section 9-311, and the U.S. Supreme Court decision in the *Fink* case.)
10. Relation between CT law and the Article 9 revisions regarding basic issues such as collateral descriptions, debtor and secured party names, nominees and agents, filing requirements, seriously misleading errors, etc. (*See, e.g.*, revised section 9-311(b) and revised Article 9 Part 5.)
11. Fixtures, accessions and commingled goods (*see* revised sections 9-334, 9-335, 9-336.)
12. Relation of CT laws to the manufacturer’s certificate of origin (MCO). Should a MCO be mandatory?
13. Should the owner or the secured party hold the CT?
14. What should be the rules for duplicate titles, lost titles, salvage titles, and foreign titles?

15. Should there be safe-harbor CT lien entry rules similar to those at revised sections 9-516 and 9-521 for financing statements?
16. Should the CT law have equivalents to the Article 9 rules on termination statements?
17. Are specific CT enforcement rules needed, in addition to Article 9 Part 6?
18. What is the relation between states that allow CT lien entry and those that don't, *e.g.*, for boats and manufactured housing?
19. Leasing issues, *e.g.*, if a lessor's interest is deemed a security interest and the lessor is the named owner on the CT (rather than being listed as lienholder), is the lessor perfected?
20. Electronic titling and registration.
21. Privacy issues.
22. Should the CT law include administrative agency rules, documentation requirements, etc.? If so, what should they be?
23. What about rules governing assignments of CT liens, with or without transfer of the CT or a new lien entry?
24. Should there be specified uniform standards for re-titling CT goods from another jurisdiction?
25. Should there be a system allowing record title searches, *e.g.*, similar to the Article 9 filing system?
26. Securitization issues. Should the lien follow the debt, as in revised Article 9?

It seems to me that UCC Articles 2, 7 and 9 provide answers to many of these questions, that could be adapted to the CT context as a baseline for consideration. If this approach was ultimately followed, the result would be enhanced consistency, clarity and uniformity through-out the law.

IV. Structure of a Proposed Uniform CT Act

Another fundamental issue to be addressed is the basic structure and organization of any proposed CT law. It seems logical that there could be an introductory part (Part 1?) covering the scope issues and common definitions, followed by one or more subsequent parts organized around major subject areas, *e.g.*, the process for issuance of a CT (Part 2?), title standards and priority issues

(Part 3?), lien entry filing issues (Part 4?), and perhaps enforcement issues (Part 5?). Other issues and variations would need to be considered, but this serves to illustrate the basic point.

Then this could be followed by separate parts (Parts 6, 7, and 8?) to provide separate, specialized rules for vehicles, boats and manufactured housing as needed. These rules would be excluded from, or would supercede, the more general rules in the prior parts. Obviously we want to think about this some more, and hear other views, and review some other CT laws, but this is something to chew on. Once a basic format is chosen, we could then decide which individual issues to cover and where each fits into the overall structure.

Let me know what you think, and also how and when you think we should go about announcing the Study Committee and soliciting input.

cc: Fred Miller