UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

HARPER, Russell T. and
HARPER. Shannon C.,

Debtors.

PATRICK J. MALLOY, III, Trustee,

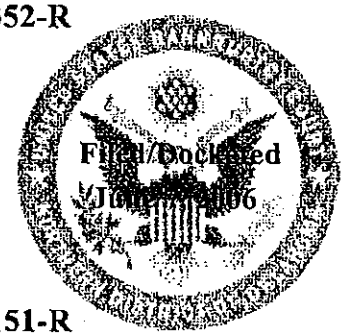
Plaintiff,

v.

WILSERV CREDIT UNION,

Defendant.

Case No. 05-13352-R
Chapter 7



Adv. No. 05-01151-R

MEMORANDUM OPINION

On August 10, 2005, Plaintiff Patrick J. Malloy III, Trustee (the "Trustee"), filed a Complaint (Adv. Doc. 1) in which he claims priority over the security interest of Defendant Wilserv Credit Union (the "Credit Union") in the Debtors' 2001 Chevrolet Pickup (the "Vehicle") under Section 544(a) of the Bankruptcy Code. On January 4, 2006, the Court granted the Joint Motion for Order Authorizing Submission of Issues Upon Joint Stipulation (Adv. Doc. 12), filed on December 30, 2005. See Order Authorizing Submission of Issues Upon Joint Stipulation of Facts and the Filing of the Parties' Briefs (Adv. Doc. 13).

Before the Court are the Joint Stipulation of Facts (Adv. Doc. 14) filed on January 5, 2006 ("Stipulation"), Plaintiff's Opening Brief (Adv. Doc. 20) filed on February 13, 2006 ("Trustee's Brief"), Defendant's Brief in Response (Adv. Doc. 21) filed on March 3, 2006

(the "Credit Union's Brief"), and the Supplemental Joint Stipulation of Facts (Adv. Doc. 25) filed on June 5, 2006 ("Supplemental Stipulation").

I. Jurisdiction

The Court has jurisdiction of this core proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2)(F) and (K); and Local Civil Rule 84.1(a) of the United States District Court for the Northern District of Oklahoma (effective as of March 2, 2005).

II. The Parties' Contentions

The Trustee contends that the Credit Union did not have a perfected security interest in the Vehicle on May 27, 2005, the date that the Debtors Russell and Shannon Harper (the "Debtors") filed their Chapter 7 bankruptcy petition. Although the Trustee acknowledges that the Court has previously ruled that a security interest in a vehicle titled by the Cherokee Nation was properly perfected when the security interest attached,[1] he argues that it is significant that the Cherokee Nation, which issued the certificate of title covering the vehicle in that case, had entered into a "Compact" with the State of Oklahoma which permitted the Cherokee Nation to issue certificates of title to its members that resided within the Indian Territory defined in the Compact, but the Muscogee (Creek) Nation (the "Creek Nation"), which issued the certificate of title in this case, did not have such a "Compact." See Trustee's Brief at 3. The Trustee also argues that the Credit Union was required to comply

[1]See Order Denying Trustee's Motion for Summary Judgment and Granting Partial Summary Judgment to Bank of Commerce in Patrick J. Malloy, III, Trustee, v. Bank of Commerce (In re Dalton), Adv. No. 04-01061-R (Bankr. N.D. Okla. May 8, 2005), *aff'd* BAP No. NO-05-052 (B.A.P. 10th Cir. December 8, 2005).

with the provisions of Section 1110 of Title 47 of the Oklahoma Statutes because the certificate of title covering the Vehicle was issued to an Oklahoma citizen who did not reside on Indian land. Finally, the Trustee contends that the certificate of title was issued in violation of federal law, *citing* Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993). Id. at 4-5. The Credit Union contends that the Vehicle was properly registered by the Creek Nation and the Credit Union's lien was perfected pursuant to Title 36 of the Creek Nation Code.

III. Undisputed Material Facts

On September 1, 2001, the Debtors purchased the Vehicle from South Point Chevrolet (the "Dealer"). Supplemental Stipulation at ¶ 1. At the time of the purchase, the Debtors financed $22,589.00 of the purchase price through the Dealer. Id. at ¶ 2. The financing agreement was subsequently assigned to Union Acceptance Corp. Id. at ¶ 3. On October 5, 2001, the Creek Nation issued to the Debtors a certificate of title to the Vehicle. Certificate of Title, Exhibit A to the Complaint (the "Certificate of Title"); Answer (Adv. Doc. 5) at ¶ 2 (admitting authenticity of Exhibit A). Issuance of the Certificate of Title "verifies that according to the records of the Muscogee (Creek) Nation, the person named [therein] is an Enrolled member and the owner of the vehicle described." Id.

On October 18, 2001, the Debtors obtained a loan from the Credit Union in the amount of $28,611.93. Supplemental Stipulation at ¶ 4. In connection therewith, the Debtors executed a "Disclosure Statement and Agreement" (the "Security Agreement") in which the Debtors granted the Credit Union a security interest in the Vehicle to secure the loan, of

which $28,601.93 was paid directly to the Debtors and $10 was paid to "public officials," presumably for the lien entry fee.[2] Security Agreement, Exhibit A to the Stipulation. The Security Agreement provides that the "purpose" of the loan was to "refinance vehicle." Id. The Debtors used the loan proceeds to pay off the loan assigned to Union Acceptance Corp. Supplemental Stipulation at ¶ 5.[3] The parties agree that the Credit Union's security interest in the Vehicle is valid and enforceable against the Debtors. Stipulation at ¶ 2.

The Vehicle was registered with the Creek Nation pursuant to Section 3-103 of Title 36 of the Creek Nation Statutes. Although the Debtors did not reside on an Indian reservation, allotted Indian land, or a dependent Indian community at the time they purchased the Vehicle, the parties stipulate that the Debtors and the Vehicle met the requirements of the statute. Stipulation at ¶ 4. On December 13, 2001, the Credit Union executed and filed a lien entry form covering the Vehicle with the Muskogee Creek Nation Tax Commission, and

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[2]In the Supplemental Stipulation, the parties state that the lien filing fee was paid to the Oklahoma Tax Commission. Id. at 5, 6. There is no evidence that a lien entry form was submitted to the Oklahoma Tax Commission, however. In their earlier Stipulation, the parties stated that the Credit Union "filed a lien entry form with the Muskogee Creek Nation Tax Commission" and that "no lien entry forms were filed with the Oklahoma Tax Commission." Stipulation at ¶ 3. The Lien Entry Form indicates that the Motor License Agent was the "MCN Tax Commission." Lien Entry Form, Exhibit B to the Stipulation.

[3]The parties also stipulate that "[n]o additional funds were advanced by [the Credit Union] to the [D]ebtors, other than to pay off the purchase contract held by Union Acceptance Corp., and for the Oklahoma Tax Commission lien filing fee." Supplemental Stipulation at ¶ 6. The parties do not explain why the Debtors would have borrowed $28,601.93 to pay off a loan made only seven weeks earlier in the amount of $22,589.00. Since the Credit Union loan proceeds were distributed directly to the Debtors and not to Union Acceptance Corp., the disposition of $6,012.93 of the proceeds is unclear.

the Credit Union's lien was noted on the Certificate of Title. Lien Entry Form, Exhibit B to the Stipulation; Certificate of Title.

On May 27, 2005, the Debtors filed a Joint Voluntary Petition for Relief Under Chapter 7, Case No. 05-13352-R, and listed the Vehicle as an asset of the estate.

IV. Conclusions of Law

Section 544(a)(1) of the Bankruptcy Code "confers on a trustee in bankruptcy the same rights that an ideal hypothetical lien claimant without notice possesses as of the date the bankruptcy petition is filed." Pearson v. Salina Coffee House, Inc., 831 F.2d 1531, 1532 (10th Cir. 1987). Under Oklahoma law, a lien creditor has priority over an unperfected security interest. See 12A O.S. § 1-9-317. Thus, under Section 544(a)(1), the Trustee will have priority over an unperfected lien on property of the estate. The issue before the Court is whether the Credit Union had a perfected security interest in the Vehicle on May 27, 2005, the date the Debtors filed bankruptcy. If the Credit Union's interest was not perfected, the Trustee will prevail.

In order to assess the relative rights of the Trustee and the Credit Union, the Court must examine the applicable law. The choice of law provision found in Oklahoma's Uniform Commercial Code (the "OUCC"), entitled "[l]aw governing perfection and priority of security interests," states–

> *Except as otherwise provided in Sections 1-9-303 through 1-9-306* of this title, the following rules determine the law governing perfection, the effect of perfection or non-perfection, and the priority of a security interest in collateral . . .

> (1) Except as otherwise provided in this section, while a *debtor is located* in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the collateral.

12A O.S. § 1-9-301 (emphasis added).[4]

Initially, the Court must determine whether OUCC Section 1-9-303 excepts the Debtors and the Vehicle from Section 1-9-301's choice of law regime.[5] OUCC Section 1-9-303 defines the "law governing perfection and priority of security interests in goods covered by a certificate of title."

> (a) This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.
>
> (b) *Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority*. . . .
>
> (c) *The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection*, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

12A O.S. § 1-9-303 (emphasis added).[6]

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[4]All citations to Oklahoma statutes herein refer to the statute that was in effect as of May 27, 2005 (the bankruptcy petition date), unless otherwise noted.

[5]The exceptions to OUCC Section 1-9-301 provided in Sections 1-9-304 (perfection and priority of security interests in deposit accounts), 1-9-305 (perfection and priority of security interests in investment property), and 1-9-306 (perfection and priority of security interests in letter-of-credit rights) are not even arguably applicable in this case.

[6]Comment 3 of the Uniform Commercial Code Comments (2001 Main Volume) states–

The foregoing Section 1-9-303 only applies, however, if the Vehicle is covered by a "certificate of title" as that term is defined in the Definitions section of Article 9 of the OUCC. OUCC Section 1-9-102(10) provides that for purposes of Article 9–

> "Certificate of title" means 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.

12A O.S. § 1-9-102(10) (emphasis added).

The Creek Nation's Motor Vehicle Tax and License Code provides, in section 3-104(B) of title 36 of the Creek Nation Code ("Creek Motor Vehicle Registration Statute"), that the Creek Nation shall issue a certificate of title to the purchaser of a vehicle "upon proper application and payment of all fees and taxes."[7] The same statute further provides that "[n]otice of liens against said vehicle shall be placed upon said title upon request of the lending institution." Id. The Creek Motor Vehicle Registration Statute does not provide (or even suggest) that noting the lien on the certificate of title issued by the Creek Nation *is a condition* to the lien holder obtaining priority over a lien creditor, or that noting the lien

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> Normally, under the law of the relevant jurisdiction, the perfection step would consist of compliance with that jurisdiction's certificate-of-title statute and a resulting notation of the security interest on the certificate of title. See Section 9-311(b). In the typical case of an automobile . . . a person who wishes to take a security interest in the vehicle can ascertain whether it is subject to any security interests by looking at the certificate of title.

[7]This statute became effective on August 1, 2001.

results in priority over a lien creditor.[8] Accordingly, the Certificate of Title issued by the Creek Nation in this case, like the certificate of title issued by the Cherokee Nation in the recently decided Dalton case, is not a "certificate of title" as defined by the OUCC. See Patrick J. Malloy, III, Trustee, v. Bank of Commerce (In re Dalton), Adv. No. 04-01061-R (Bankr. N.D. Okla. May 8, 2005) ("Dalton"), at 6-7, *aff'd* BAP No. NO-05-052 (B.A.P. 10th Cir. December 8, 2005). Because the Creek Nation title is not a "certificate of title" under OUCC Section 1-9-102(10), then, upon returning to the choice of law rules of OUCC Section 1-9-301, the Court is directed to the law of the jurisdiction where the Debtors are located (rather than the law of the jurisdiction that issued the Certificate of Title) to determine perfection. "A debtor who is an individual is located at the individual's principal residence." 12A O.S. § 1-9-307(b)(1). The Debtors reside in Oklahoma, and the parties stipulated that the Debtors did not live on an Indian reservation, allotted Indian land or in a dependent Indian community. Therefore, Oklahoma perfection law applies.

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[8]Section 7-405(C) of Title 24 of the Creek Nation Code, which was supplied to the Court by the parties, provides that "[l]iens have priority according to the time of their creation, so long as the instruments creating the liens are duly recorded, and unless otherwise accorded a different status under the Nation's law." Section 7-405 is contained in Subchapter 4 of Title 24 of the Creek Nation Code, which is entitled "Lien Procedures." Title 24 appears to govern "Housing" and "Mortgage Foreclosure and Eviction," however, which leads the Court to conclude that the lien procedures contained in Subchapter 4 apply only to liens on interests in real estate. This belief is enhanced by the requirement that *recording* an instrument creating the lien (presumably in the land records) is a prerequisite to achieving priority. Thus, it would be inappropriate to incorporate the lien priority provisions of Section 7-405 of Title 24 into the Creek Motor Vehicle Registration Statute in order to create a priority scheme that is envisioned by OUCC Sections 1-9-102(10) and 1-9-303 as a threshold to invoking the "certificate of title" provisions of the OUCC.

Pursuant to OUCC Section 1-9-308, "[e]xcept as otherwise provided in this section and Section 1-9-309 of this title [relating to automatic perfection], a security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 1-9-310 through 1-9-316 of this title have been satisfied." 12A O.S. § 1-9-308(a).

OUCC Section 1-9-311 governs "[p]erfection of security interests in property subject to certain statutes, regulations, and treaties" and directly addresses liens noted on "certificates of title" that conform to the OUCC definition of "certificate of title" as well as liens noted on "certificates of title issued by [an] Indian tribe." It states–

> (a) Except as otherwise provided in subsection (d) of this section [regarding vehicles held in inventory], the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:
>
> *****
>
> (3) a certificate of title statute of another jurisdiction which provides for a security interest 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 property; or
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> (4) the law or procedure of a federally recognized Indian tribe, if the security interest is in a vehicle registered or to be registered by the federally recognized Indian tribe and if within thirty (30) days after the security interest attaches, it is noted on the face of a certificate of title issued by the Indian tribe or, notwithstanding subsection G of Section 1110 of Title 47 of the Oklahoma Statutes, the security interest is otherwise perfected under an applicable law or procedure of that tribe.

12A O.S. Supp. 2005, § 1-9-311(a). Because the Court concludes that certificates of title issued by the Creek Nation do not fall within the Section 1-9-102(10) definition of "certificate of title," the Court must look to subsection (4) rather than subsection (3).

Subsection (4) was enacted in 2005, and became effective on May 5, 2005.[9] The first clause of OUCC Section 1-9-311(a)(4) deems liens in vehicles registered by Indian tribes perfected without the filing of a financing statement if the lien is noted on the title within thirty days of attachment, regardless of the tribe's perfection law (or absence of perfection law). The undisputed facts reflect that more than thirty days elapsed between the attachment of the security interest (October 18, 2001)[10] and the notation of the Credit Union's lien on the certificate of title (December 13, 2001). See Certificate of Title, Exhibit A to Complaint; Note and Security Agreement, Exhibit B to Stipulation. Accordingly, the Credit Union's lien was not perfected by notation under the first clause of subsection (4) and the Court must determine whether the Credit Union's security interest was *otherwise perfected* under an

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[9]The Debtors filed their bankruptcy petition on May 27, 2005. Thus, OUCC Section 1-9-311(a)(4) was in effect at the time the Trustee obtained his hypothetical lien creditor status under Section 544(a) of the Bankruptcy Code and consequently when the Trustee's cause of action seeking a declaration of lien priority arose.

[10]Attachment occurs when a security interest becomes enforceable against the collateral. See 12A O.S. § 1-9-203(a). A security interest becomes enforceable when value has been given by the secured party, the debtor obtains rights in the collateral sufficient to transfer an interest to the secured party, and the debtor has executed a security agreement describing the collateral. See 12A O.S. § 1-9-203(b). The Debtors obtained rights in the collateral on September 1, 2001, and executed the Security Agreement and obtained value from the secured party (the loan proceeds) on October 18, 2001.

applicable law or procedure of the tribe, which again requires the examination of the Creek Nation Code.

As stated above, the Creek Motor Vehicle Registration Statute does not address the concept of *perfection* of liens; it merely provides that a lien will be noted on the title if the financing institution requests the same.[11] The parties did not supply any Creek Nation law resembling a commercial code or procedure that governs creation, perfection, priority, or foreclosure of liens on personal property. Because it appears that the Creek Nation Code lacks a perfection statute or procedure, the Court cannot conclude that the Credit Union "otherwise perfected" its security interest under an applicable law or procedure of the Creek Nation contemplated by the second clause of OUCC Section 1-9-311(a)(4).

OUCC Section 1-9-311(b) states that "a security interest in property subject to a statute, regulation, or treaty described in subsection (a) of this section may be perfected only by compliance with those requirements." Because the Creek Nation does not have a perfection scheme, the only way the Credit Union could have perfected its security interest under Section 1-9-311(a)(4) was to obtain a notation on the title within thirty days of

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[11]See, for example, Section 1110 of title 47 of the Oklahoma Statutes, which explicitly provides a procedure for perfection of a security interest in a vehicle. It states–

> a security interest in a vehicle as to which a certificate of title may be properly issued by the Oklahoma Tax Commission *shall be perfected* only when a lien entry form, and the existing certificate of title, if any, or application . . . and the required fee are delivered to the Tax Commission.

47 O.S. § 1110(A)(1) (emphasis added).

attachment, which it failed to do. In Dalton, the Court concluded that the lender's security interest in a vehicle registered by the Cherokee Nation was automatically perfected under OUCC Section 1-9-309(1) as a purchase money security interest. Dalton, Order at 8-10. OUCC Section 1-9-311(a)(4) was not applicable in the Dalton case, however, because the Daltons' bankruptcy predated the enactment of Section 1-9-311(a)(4). Thus, the lender in Dalton was not precluded by 1-9-311(b) from obtaining perfection by some means other than Section 1-9-311(a)(4). In this case, however, it appears that Section 1-9-311(b) precludes perfection of liens in vehicles registered by Indian tribes by means other than those stated in 1-9-311(a)(4).

The Credit Union could not have foreseen in 2001, when it attempted to perfect its lien, that Section 1-9-311(a)(4) would deem a lien perfected only if it was noted on a title issued by an Indian tribe within thirty days of attachment, and the Credit Union could not have complied with the law after its enactment in May 2005 because attachment had long since occurred. Thus, the Court must determine whether Section 1-9-311(a)(4) was intended to apply to liens obtained prior to its enactment, and if not, what perfection law was in effect when the Credit Union obtained its lien.

"The general rule is statutes are to be applied prospectively only." Oklahoma Bd. of Medical Licensure and Supervision v. Oklahoma Bd. of Examiners in Optometry, 1995 OK 13, 893 P.2d 498, 499 (citation omitted). "This general rule is not applicable to statutes affecting only procedure because no one has a vested right in any particular procedure. Thus, statutes that affect procedures and not substantive rights or vested rights, will be given

retrospective effect." Id. For instance, a statute that granted the Oklahoma Medical Board authority to bring declaratory judgment actions to determine whether particular practices constitute unauthorized practice of medicine was found to be a procedural statute which did not impact any vested rights and therefore such statute was applicable to a lawsuit filed prior to the enactment of the law. Id. at 499-500. The Oklahoma Supreme Court has also concluded that a statutory amendment that extended the time for seeking appeal-related attorney fees was procedural and therefore was applicable to appeals that were filed prior to the amendment of the statute. See McCormack v. Town of Granite, 1996 OK 19, 913 P.2d 282, 285. A statute may also operate retroactively if the statute clearly indicates that the legislature intended it to be applied to conduct predating the statute. See Mid-Continent Casualty Co. v. P&H Supply, Inc., 1971 OK 135, 490 P.2d 1358, 1361.

However, even "[r]emedial or procedural statutes may operate retrospectively only where they do not create, enlarge, diminish or destroy vested rights. A substantive change that alters the rights or obligations of a party cannot be viewed as solely a remedial or procedural change and cannot be retrospectively applied." Sudbury v. Deterding, 2001 OK 10, 19 P.3d 856, 860 (citation omitted). An amendment to a statute that ascertained the measure of damages to which a property owner is entitled for wrongful injury to timber or trees, which increased the tortfeaser's liability from three times actual damages to ten times actual damages, was determined not to be merely procedural or remedial, but rather a substantive increase in potential liability, and therefore could not be applied to conduct occurring prior to the amendment. Id. An amendment to a statute of limitations cannot be

applied to a claim that arose prior to the amendment if such application would divest the plaintiff from its right to assert a claim that had already accrued and was not time-barred under the old statute. See Mid-Continent, 490 P.2d at 1361. In another case, the Oklahoma Court of Civil Appeals held that an amendment to a provision of the Oklahoma Consumer Credit Code that restricted the time in which a consumer debtor could rescind a loan transaction was inapplicable to a debtor who entered into a loan transaction under the prior law which permitted rescission any time prior to the delivery of all required disclosures. See Testerman v. First Family Life Ins. Co., 1990 OK CIV APP 108, 808 P.2d 703, 708. "Rescission is a contractual right which vested and accrued at the execution of the loan documents. At that point in time, the right to rescind was fixed under the unamended version of [the statute], and the statutory provisions became as much a part of the contract as if recited in it." Id.

In this case, OUCC Section 1-9-311(a)(4) became effective more than three years after the Credit Union obtained its lien and attempted to perfect its security interest in the Vehicle.[12] Thus, if OUCC Section 1-9-311(b) is applied to preclude the Credit Union from perfecting in a manner other than as set forth in subsection (a)(4), the Credit Union would be deprived of perfection it may have accomplished under the OUCC prior to the

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[12]Although the legislature declared the enactment of OUCC Section1-9-311(a)(4) an emergency and "immediately necessary for the preservation of the public peace, health and safety," and therefore effective immediately upon passage, the legislature did not indicate that its provisions should apply retroactively. 2005 Okla. Sess. Law Serv. Ch. 139 (H.B. 2028) (50th Leg., 1st Sess.), §§ 41, 42.

amendment. Accordingly, the Court must analyze whether the Credit Union perfected its lien under the OUCC as it existed in October 2001 and under any statutes or subsequent statutory amendments that would require the Credit Union to re-perfect its lien at any point in time.[13]

In Dalton, the Court analyzed perfection under the OUCC of a lien on a vehicle registered by an Indian tribe prior to the May 5, 2005 amendment to OUCC Section 1-9-311(a)(4). In that case, the lender's lien was a purchase-money security interest in consumer goods. OUCC Section 1-9-309(1) provides that a purchase-money security interest in consumer goods that are not subject to a certificate of title statute becomes perfected when the security interest attaches. See 12A O.S. § 1-9-309(1).

In this case, however, the Credit Union's lien is not a purchase-money security interest. Section 1-9-103 of the OUCC provides that "[a] security interest is a purchase-money security interest . . . to the extent that the goods are purchase-money collateral with respect to that security interest." 12A O.S. § 1-9-103(b)(1). The OUCC defines "purchase-money collateral" as "goods . . . that secure[] a purchase-money obligation incurred with respect to that collateral" and defines a "purchase-money obligation" as "an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." 12A O.S. § 1-9-103(A)(1) and (2). In this case, the Debtors already owned the Vehicle when they secured the Credit Union loan with the Vehicle, and the loan proceeds were paid directly to

[13]For instance, the OUCC contains provisions for re-perfecting when some types of collateral are moved out of the jurisdiction. See, e.g., 12A O.S. § 1-9-316.

the Debtors, not to the seller of the Vehicle. Thus, the loan was not incurred to pay the price of the Vehicle (because the price of the Vehicle had already been paid to the Dealer) nor was it given to "enable the debtor[s] to acquire rights in or the use of the collateral," as the Debtors already had rights in and use of the Vehicle when they incurred the obligation to the Credit Union.[14] Therefore, the Credit Union's lien was not automatically perfected upon attachment under OUCC Section 1-9-309(1).

OUCC Section 1-9-310 provides that except in circumstances not present in this case, "a financing statement must be filed to perfect all security interests." 12A O.S. § 1-9-310(a). There is no evidence that the Credit Union filed a financing statement with the appropriate filing office in Oklahoma. Therefore, the Court concludes that the Credit Union is not

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[14]The Court acknowledges that a secured party does not necessarily lose its purchase-money security interest upon refinancing, extending or consolidating the original purchase-money obligation. See, e.g., Billings v. Avco Colorado Industrial Bank (In re Billings), 838 F.2d 405, 410 (10th Cir. 1988); Russell v. Associates Financial Services Co. (In re Russell), 29 B.R. 270 (Bankr. W.D. Okla. 1983) (creditor retains purchase-money security interest to the extent that unpaid purchase-money obligation is incorporated into refinanced or renewed loan); Oklahoma Comment to 12A O.S. § 1-9-103. However, in this case, the Credit Union was not the secured party who provided the funds for the original purchase price of the Vehicle. If the Credit Union had extended the original purchase-money loan, it may have had a purchase-money security interest that would survive a refinancing transaction, but under the facts of this case, it had no pre-existing purchase-money security interest to retain. See, e.g., In re Moody, 97 B.R. 605, 607 (Bankr. D. Kan. 1989) ("courts have consistently found that if the original debt is refinanced by a third party, then the lien loses its purchase money status"); In re Janz, 67 B.R. 553, 556 (Bankr. D. N.D. 1986); Johnson v. Richardson (In re Richardson), 47 B.R. 113, 118 (Bankr. W.D. Wis. 1985).

perfected, and pursuant to OUCC Section 1-9-317(a)(2),[15] the Trustee's hypothetical lien has priority over the Credit Union's unperfected lien on the Vehicle.[16]

V. Conclusion

For the reasons cited above, judgment is granted in favor of the Trustee on the Trustee's Section 544(a) claim. A judgment consistent with this Order is entered concurrently herewith.

SO ORDERED this 7th day of June, 2006.

DANA L. RASURE
UNITED STATES BANKRUPTCY JUDGE

[15]Section 1-9-317(a)(2) provides that "[a] security interest . . . is subordinate to the rights of . . . a person that becomes a lien creditor before . . . the security interest . . . is perfected." 12A O.S. § 1-9-317(a)(2)(A).

[16]The Court concludes that the fact that the Creek Nation has not entered into a Compact with the State of Oklahoma is not relevant to the resolution of this matter, nor does the United States Supreme Court case cited by the Trustee have any bearing on the issue of perfection of the Credit Union's lien.

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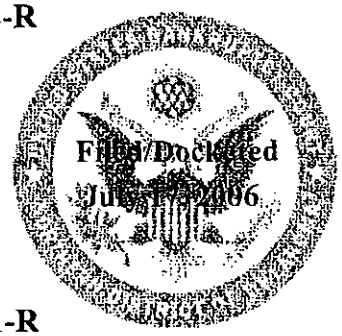

Adv. No. 05-01151-R

ORDER DENYING MOTION FOR NEW TRIAL

On June 7, 2006, the Court entered a Memorandum Opinion (Adv. Doc. 26) and Judgment (Adv. Doc. 27) in the above-captioned adversary proceeding upon consideration of the parties' Joint Stipulation of Facts (Adv. Doc. 14) and Supplemental Joint Stipulation of Facts (Adv. Doc. 25). Pursuant to stipulated facts and legal conclusions drawn therefrom, as stated in the Memorandum Opinion, judgment was entered in favor of the Plaintiff, Patrick J. Malloy III, Trustee ("Trustee"), and against the Defendant, Wilserv Credit Union ("Credit Union"). The Court concluded that the Credit Union's security interest in the Debtors' 2001 Chevrolet pickup truck (the "Vehicle") was not a purchase money security interest and therefore was not automatically perfected, and concluded further that the Credit Union failed to otherwise perfect its lien. Thus, the Court held that the Trustee's interest as a hypothetical

lien creditor under Section 544 of the Bankruptcy Code was prior and superior to the Credit Union's lien on the Vehicle.

On June 16, 2006, the Credit Union filed its Motion for New Trial and Brief in Support (Adv. Doc. 29), alleging that (1) the parties' stipulation concerning the purchase price of the Vehicle contained a typographical error which, when remedied, would arguably prove that the Credit Union's security interest was a purchase money security interest; (2) the Court committed legal error in concluding that the Credit Union did not acquire a purchase money security interest by refinancing the Debtors' original purchase money loan; (3) the Credit Union was entitled to retain the prior lender's purchase money security interest through the doctrine of equitable subrogation; and (4) the Creek Nation Title on the Vehicle, which noted the Credit Union's security interest, should be accorded the status of a Certificate of Title under the Oklahoma Uniform Commercial Code (the "OUCC"), which would render the Credit Union's security interest perfected under OUCC Section 1-9-311.

On June 30, 2006, the Trustee filed the Trustee's Objection to Defendant's Motion for New Trial and Brief in Support (Adv. Doc. 30), disputing the legal arguments advanced by the Credit Union. The Trustee does not dispute the Credit Union's allegation that the stipulation inaccurately states the original purchase price of the Vehicle or that the actual original purchase price of the Vehicle was $28,589.00 rather than $22,589.00.

Upon consideration of the pleadings, the record in this adversary proceeding, and applicable law, the Court finds and concludes that the Motion for New Trial should be denied.

A. Correction of the erroneous stipulated fact would not alter the Court's analysis.

The fact that the Credit Union advanced to the Debtors the exact amount required to pay off the purchase money loan extended by the Debtors' original lender (rather than an amount in excess of $6,000 more than required to pay off the original purchase money loan) does not change the Court's conclusion that the Credit Union's security interest was not a purchase money security interest.[1] It is undisputed that the Debtors *already owned the Vehicle* when the Credit Union extended credit to the Debtors for the purpose of refinancing the original purchase money loan secured by the Vehicle. It remains true that the Credit Union's "loan was not incurred to pay the price of the Vehicle (because the price of the Vehicle had already been paid to the Dealer) nor was it given to 'enable the debtor[s] to acquire rights in or the use of the collateral,' as the Debtors already had rights in and use of the Vehicle when they incurred the obligation to the Credit Union." Memorandum Opinion at 16.

Because the erroneous stipulated fact did not affect the outcome of the proceeding, neither party was prejudiced by the error, and a new trial is not warranted.

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[1]Amending the stipulation to correctly state the Vehicle's original purchase price would clear up an inconsistency in the stipulated facts and would render footnote 3 to the Memorandum Opinion moot, but because the *amount* loaned to the Debtors by the Credit Union was not critical to the Court's conclusion that the Credit Union's lien was not a purchase money security interest, such an amendment would not affect the Court's analysis of the facts or its legal conclusion.

B. The Court correctly applied the purchase money security interest provisions of the OUCC to the stipulated material facts.

The Credit Union contends that after the Court requested a supplemental stipulation "regarding the issue of whether or not the loan made by WilServ was a 'purchase money' loan," the Credit Union "was deprived of an opportunity to brief the issue of whether or not the loan should be considered as a purchase money loan." Motion for New Trial at 1-2. The Court observes that while both parties were advised of the Court's intent to determine whether the Credit Union's lien was a purchase money security interest in order to determine whether the Credit Union's lien was perfected, neither party submitted a brief in connection with the supplemental stipulation. Nevertheless, in rendering the Judgment, the Court had already carefully considered the authorities that were belatedly advanced by the Credit Union in its Motion for New Trial, including the Oklahoma Comments to 12A O.S. § 1-9-103, Russell v. Associates Financial Services Co. (In re Russell), 29 B.R. 270 (Bankr. W.D. Okla. 1983),[2] and Nat'l Bank of Commerce v. First Nat'l Bank & Trust Co., 1968 OK 151, 446 P.2d 277.[3]

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[2]The Oklahoma Comments to 12A O.S. § 1-9-103 and the Russell case are cited in the Memorandum Opinion at 16, n.14.

[3]The disputed issue in Nat'l Bank of Commerce v. First Nat'l Bank & Trust Co. was classification of collateral, not automatic perfection of a purchase-money security interest in consumer goods. Once the Oklahoma Supreme Court affirmed the trial court's determination that the collateral was equipment rather than a consumer good, the facts revealed that only one secured party filed a financing statement in the appropriate filing office, and therefore only that party had perfected its lien. Thus, that party had priority over the unperfected lien of the other party. The court's statement that the secured party had perfected a "purchase-money security interest" was not necessary to the holding. Further, the court's statement that the party's lien was a "purchase-money security interest" was not supported by any analysis of the factors necessary to render a lien a "purchase-money security interest." Apparently,

Moreover, in the Memorandum Opinion, the Court acknowledged that Oklahoma has adopted the "dual status" rule that recognizes that a secured party may retain perfection based on the purchase-money security interest status of its lien when refinancing a purchase-money loan. Footnote 14 of the Memorandum Opinion states: "The Court acknowledges that a secured party does not necessarily lose its purchase-money security interest upon refinancing, extending or consolidating the original purchase-money obligation." The Court observed, however, that automatic perfection of a purchase-money security interest continues only if the original secured party refinances the purchase-money loan, and a subsequent third party lender does not enjoy such a benefit because "it had no pre-existing purchase-money security interest to retain." Memorandum Opinion at 16, n.14, citing cases.

Accordingly, the Credit Union is not entitled to a new trial or modification of the Judgment due to an alleged manifest error of law concerning the elements of a purchase money security interest.

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the court *assumed* that the lien was a purchase-money security interest because the secured party (a bank) loaned money to the debtor *to cover a check* written by the debtor to the seller for the purchase price of the vehicle. The debtor obtained the loan to purchase the vehicle, and granted the lender a security interest in the vehicle, only six days after the debtor had written the check to the seller and obtained possession of the vehicle, and the loan was intended to fund ("cover") the purchase-money check. Thus, the loan was substantially contemporaneous with the purchase of the vehicle.

In this case, the Debtors borrowed funds from the Dealer to purchase the Vehicle on September 1, 2001, and granted the Dealer a security interest in the Vehicle. The Dealer assigned the note and security interest to Union Acceptance Corp. Seven weeks later, the Debtors borrowed funds from the Credit Union, granted a security interest in the Vehicle to the Credit Union and paid the debt to Union Acceptance Corp. Even if the reference to a purchase-money security interest in Nat'l Bank of Commerce was not dicta, this case is factually distinguishable in any event.

C. The Credit Union is not entitled to attain perfection of its lien under the doctrine of equitable subrogation.

The Credit Union asserts that application of the doctrine of equitable subrogation would result in the perfection of its lien against the Trustee. Because the Credit Union did not raise equitable subrogation as a theory of perfection in its pre-judgment submissions, the Court did not consider whether the doctrine was applicable before entering the Judgment, but after reviewing the state of the law, the Court concludes that equitable subrogation cannot be invoked to perfect the Credit Union's lien.

In Oklahoma,[4] subrogation to a prior lienholder's superior security position in property is available by statute by "[o]ne who has a lien, inferior to another upon the same property" if such person "satisf[ies] the claim secured thereby." 42 O.S. § 19(2).[5] This

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[4]"[W]hile federal law defines a bankruptcy trustee's avoidance powers, state law governs the determination of property rights, including the perfection of liens." Vieira v. Pearce (In re Pearce), 236 B.R. 261, 264 (Bankr. S.D. Ill. 1999). "Thus, to the extent a state court would grant relief to an unperfected creditor under the equitable doctrine of subrogation, and to the extent such a result would not be inconsistent with the language and policy of federal bankruptcy statutes, this Court must give effect to state subrogation principles in determining the efficacy of such creditor's lien against the avoiding powers of the trustee." Id.

[5]Section 19 provides in full–

One who has a lien, inferior to another upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and,
2. To be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby.

42 O.S. § 19.

statutory remedy is not available to the Credit Union because the Credit Union did not have an inferior lien on the property when it advanced funds to the Debtors to satisfy the Debtors' debt to Union Acceptance Corp.

A non-statutory doctrine of equitable subrogation has evolved which entitles a secured party to step into the shoes of, and acquire the lien priority of, a prior secured lender whose debt is paid with the proceeds of a subsequent loan to the debtor. The Credit Union has not referred the Court to any Oklahoma case in which equitable subrogation has been applied to *perfect* a lien in favor of a secured party where the secured party has failed to act with due diligence to perfect the lien on its own behalf, however.

The most complete articulation of the non-statutory doctrine of equitable subrogation is found in Landis v. State *ex rel.* Commissioners of Land Office, 1937 OK 176, 66 P.2d 519, which states–

> The doctrine of subrogation has long been an established branch of equity jurisprudence. Although originally it was limited in application to actions where the relation of principal and surety existed and to those cases involving conventional subrogation, the doctrine as now applied by most courts is broad enough to cover every instance where payment is made by any person other than a volunteer of a debt for which another is primarily liable and which in equity and in good conscience should be discharged by another. The authorities are in conflict upon the right of one lending money upon the security of a forged or unauthorized mortgage which has been discharged by the money advanced upon the void mortgage. However, a majority in number, and in our opinion the better reasoned cases, hold that one lending money upon the security of a void mortgage is entitled to be subrogated to the rights of the mortgage under the prior valid mortgage which has been discharged with the proceeds of the void one. . . . *While the mere loan of money for the purpose of enabling the borrower to pay a debt will not entitle the lender to be subrogated to the right of the creditor whose debt was thus paid . . . this rule does not apply where one lends money upon real estate security for the express purpose of paying incumbrances on the same property believing in good faith*

> *that his security will of record be substituted in place of that which he discharges.* . . . Where money is advanced on defective security for the purpose of paying off a prior incumbrance, and where the person advancing the money expected to get good security therefor, the person advancing the money is not a volunteer, and in the absence of intervening equities, he will be held to be subrogated to the lien which the money advanced is used to pay.

Landis, 66 P.2d at 521-22 (quotations and citations omitted). The goal of equitable subrogation is "to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it." Landis, 66 P.2d at 522. The Court notes that the Landis court expressly limited the application of equitable subrogation to cases in which the collateral for the first and refinanced mortgages is real estate[6] and that the Landis court envisioned that equitable subrogation would equitably impose on the *mortgagor*, who had received the benefit of the loan but who might otherwise be freed from its obligations by virtue of granting a defective mortgage, the obligation to pay the debt from the mortgagor's property. Id. at 522 (refinancing lender was equitably subrogated and assumed the benefits of the valid mortgage it satisfied when evidence revealed that the new mortgage taken by the refinancing lender was void due to forgery). Under Landis, equitable subrogation is intended to give a lender who did not obtain an effective security interest (due to fraud or forgery of the debtor, for example) a vehicle under which it could enforce the security interest it expected to

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[6]In at least one case, the Oklahoma Supreme Court considered equitable subrogation in connection with the priority of liens on personal property but the court rejected its application because the lienholder claiming equitable subrogation had constructive notice of the intervening liens it sought to supersede. See Citizens State Bank v. Pittsburg County Broadcasting Co., 1954 OK 51, 271 P.2d 725, 726 (refinancing lender sought equitable subrogation to advance ahead of intervening lienholders in an automobile; whether equitable subrogation is applicable to security interests in personal property was not at issue and was not decided one way or the other).

receive against the debtor's property, and nothing in Landis indicates that equitable subrogation should be applied to enhance the rights of a refinancing lienholder to the detriment of third party lienholders who had done nothing to cause the failure or invalidity of lender's security interest.

Certain Oklahoma cases appear to recognize that equity might justify subrogation to the rights of a first lienholder in favor of a subsequent lender who loaned funds to enable a debtor to pay off a debt secured by a first lien on property when the lender was somehow deceived into believing that the lender would obtain a first lien on the property but, due to no fault of the lender, it in fact obtains a lien *junior to undisclosed intervening liens*. In such a case, equity may entitle the lender to priority over the intervening liens "only when 'from all the facts and circumstances surrounding the transaction it is clearly to be implied that it was the intention of the parties that the person making the advance was to have security of equal dignity and position with that discharged.'" Southwest Title & Trust Co. v. Norman Lumber Co., 1968 OK 71, 441 P.2d 430, 434. See also Mortgage Electronic Registration Systems, Inc. v. United States, 2006 OK CIV APP 45, 134 P.3d 913, 916.

However, in cases where a refinancing lender seeks to usurp the priority of intervening lienholders in property, Oklahoma courts have consistently required a showing that the refinancing lender believed that he would be substituted for the original lender but such substitution did not occur. Such evidence might consist of an agreement requiring the assignment of the prior mortgage to the refinancing lender. See Southwest Title, 441 P.2d at 433-34 (procuring an assignment of the prior mortgage was proof that the parties intended

to merely substitute the refinancing lender for the first mortgagee to preserve priority of the first mortgage); Citizens State Bank v. Pittsburg County Broadcasting Co., 1954 OK 51, 271 P.2d 725, 727 (first mortgagee provided a release of mortgage upon payment by refinancing lender; refinancing lender did not request an assignment of the first mortgage until after it learned of intervening liens, but such mortgage had already been released; thus, refinancing lender was not entitled to equitable subrogation); Bourquin v. Feland, 1941 OK 274, 117 P.2d 789, 791 (the judgment lienholder purchased the judgment (which lien was junior to the original mortgage) after the refinancing mortgage was executed but eight months before the first mortgage was released of record; "[o]n the surface, the whole transaction had all the earmarks of a completed arrangement to substitute liens, and, as a matter of law, was of such a nature as to put [the lienholder] on inquiry" that a superior mortgage existed). Evidence that the parties intended that the first mortgage would be released and the refinancing lender would take a new mortgage negates the implication that the parties intended that the refinancing lender would step into the shoes of the first mortgagee. Citizens State Bank, 271 P.2d at 727.

Moreover, the lender seeking equitable subrogation must not be guilty of any lack of diligence in ascertaining the existence of intervening liens, or have committed any negligence in failing to protect its interests. See, e.g., Citizens State Bank, 271 P.2d at 728 (because refinancing lender had constructive notice of properly filed intervening liens, it was not equitable to intervening lienholders to grant refinancing lender priority of first mortgagee whose debt was satisfied with proceeds of refinanced loan); Owen v. Interstate Mortgage

Trust Co., 1922 OK 165, 211 P. 87, 89 (equitable subrogation not available to lender that failed to protect its interests when review of the record would have revealed prior judgment lien); Mortgage Electronic Registration Systems, 134 P.3d at 917 ("Negligence and improper business maneuvers by a lender might act to remove an equitable remedy entitling it to a priority lien"); King v. Towe, 2000 OK CIV APP 1, 996 P.2d 948, 950-51 (when assessing whether equitable subrogation should be applied, a lender that fails to practice due diligence in protecting its interest bears the risk of loss).

Unlike Landis, this case does not involve a void mortgage or security interest. The Credit Union has a valid security interest in the Vehicle; it just failed to perfect its interest against later lien creditors. Nor was the Credit Union's failure to perfect its valid security interest due to fraud, deception or other wrongdoing. There is no evidence that the Credit Union sought or was promised an assignment of Union Acceptance Corp.'s debt and security interest or that the Credit Union's lien would have "equal dignity and position with that [lien] discharged." Southwest Title, 441 P.2d at 434. In fact, the Credit Union advanced the proceeds of its loan directly to the Debtors, not to Union Acceptance Corp.[7] Although the law regarding perfection of liens on vehicles registered with Indian tribes is complex and

[7]Although the Disclosure Statement and Agreement ("Security Agreement") entered into between the Debtors and the Credit Union states that the purpose of the loan was to "Refinance Vehicle," nothing in the Security Agreement obligated the Debtors to provide the Credit Union with a *first lien* on the Vehicle, nor did the agreement expressly require the Debtors to use the proceeds of the Credit Union's loan to satisfy the Union Acceptance Corp. debt. See Exhibit A to Joint Stipulation of Facts. While the Court assumes that the Debtors in fact satisfied their debt to Union Acceptance Corp., under the terms of the Security Agreement, the Debtors could have applied the proceeds to another debt or purpose, and the Credit Union's lien might have been junior to the lien of Union Acceptance Corp.

unsettled, ultimately, only the Credit Union could have protected its interest in the Vehicle. For these reasons, the equities do not favor the Credit Union over the Trustee, and the Credit Union is not entitled to the benefits of equitable subordination. Accordingly, modification of the Judgment on that ground is not warranted.[8]

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[8]Faced with a similar set of facts, an Illinois bankruptcy court, applying Illinois law, likewise refused to cure a creditor's failure to perfect its lien by application of equitable subrogation, stating that the creditor's "taking of new security to collateralize its loan underlines the fact that [the creditor] is not an innocent party needing the protection of equity to undo the fraud or mistake of another, but a sophisticated creditor in the business of making loans for a profit. Despite [the creditor's] delay in recording the debtors' mortgage, it is apparent that [the creditor] intended to rely on its own mortgage with the debtors rather than that of the previous mortgagee on the property." Vieira v. Pearce (In re Pearce), 236 B.R. 261, 266 (Bankr. S.D. Ill. 1999). "In the absence of a strong showing of equity on the part of a potential subrogee, this Court must not allow state subrogation principles to override the equitable purposes of bankruptcy law." Id at 267. See also Farmer v. LaSalle Bank (In re Morgan), 291 B.R. 795, 803 (Bankr. E.D. Tenn. 2003) (applying Tennessee subrogation law, the court refused to grant refinancing lender subrogation to prior perfected lender's position when refinancing lender failed to note its lien on the certificate of title of debtor's vehicle until after bankruptcy was filed; it was not inequitable to place the risk of loss on "the secured party who is ultimately responsible for seeing that the lien is properly noted" (quotations and citations omitted)); Equicredit Corp. v. Simms (In re Simms), 300 B.R. 877, 879 (Bankr. S.D. W.Va. 2003) (applying Ohio law, which provides "[e]quitable subrogation will not be used to benefit parties who were negligent in their business transactions, and who were obviously in the best position to protect their own interests," the court denied equitable subrogation to refinancing lender who failed to discover tax liens filed during the time between the recording of the first lender's mortgage and the refinancing lender's mortgage); In re American Applicance, 272 B.R. 587, 598 (Bankr. D. N.J. 2002) (under Delaware law, equitable subrogation not available where defect in security interest in property was not caused by fraud or mistake of a third party, but by negligence of lender); Boyd v. Superior Bank (In re Lewis), 270 B.R. 215 (Bankr. W.D. Mich. 2001) (applying Michigan law, court denied refinancing lender equitable subrogation to take advantage of prior lender's perfection date where refinancing lender failed to record its mortgage in a timely manner and consequently perfected within the preference period, rendering the mortgage voidable).

For a contrary view, see Rinn v. First Union Nat'l Bank, 176 B.R. 401 (D. Md. 1995) (applying Maryland subrogation law).

D. The Creek Nation title is not a Certificate of Title under the OUCC.

The Credit Union argues that the Title issued by the Creek Nation satisfies the requirements of OUCC Section 1-9-102(10) and is therefore a "Certificate of Title" for the purposes of Article 9 of the OUCC because the Creek Nation Title form provides a place to list the entry of a first lien and a second lien on the Vehicle. Motion for New Trial at 7-8. Section 1-9-102(10) provides that –

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

12A O.S. § 1-9-102(10) (emphasis added). While section 3-104(B) of title 36 of the Creek Nation Motor Vehicle Tax and License Code requires the tribe to reflect on the title a "notice of lien against said vehicle . . .upon request of the lending institution," no Creek Nation statute "provides for the security interest in question to be indicated on the certificate of title as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." 12A O.S. § 1-9-102(10). So far as this Court has been able to discern from the submissions of the parties, the Creek Nation lacks a statutory scheme, such as a commercial code, that addresses perfection and priority of liens noted on a Creek Nation title as against a lien creditor. The form on which title is issued is not a statute nor does it address whether the noted lienholder has priority over a lien creditor. The Court cannot construct perfection and priority statutes for the Creek Nation where none exist.

Accordingly, the Court reaffirms its conclusion that the Creek Nation Title is not a "Certificate of Title" under the OUCC, as set forth in the Memorandum Opinion. Thus, the Credit Union is not entitled to a new trial or modification of the Judgment due to a manifest error in interpreting OUCC 1-9-102(10).

For the above reasons, the Credit Union's Motion for New Trial is denied.

SO ORDERED this 17th day of July, 2006.

DANA L. RASURE
UNITED STATES BANKRUPTCY JUDGE

FILED
United States Bankruptcy Appellate Panel
of the Tenth Circuit

January 9, 2007

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RUSSELL T. HARPER, SHANNON C. HARPER, Debtors.	BAP No. NO-06-076
PATRICK J. MALLOY, III, TRUSTEE, Plaintiff – Appellee, v. WILSERV CREDIT UNION, Defendant – Appellant.	Bankr. No. 05-13352-R Adv. No. 05-01151-R Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Northern District of Oklahoma

Before NUGENT, BROWN, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Willserv Credit Union ("Credit Union") timely appeals the Judgment entered June 7, 2006, and the Order Denying Motion for New Trial entered July

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

17, 2006, (collectively "Judgment") of the United States Bankruptcy Court for the Northern District of Oklahoma in favor of the Chapter 7 trustee, Patrick J. Malloy, III ("Trustee"), avoiding the Credit Union's lien against the Debtors' vehicle pursuant to 11 U.S.C. § 544. For the reasons stated, the bankruptcy court's Judgment is AFFIRMED.

I. Jurisdiction and Standard of Review

The Credit Union filed a timely Notice of Appeal from the Judgment and neither party has elected to have the appeal heard by the United States District Court for the Northern District of Oklahoma. Therefore, this Court has jurisdiction over the appeal. 28 U.S.C. § 158(a), (b)-(c); Fed. R. Bankr. P. Rule [Interim] 8001(a) & (e); Fed. R. Bankr. P. 8002(a); 10th Cir. BAP L.R. 8001-1.

The bankruptcy court's Judgment was entered on stipulated facts, and the issues presented in this appeal are questions of law. We review questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

II. Background

On September 1, 2001, Russell Harper and Shannon Harper ("Debtors") purchased a truck for $28,589.00 from a dealer who financed the purchase. The dealer assigned the purchase contract to a financing company. On October 5, 2001, the Muscogee (Creek) Nation ("Muscogee Nation") issued a certificate of title to the truck.

On October 18, 2001, the Debtors obtained a loan from the Credit Union in the amount of $28,611.93, paid directly to the Debtors. The Debtors used the loan proceeds from the Credit Union to pay off the loan with the financing company. The Debtors granted the Credit Union a security interest in the truck. On December 13, 2001, the Credit Union executed and filed a lien entry form with the Muscogee (Creek) Nation Tax Commission, and the Muscogee Nation recorded the Credit Union's lien on the certificate of title. The Credit Union did not file a lien entry form or a financing statement with the Oklahoma Tax

Commission.

At the time of the purchase and financing, the Debtors resided in Glenpool, Oklahoma. The Muscogee Nation certificate of title verified that the Debtors were enrolled members of the Muscogee (Creek) Nation. The parties stipulated that the Debtors did not live on Muscogee tribal lands, and that the "vehicle was registered under Title 36, section 3-103 of the Creek Nation Statutes, and the debtors and the vehicle met the requirements of that statute." *Joint Stipulation of Facts* at 2, ¶ 4 *in* Appellant's App. at 24.

On May 27, 2005, the Debtors filed a Chapter 7 petition for relief and listed the truck as an asset of the estate. The Trustee subsequently commenced an adversary proceeding against the Credit Union, alleging that the Credit Union's lien on the truck was avoidable under § 544 because it was not perfected under Oklahoma law on the date of the Debtors' petition.

On the basis of the stipulated facts, the bankruptcy court entered judgment for the Trustee, avoiding the Credit Union's lien under § 544(a). The bankruptcy court ruled that the certificate of title issued by the Muscogee Nation was not a "certificate of title" under the definition of the Oklahoma Uniform Commercial Code ("Oklahoma UCC") and, therefore, the Credit Union was required to file a financing statement in order to perfect its interest in the truck. Because the Credit Union failed to file a financing statement, the bankruptcy court held the lien was not perfected and was avoidable by the Trustee under § 544(a). The bankruptcy court denied the Credit Union's Motion for a New Trial, and this appeal followed.

III. Discussion

The Debtors resided in Oklahoma when these transactions occurred, and therefore Oklahoma law, specifically the Oklahoma UCC, is applicable to determine whether the Credit Union's lien was perfected. Okla. Stat. tit. 12A, § 1-9-301(1) (2007). To perfect a lien on a vehicle under the Oklahoma UCC, the lien must be recorded on a certificate of title, and a financing statement must be

filed. Okla. Stat. tit. 12A § 1-9-310(a) (2007); Okla. Stat. tit. 47 § 1110(A)(1) (2007).

At least two exceptions to the requirement to file a financing statement are found in the Oklahoma statutes. The Oklahoma UCC defines a certificate of title as "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." Okla. Stat. tit. 12A § 1-9-102(a)(10) (2007). The local perfection and priority law of the jurisdiction issuing a certificate of title may apply if that jurisdiction's statutes comply with § 1-9-102(10). Okla. Stat. tit. 12A § 1-9-303(c) (2007).

Also, the filing of a financing statement is not necessary to perfect a security interest in property subject to, among other things:

> the law or procedure of a federally recognized Indian tribe, if the security interest is in a vehicle registered or to be registered by the federally recognized Indian tribe and if within thirty (30) days after the security interest attaches, it is noted on the face of a certificate of title issued by the Indian tribe or . . . the security interest is otherwise perfected under an applicable law or procedure of that tribe.

Okla. Stat. tit. 12A § 1-9-311(a)(4) (2007). The Credit Union does not dispute that the security interest was noted on the certificate of title more than thirty days after it attached. However, the Credit Union contends the Muscogee Nation certificate of title is valid, the Credit Union's lien falls into the exception of Okla. Stat. tit. 12A § 1-9-311(a)(4), and therefore, a financing statement is not required to be filed.

The Muscogee Nation enacted statutes governing the licensing and taxation of motor vehicles. An eligible vehicle is defined as "any personal vehicle . . . which is principally garaged within the political jurisdiction of the Muscogee (Creek) Nation and title to which is held by . . . any enrolled member of the Muscogee (Creek) Nation who resides within the political jurisdiction of the

Muscogee (Creek) Nation." Muscogee (Creek) Nation Code tit. 36 § 3-102(B) (2001).

Under Muscogee (Creek) Nation Code tit. 36 § 3-103(C) (2001), "[a]ny Muscogee (Creek) Nation citizen who resides within the political jurisdiction of the Muscogee (Creek) Nation and who holds title to an eligible vehicle shall have the option to apply for registration of said vehicle with the Muscogee (Creek) Nation Tax Commission . . . ." The Muscogee Nation certificate of title requirements state that "[n]otice of liens against said vehicle shall be placed upon said title upon request of the lending institution." Muscogee Creek Nation Code tit. 36 § 3-104(B) (2001).

The Credit Union has not provided the Court with any applicable Muscogee Nation law providing for the perfection or priority of a lien on a motor vehicle.[1] Therefore, the Credit Union, having failed to file a financing statement with the Oklahoma Tax Commission, has no perfected security interest in the truck.

The Credit Union raises four other arguments, all of which were properly rejected by the bankruptcy court. First, the Credit Union contends the certificate of title format provides for lien priority and satisfies the procedural law requirement. The Court disagrees. A form of title is not sufficient as, and does not take the place of, a procedure enacted to provide for perfection. Neither the certificate of title nor Muscogee Creek Nation Code tit. 36 § 3-104 addresses perfection.

Second, the Credit Union argues it is exempt from the filing requirement by a provision added to the Oklahoma Statutes, effective April 13, 2004. The new provision states, "[a] security interest in vehicles registered by a federally

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[1] The Court agrees with the bankruptcy court that Muscogee (Creek) Nation Code, tit. 24, statutes relating to lien procedures found in the Housing and Mortgage Foreclosure and Eviction Title, apply only to liens on interests in real estate and not to the creation of a lien on a motor vehicle.

recognized Indian tribe shall be deemed valid under Oklahoma law if validly perfected under the applicable tribal law and the lien is noted on the face of the tribal certificate of title." Okla. Stat. tit. 47, § 1110(G) (2007). The parties dispute whether this provision is retroactive to save the Credit Union's lien from avoidance.

Whether or not retroactive, the Credit Union's argument fails for the same reason that the other provisions do not save the lien. The Court is unaware of any Muscogee Nation tribal law dealing with perfection of vehicle liens, and therefore, the statute is inapplicable in this case.

Third, the Credit Union seeks to show perfection of its security interest under Oklahoma's provision providing for perfection upon attachment for, among other things, a purchase-money security interest. The provision in Okla. Stat. tit. 12A § 1-9-309(a)(2001) was applied to validate a lien on a certificate of title issued by the Cherokee Nation in the unpublished case of *Malloy v. Bank of Commerce (In re Dalton)*, 336 B.R. 600 (10th Cir. BAP 2005). However, in the instant case, the bankruptcy court concluded the Credit Union's security interest was not a purchase-money security interest. We see no error in this conclusion because the Debtors paid off the first lien on the truck with the loan proceeds, and the Credit Union is an entirely different creditor than the original lien holder.

Finally, the Court rejects the Credit Union's argument that it is entitled to statutory or equitable subrogation of the original lien holder's position. Under Oklahoma statute, one who has a lien inferior to another upon the same property has a right of subrogation to the benefits of the superior lien upon satisfying the superior claim. Okla. Stat. tit. 42 § 19(2) (2007). The Credit Union's argument fails as a matter of fact. The Credit Union did not have a lien position on the vehicle inferior to the prior lender. Moreover, there is no evidence in the record that the prior lender had a validly perfected security interest.

Nor is equitable subrogation applicable here. The doctrine applies when a

creditor has been unfairly deceived or defrauded, and may be applicable to protect a refinancing lender who is granted a defective mortgage. *Landis v. State ex rel Comm'rs of Land Office*, 66 P.2d 519, 521-522 (Okla. 1937). However, it is not applicable where a creditor fails to take an assignment of a prior lien voluntarily paid and discharged. *Sw. Title & Trust Co. v. Norman Lumber Co.*, 441 P.2d 430, 433 (Okla. 1968). Here, the Credit Union loaned the Debtors funds, the Debtors paid off the original lien, and the Credit Union failed to protect its security interest and position. No evidence in the record supports the implementation of an equitable remedy. Equitable subrogation is simply not applicable here.

IV. Conclusion

Finding no error, the Judgment of the bankruptcy court is AFFIRMED.

ADDENDUM

12A O.S. Sec. 1-9-102(10)

(10) "Certificate of title" means 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.

42 O.S. Sec. 19

One who has a lien, inferior to another upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and,

2. To be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby.

in form was in fact a mortgage or instrument of pledge to secure debt might introduce parol or extrinsic evidence to support assertion, though instrument was unambiguous, but to prevail, was required to introduce clear, cogent, and convincing proof. Beverly Hills Nat. Bank & Trust Co. v. Martin, Okla., 185 Okla. 254, 91 P.2d 94 (1939).

Evidence was insufficient to establish that instrument purporting to create trust was in reality an instrument of pledge intended to secure payment of a debt. Beverly Hills Nat. Bank & Trust Co. v. Martin, Okla., 185 Okla. 254, 91 P.2d 94 (1939).

Upon the question whether an ambiguous transaction constituted a pledge, the writing, if any, accompanying the tra... action, the oral statements of the par... made at the time or afterwards, and ... collateral circumstances tending to sho... the intention of the parties, could be co... sidered. Carothers Warehouse Bl... Ass'n v. McConnell, Okla., 30 Okla. 3... 121 P. 191 (1911).

20. Questions of law

Under Uniform Commercial Code, cl... sification is not ordinarily a matter ... intent of parties but a question of la... applied to facts as they exist. Mitchell ... Shepherd Mall State Bank, W.D.Okl... 1971, 324 F.Supp. 1029, affirmed ... F.2d 700.

§ 1–9–103. Purchase-money security interest; application of payments; burden of establishing

Purchase-money security interest; application of payments; bur... den of establishing

(a) In this section:

(1) "purchase–money collateral" means goods or software that ... secures a purchase-money obligation incurred with respect to that ... collateral; and

(2) "purchase–money obligation" means an obligation of an obl... gor incurred as all or part of the price of the collateral or for valu... given to enable the debtor to acquire rights in or the use of the ... collateral if the value is in fact so used.

(b) A security interest in goods is a purchase-money security inte... est:

(1) to the extent that the goods are purchase-money collateral wi... respect to that security interest;

(2) if the security interest is in inventory that is or was purchase... money collateral, to the extent that the security interest secures ... purchase-money obligation incurred with respect to other inventory ... in which the secured party holds or held a purchase-money securit... interest; and

(3) to the extent that the security interest secures a purchase... money obligation incurred with respect to software in which the ... secured party holds or held a purchase-money security interest.

(c) A security interest in software is a purchase-money security ... interest to the extent that the security interest also secures a pur... chase-money obligation incurred with respect to goods in which the ... secured party holds or held a purchase-money security interest if

(1) the debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(2) the debtor acquired its interest in the software for the principal purpose of using the software in the goods.

(d) The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.

(e) In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) in accordance with any reasonable method of application to which the parties agree;

(2) in the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) to obligations that are not secured; and

(B) if more than one obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

(f) In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(1) the purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) the purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

(g) In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

(h) The limitation of the rules in subsections (e), (f), and (g) of this section to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that

limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.
Laws 2000, c. 371, § 3, eff. July 1, 2001.

OKLAHOMA COMMENTS

One of the components of the consumer issues compromise that paved the way for approval of revised Article 9 was agreement that there would be no codification of either the "dual status" or "transformation" rules for determining whether a purchase money security interest continues after a refinance of or other subsequent change in a consumer-goods transaction. The compromise indicated an intent that there be no change to the current law in each jurisdiction. *See Memorandum of Consumer and Creditor Understanding of Proposal on Consumer Issues*, 52 Consumer Fin. L. Q. Rep. 226 (1998). On the transformation and dual status rules generally, *see* Robert M. Lloyd, *Consolidated and Refinanced Purchase Money Loans Under the Bankruptcy Code and the Uniform Commercial Code*, 49 Consumer Fin. L. Q. Rep. 69 (1990).

The result of this compromise is revised section 9-103(f) and (h), excluding consumer-goods transactions from codification of the dual status rule for other transactions and specifying that there shall be no inference that this exclusion is intended to alter "established approaches" in any state. In other words, for consumer-goods transactions current law should continue to apply, for other transactions the dual status rule is codified.

In Oklahoma this should mean there is no change in the law, for either consumer-goods or other transactions, as Oklahoma case law previously adopted the dual status rule and rejected the transformation rule. *See, e.g., In re* Johnson, BK-89-716-BH (W.D. Okla. June 21, 1989); *In re* Russell, 29 B.R. 270 (Bankr. W.D. Okla. 1983). *See also* Notes and Comments, *Section 522(f): A Proposal for the Survival of Purchase Money Security Interests Following Refinancing*, 18 Tulsa L. J. 280 (1982) (advocating the dual status rule and criticizing the transformation rule). *See also* Lloyd, *supra* (criticizing the transformation rule and stating that the "majority of recent cases" had adopted the dual status rule).

A related issue is illustrated by National Bank of Commerce v. First National Bank & Trust Co. of Tulsa, 446 P.2d 277 (S. Ct. Okla. 1968), where a purchase money security interest was recognized even though the debtor had already acquired the collateral when the loan was extended. Revised section 9-103(a)(2) arguably might accommodate the *National Bank of Commerce* view, in appropriate circumstances where a loan is obtained for the purpose of purchasing the collateral, notwithstanding arguments that the loan proceeds check must be payable to the seller of the collateral or that the loan must be closed or funded before the collateral is acquired. Thus perhaps a loan proceeds check deposited in the debtor's bank account to cover a check written by the debtor to purchase the

collateral in a previous transaction could qualify as a purchase money loan, but as noted at Official Comment 3 there must be a nexus between the transactions.

Uniform Commercial Code Comment

1. **Source.** Former Section 9–107.

2. **Scope of This Section.** Under Section 9–309(1), a purchase-money security interest in consumer goods is perfected when it attaches. Sections 9–317 and 9–324 provide special priority rules for purchase-money security interests in a variety of contexts. This section explains when a security interest enjoys purchase-money status.

3. **"Purchase–Money Collateral"; "Purchase–Money Obligation"; "Purchase–Money Security Interest."** Subsection (a) defines "purchase-money collateral" and "purchase-money obligation." These terms are essential to the description of what constitutes a purchase-money security interest under subsection (b). As used in subsection (a)(2), the definition of "purchase-money obligation," the "price" of collateral or the "value given to enable" includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

The concept of "purchase-money security interest" requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.

4. **Cross-Collateralization of Purchase–Money Security Interests in Inventory.** Subsection (b)(2) deals with the problem of cross-collateralized purchase-money security interests in inventory. Consider a simple example:

Example: Seller (S) sells an item of inventory (Item–1) to Debtor (D), retaining a security interest in Item–1 to secure Item–1's price and all other obligations, existing and future, of D to S. S then sells another item of inventory to D (Item–2), again retaining a security interest in Item–2 to secure Item–2's price as well as all other obligations of D to S. D then pays to S Item–1's price. D then sells Item–2 to a buyer in ordinary course of business, who takes Item–2 free of S's security interest.

Under subsection (b)(2), S's security interest in *Item–1* securing *Item–2's unpaid price* would be a purchase-money security interest. This is so because S has a purchase-money security interest in Item–1, Item–1 secures the price of (a "purchase-money obligation incurred with respect to") Item–2 ("other inventory"), and Item–2 itself was subject to a purchase-money security interest. Note that, to the extent Item–1 secures the price of Item–2, S's security interest in Item–1 would not be a purchase-money security interest under subsection (b)(1). The security interest in Item–1 is a purchase-money security interest under subsection (b)(1) only to the extent that Item–1 is "purchase-money collateral," i.e., only to the extent that Item–1 "secures a purchase-money obligation incurred with respect to that collateral" (i.e., Item–1). See subsection (a)(1).

5. **Purchase-Money Security Interests in Goods and Software.** Subsections (b) and (c) limit purchase-money security interests to security

interests in goods, including fixtures, and software. Otherwise, no change in meaning from former Section 9–107 is intended. The second sentence of former Section 9–115(5)(f) made the purchase-money priority rule (former Section 9–312(4)) inapplicable to investment property. This section's limitation makes that provision unnecessary.

Subsection (c) describes the limited circumstances under which a security interest in goods may be accompanied by a purchase-money security interest in software. The software must be acquired by the debtor in a transaction integrated with the transaction in which the debtor acquired the goods, and the debtor must acquire the software for the principal purpose of using the software in the goods. "Software" is defined in Section 9–102.

6. **Consignments.** Under former Section 9–114, the priority of the consignor's interest is similar to that of a purchase-money security interest. Subsection (d) achieves this result more directly, by defining the interest of a "consignor," defined in Section 9–102, to be a purchase-money security interest in inventory for purposes of this Article. This drafting convention obviates any need to set forth special priority rules applicable to the interest of a consignor. Rather, the priority of the consignor's interest as against the rights of lien creditors of the consignee, competing secured parties, and purchasers of the goods from the consignee can be determined by reference to the priority rules generally applicable to inventory, such as Sections 9–317, 9–320, 9–322, and 9–324. For other purposes, including the rights and duties of the consignor and consignee as between themselves, the consignor would remain the owner of goods under a bailment arrangement with the consignee. See Section 9–319.

7. **Provisions Applicable Only to Non-Consumer-Goods Transactions.**

a. **"Dual-Status" Rule.** Fo
transactions other than consume
goods transactions, this Article ap
proves what some cases have calle
the "dual-status" rule, under which
a security interest may be a pur
chase-money security interest to
some extent and a non-purchase
money security interest to some ex
tent. (Concerning consumer-goods
transactions, see subsection (h) and
Comment 8.) Some courts have
found this rule to be explicit or im
plicit in the words "to the extent"
found in former Section 9–107 and
continued in subsections (b)(1) and
(b)(2). The rule is made explicit in
subsection (e). For non-consumer
goods transactions, this Article re
jects the "transformation" rule
adopted by some cases, under which
any cross-collateralization, refinanc
ing, or the like destroys the pur
chase-money status entirely.

Consider, for example, what hap
pens when a $10,000 loan secured
by a purchase-money security inter
est is refinanced by the original lend
er, and, as part of the transaction,
the debtor borrows an additional
$2,000 secured by the collateral.
Subsection (f) resolves any doubt
that the security interest remains a
purchase-money security interest.
Under subsection (b), however, it en
joys purchase-money status only to
the extent of $10,000.

b. **Allocation of Payments.** Con
tinuing with the example, if the debt
or makes a $1,000 payment on the
$12,000 obligation, then one must
determine the extent to which the
security interest remains a purchase-
money security interest–$9,000 or
$10,000. Subsection (e)(1) express
es the overriding principle, applica
ble in cases other than consumer
goods transactions, for determining
the extent to which a security inter
est is a purchase-money security in
terest under these circumstances:
freedom of contract, as limited by
principle of reasonableness. An un

conscionable method of application, for example, is not a reasonable one and so would not be given effect under subsection (e)(1). In the absence of agreement, subsection (e)(2) permits the obligor to determine how payments should be allocated. If the obligor fails to manifest its intention, obligations that are not secured will be paid first. (As used in this Article, the concept of "obligations that are not secured" means obligations for which the debtor has not created a security interest. This concept is different from and should not be confused with the concept of an "unsecured claim" as it appears in Bankruptcy Code Section 506(a).) The obligor may prefer this approach, because unsecured debt is likely to carry a higher interest rate than secured debt. A creditor who would prefer to be secured rather than unsecured also would prefer this approach.

After the unsecured debt is paid, payments are to be applied first toward the obligations secured by purchase-money security interests. In the event that there is more than one such obligation, payments first received are to be applied to obligations first incurred. See subsection (e)(3). Once these obligations are paid, there are no purchase-money security interests and no additional allocation rules are needed.

Subsection (f) buttresses the dual-status rule by making it clear that (in a transaction other than a consumer-goods transaction) cross-collateralization and renewals, refinancings, and restructurings do not cause a purchase-money security interest to lose its status as such. The statutory terms "renewed," "refinanced," and "restructured" are not defined. Whether the terms encompass a particular transaction depends upon whether, under the particular facts, the purchase-money character of the security interest fairly can be said to survive. Each term contemplates an identifiable portion of the purchase-money obligation could be traced to the new obligation resulting from a renewal, refinancing, or restructuring.

c. **Burden of Proof.** As is the case when the extent of a security interest is in issue, under subsection (g) the secured party claiming a purchase-money security interest in a transaction other than a consumer-goods transaction has the burden of establishing whether the security interest retains its purchase-money status. This is so whether the determination is to be made following a renewal, refinancing, or restructuring or otherwise.

8. **Consumer-Goods Transactions; Characterization Under Other Law.** Under subsection (h), the limitation of subsections (e), (f), and (g) to transactions other than consumer-goods transactions leaves to the court the determination of the proper rules in consumer-goods transactions. Subsection (h) also instructs the court not to draw any inference from this limitation as to the proper rules for consumer-goods transactions and leaves the court free to continue to apply established approaches to those transactions.

This section addresses only whether a security interest is a "purchase-money security interest" under this Article, primarily for purposes of perfection and priority. See, e.g., Sections 9–317, 9–324. In particular, its adoption of the dual-status rule, allocation of payments rules, and burden of proof standards for non-consumer-goods transactions is not intended to affect or influence characterizations under other statutes. Whether a security interest is a "purchase-money security interest" under other law is determined by that law. For example, decisions under Bankruptcy Code Section 522(f) have applied both the dual-status and the transformation rules. The Bankruptcy Code does not expressly adopt the state law definition

of "purchase-money security interest." Where federal law does not defer to this Article, this Article does not, and could not, determin question of federal law.

Historical and Statutory Notes

Source:

Laws 1961, p. 165, § 9–107.
12A O.S.1991, § 9–107.

Uniform Law:

This section is similar to § 9–103 of the Uniform Commercial Code (2000). See Vol. 3, Pt. I, Uniform Laws Annot Master Edition or ULA Database Westlaw.

Cross References

Attachment, Perfection of security interest, see Title 12A, § 1–9–309.
Conflicting security interests and agricultural liens, priorities, see Title 1 § 1–9–322.
Definitions, index, see Title 12A, § 1–9–102.
Filing provision, inapplicability to certain security interests or agricultural liens, s Title 12A, § 1–9–310.
Future advances, see Title 12A, § 1–9–323.
Interests taking priority or taking free of security interest or agricultural lien, see Ti 12A§ 1–9–317.
Oklahoma Industrial Finance Authority, see Title 74, § 853.
Perfecting security interests, property subject to certain statutes, regulations a treaties, see Title 12A, § 1–9–311.
Purchase–money security interests, priority, see Title 12A, § 1–9–324.

Law Review and Journal Commentaries

Commercial transactions: Consignors, creditors, and U.C.C. 19 Okla.L.Rev. 407 (1966).

Priority of purchase-money security interests under Article IX. Alan R. Shane, 10 UCC L.J. 98 (1977).

Section 522(f): Proposal for survival purchase money security interests follo ing refinancing. 18 Tulsa L.J. (1982).

Library References

Secured Transactions ⇐2, 146.
WESTLAW Topic No. 349A.

C.J.S. Secured Transactions §§ 3, 7 to 10, 22, 27, 103 to 105.

Notes of Decisions

In general 1
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1. In general

Renewal loan which included balance of original purchase loan obtained for purchase of television plus cash advanced to debtor did not cause security to lose its purchase money character for purposes of lien avoidance action to the extent of balance of original loan. In re Russell, Bkrtcy.W.D.Okla.1983, 29 B.R. 270.

Auction company which sold autom bile in usual course of its business, rem ting sale price less customary comm sion to the seller and accepting buy check in payment, did not secure a p prietary interest in the automobile whi would support an action in replev against a secured creditor of seller. T sa Auto Dealers Auction v. North Si State Bank, Okla., 431 P.2d 408 (196

2. Identification of collateral

Creditor failed to establish that it had purchase money security interest (PMS

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Title 12A. Uniform Commercial Code

Oklahoma Statutes Citationized

Title 12A. Uniform Commercial Code

Article 9 - Secured Transactions

Part 3 - Priority and Perfection

Section 1-9-309 - Security Interest Perfected Upon Attachment

Cite as: O.S. §, ___

The following security interests are perfected when they attach:

(1) a purchase-money security interest in consumer goods, except as otherwise provided in subsection (b) of Section 1-9-311 of this title with respect to consumer goods that are subject to a statute or treaty described in subsection (a) of Section 1-9-311 of this title;

(2) an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

(3) a sale of a payment intangible;

(4) a sale of a promissory note;

(5) a security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services;

(6) a security interest arising under Section 2-401, 2-505, paragraph (3) of Section 2-711, or paragraph (5) of Section 2A-508 of this title, until the debtor obtains possession of the collateral;

(7) a security interest of a collecting bank arising under Section 4-210 of this title;

(8) a security interest of an issuer or nominated person arising under Section 5-118 of this title;

(9) a security interest arising in the delivery of a financial asset under subsection (c) of Section 1-9-206 of this title;

(10) a security interest in investment property created by a broker or securities intermediary;

(11) a security interest in a commodity contract or a commodity account created by a commodity intermediary;

(12) an assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder;

(13) a security interest created by an assignment of a beneficial interest in a decedent's estate; and

(14) a sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.

Historical Data

Added by Laws 2000, SB 1519, c. 371, § 29, eff. July 1, 2001; Amended by Laws 2004, SB 1584, c. 153, § 4, eff. November 1, 2004 (superseded document available).

Citationizer© Summary of Documents Citing This Document

Cite	Name	Level
Title 12A. Uniform Commercial Code		
12A O.S. 1-9-3,	When Security Interest or Agricultrual Lien is Perfected - Continuity of Perfection	Cited
12A O.S. 1-9-3,	Future Advances	Discussed

Citationizer: Table of Authority

Cite	Name	Level
Title 12A. Uniform Commercial Code		
12A O.S. 1-9-3,	Security Interest Perfected Upon Attachment	Cited

Oklahoma Statutes Citationized

Title 12A. Uniform Commercial Code

Article 9 - Secured Transactions

Part 3 - Priority and Perfection

Section 1-9-311 - Perfection of Security Interests in Property Subject to Certain Statutes, Regulations, and Treaties

Cite as: O.S. §, ___

(a) Except as otherwise provided in subsection (d) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt subsection (a) of Section 1-9-310 of this title;

(2) another statute of this state that provides for central filing of, or that requires indication on or delivery for indication on a certificate of title of, any security interest in the property as a condition or result of perfection, including, but not limited to, Section 1110 of Title 47 and Section 4013 of Title 63 of the Oklahoma Statutes;

(3) a certificate-of-title statute of another jurisdiction which provides for a security interest 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 property; or

(4) the law or procedure of a federally recognized Indian tribe, if the security interest is in a vehicle registered or to be registered by the federally recognized Indian tribe and if within thirty (30) days after the security interest attaches, it is noted on the face of a certificate of title issued by the Indian tribe or, notwithstanding subsection G of Section 1110 of Title 47 of the Oklahoma Statutes, the security interest is otherwise perfected under an applicable law or procedure of that tribe.

(b) Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) of this section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) of this section and Section 1-9-313 and subsections (d) and (e) of Section 1-9-316 of this title for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) of this section may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) Except as otherwise provided in subsection (d) of this section and subsections (d) and (e) of Section 1-9-316 of this title, duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) of this section are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this article.

(d) During any period in which collateral, described in Section 1110 of Title 47 and Section 4013 of Title 63 of the Oklahoma Statutes, is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral created by that person as debtor.

Historical Data

Added by Laws 2000, SB 1519, c. 371, § 31, eff. July 1, 2001; Amended by Laws 2001, SB 692, c. 354, § 1, emerg. eff. July 1, 2001 (superseded document available); Amended by Laws 2005, HB 2028, c. 139, § 37, emerg. eff. May 5, 2005 (superseded document available).

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Title 12A. Uniform Commercial Code		
12A O.S. 1-9-3,	Continued Perfection of Security Interest Following Change in Governing Law	Cited

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Title 63. Public Health and Safety		
63 O.S. 4013,	Perfection of Security Interest	Discussed
Title 12A. Uniform Commercial Code		
12A O.S. 1-9-3,	When Filing Required to Perfect Security Interest or Agricultural Lien - Security Interests and Agricultural Liens to Which Filing Provisions Do Not Apply	Cited
12A O.S. 1-9-3,	When Possession by or Delivery to Secured Party Perfects Security Interest Without Filing	Cited
12A O.S. 1-9-3,	Continued Perfection of Security Interest Following Change in Governing Law	Discussed
12A O.S. 1-9-3,	Perfection of Security Interests in Property Subject to Certain Statutes, Regulations, and Treaties	Cited

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Title 47. Motor Vehicles

Oklahoma Statutes Citationized

Title 47. Motor Vehicles

Chapter 74

Oklahoma Vehicle License And Registration Act

Section 1110 - Security Interest, Perfection of

Cite as: O.S. §, ___

A. 1. Except for a security interest in vehicles held by a dealer for sale or lease, a vehicle registered by a federally recognized Indian tribe as provided in subsection G of this section, and a vehicle being registered in this state which was previously registered in another state and which title contains the name of a secured party on the face of the other state certificate or title, a security interest in a vehicle as to which a certificate of title may be properly issued by the Oklahoma Tax Commission shall be perfected only when a lien entry form, and the existing certificate of title, if any, or application for a certificate of title and manufacturer's certificate of origin containing the name and address of the secured party and the date of the security agreement and the required fee are delivered to the Tax Commission or to a motor license agent. As used in this section, the term "dealer" shall be defined as provided in Section 1-112 of this title and the term "security interest" shall be defined as provided in paragraph (37) of Section 1-201 of Title 12A of the Oklahoma Statutes. When a vehicle title is presented to a motor license agent for transferring or registering and the documents reflect a lien holder, the motor license agent shall perfect the lien pursuant to subsection G of Section 1105 of this title. For the purposes of this section, the term "vehicle" shall not include special mobilized machinery, machinery used in highway construction or road material construction and rubber-tired road construction vehicles including rubber-tired cranes. The filing and duration of perfection of a security interest, pursuant to the provisions of Title 12A of the Oklahoma Statutes, including, but not limited to, Section 1-9-311 of Title 12A of the Oklahoma Statutes, shall not be applicable to perfection of security interests in vehicles as to which a certificate of title may be properly issued by the Tax Commission, except as to vehicles held by a dealer for sale or lease and except as provided in subsection D of this section. In all other respects Title 12A of the Oklahoma Statutes shall be applicable to such security interests in vehicles as to which a certificate of title may be properly issued by the Tax Commission.

2. Whenever a person creates a security interest in a vehicle, the person shall surrender to the secured party the certificate of title or the signed application for a new certificate of title, on the form prescribed by the Tax Commission, and the manufacturer's certificate of origin. The secured party shall deliver the lien entry form and the required lien filing fee within twenty-five (25) days as provided hereafter with certificate of title or the application for certificate of title and the manufacturer's certificate of origin to the Tax Commission or to a motor license agent. If the lien entry form, the lien filing fee and the certificate of title or application for certificate of title and the manufacturer's certificate of origin are delivered to the Tax Commission or to a motor license agent within twenty-five (25) days after the date of the lien entry form, perfection of the security interest shall begin from the date of the execution of the lien entry form, but otherwise, perfection of the security interest shall begin from the date of the delivery to the Tax Commission or to a motor license agent.

3. a. For each security interest recorded on a certificate of title, or manufacturer's certificate of origin, such person shall pay a fee of Ten Dollars ($10.00), which shall be in addition to other fees provided for in the Oklahoma Vehicle License and Registration Act. Upon the receipt of the lien entry form and the required fees with either the certificate of title or an application for certificate of title and manufacturer's certificate of origin, a motor license agent shall, by placement of a clearly distinguishing mark, record the date and number shown in a conspicuous place, on each of these instruments. Of the ten-dollar fee, the motor license agent shall retain Two Dollars ($2.00) for recording the security interest lien.

b. It shall be unlawful for any person to solicit, accept or receive any gratuity or compensation for acting as a

messenger and for acting as the agent or representative of another person in applying for the recording of a security interest or for the registration of a motor vehicle and obtaining the license plates or for the issuance of a certificate of title therefor unless the Tax Commission has appointed and approved the person to perform such acts; and before acting as a messenger, any such person shall furnish to the Tax Commission a surety bond in such amount as the Tax Commission shall determine appropriate.

4. The certificate of title or the application for certificate of title and manufacturer's certificate of origin with the record of the date of receipt clearly marked thereon shall be returned to the debtor together with a notice that the debtor is required to register and pay all additional fees and taxes due within thirty (30) days from the date of purchase of the vehicle.

5. Any person creating a security interest in a vehicle that has been previously registered in the debtor's name and on which all taxes due the state have been paid shall surrender the certificate of ownership to the secured party. The secured party shall have the duty to record the security interest as provided in this section and shall, at the same time, obtain a new certificate of title which shall show the secured interest on the face of the certificate of title.

6. The lien entry form with the date and assigned number thereof clearly marked thereon shall be returned to the secured party. If the lien entry form is received and authenticated, as herein provided, by a motor license agent, the agent shall make a report thereof to the Tax Commission upon the forms and in the manner as may be prescribed by the Tax Commission.

7. The Tax Commission shall have the duty to record the lien upon the face of the certificate of title issued at the time of registering and paying all fees and taxes due on the vehicle.

B. 1. A secured party shall, within seven (7) business days after the satisfaction of the security interest, furnish directly or by mail a release of a security interest to the Tax Commission and mail a copy thereof to the last-known address of the debtor. If the security interest has been satisfied by payment from a licensed used motor vehicle dealer to whom the motor vehicle has been transferred, the secured party shall also, within seven (7) business days after such satisfaction, mail an additional copy of the release to the dealer. If the secured party fails to furnish the release as required, the secured party shall be liable to the debtor for a penalty of One Hundred Dollars ($100.00) and, in addition, any loss caused to the debtor by such failure.

2. Upon release of a security interest the owner may obtain a new certificate of title omitting reference to the security interest, by submitting to the Tax Commission or to a motor license agent:

a. a release signed by the secured party, an application for new certificate of title and the proper fees, or

b. by submitting to the Tax Commission or the motor license agent an affidavit, supported by such documentation as the Tax Commission may require, by the owner on a form prescribed by the Tax Commission stating that the security interest has been satisfied and stating the reasons why a release cannot be obtained, an application for a new certificate of title and the proper fees.

Upon receiving such affidavit that the security interest has been satisfied, the Tax Commission shall issue a new certificate of title eliminating the satisfied security interest and the name and address of the secured parties who have been paid and satisfied. The Tax Commission shall accept a release of a security interest in any form that identifies the debtor, the secured party, and the vehicle, and contains the signature of the secured party. The Tax Commission shall not require any particular form for the release of a security interest.

The words "security interest" when used in the Oklahoma Vehicle License and Registration Act do not include liens dependent upon possession.

C. The Tax Commission shall file and index certificates of title so that at all times it will be possible to trace a certificate of title to the vehicle designated therein, identify the lien entry form, and the names and addresses of secured parties, or their assignees, so that all or any part of such information may be made readily available to those who make legitimate inquiry of the Tax Commission as to the existence or nonexistence of security interest in the vehicle.

D. 1. Any security interest in a vehicle properly perfected prior to July 1, 1979, may be continued as to its effectiveness or duration as provided by Sections 1-9-501 and 1-9-515 of Title 12A of the Oklahoma Statutes, or may be terminated, assigned or released as provided by Sections 1-9-512, 1-9-513 and 1-9-514 of Title 12A of the Oklahoma Statutes, as fully as if this section had not been enacted, or, at the option of the secured party, may also be perfected under this section, and, if so perfected, the time of perfection under this section shall be the date the security interest was originally perfected under the prior law.

2. Upon request of the secured party, the debtor or any other holder of the certificate of title shall surrender the certificate of title to the secured party and shall do such other acts as may be required to perfect the security interest under this section.

E. If a manufactured home is permanently affixed to real estate, the original document of title may be surrendered to the Tax Commission or a motor license agent for cancellation. When the document of title is surrendered, the owner shall provide the legal description or the appropriate tract or parcel number of the real estate and other information as may be required on a form provided by the Tax Commission. The Tax Commission may not cancel a document of title if a lien has been registered or recorded. The Tax Commission or motor license agent shall notify the owner and any lienholder that the title has been surrendered to the Tax Commission and that the Tax Commission may not cancel the title until the lien is released. Such notification shall include a description of the lien and such notification to the owner shall be accompanied by the return of title surrendered. Permanent attachment to real estate does not affect the validity of a lien recorded or registered with the Tax Commission before the document of title is cancelled pursuant to this section. The rights of a prior lienholder pursuant to a security agreement or the provisions of a credit transaction and the rights of the state pursuant to a tax lien are preserved. The Tax Commission or motor license agent shall forward the information to the county assessor of the county where the real estate is located and indicate whether the original document of title has been canceled. A fee of Five Dollars ($5.00) shall accompany the application for cancellation of title. When the fee is paid by a person making an application directly with the Tax Commission, the fee shall be deposited in the Oklahoma Tax Commission Revolving Fund. A fee paid to a motor license agent shall be retained by the agent. A security interest in a manufactured home perfected pursuant to this section shall have priority over a conflicting interest of a mortgagee or other lien encumbrancer, or the owner of the real property upon which the manufactured home became affixed or otherwise permanently attached. The holder of the security interest in the manufactured home, upon default, may remove the manufactured home from such real property. The holder of the security interest in the manufactured home shall reimburse the owner of the real property who is not the debtor and who has not otherwise agreed to access the real property for the cost of repair of any physical injury to the real property, but shall not be liable for any diminution in value to the real property caused by the removal of the manufactured home, trespass, or any other damages caused by the removal. The debtor shall notify the holder of the security interest in the manufactured home of the street address, if any, and the legal description of the real property upon which the manufactured home is affixed or otherwise permanently attached and shall sign such other documents, including any appropriate mortgage, as may reasonably be requested by the holder of such security interest.

F. In the case of motor vehicles or trailers, notwithstanding any other provision of law, a transaction does not create a sale or security interest merely because it provides that the rental price is permitted or required to be adjusted under the agreement either upward or downward by reference to the amount realized upon sale or other disposition of the motor vehicle or trailer.

G. A security interest in vehicles registered by a federally recognized Indian tribe shall be deemed valid under Oklahoma law if validly perfected under the applicable tribal law and the lien is noted on the face of the tribal certificate of title.

Historical Data

Added by Laws 1985, HB 1219, c. 179, § 13, eff. July 1, 1985; Amended by Laws 1988, HB 1641, c. 167, § 2, emerg. eff. May 24, 1988; Amended by Laws 1988, SB 501, c. 166, § 12, emerg. eff. May 24, 1988 (repealed by Laws 1989, HB 1357, c. 58, § 4, emerg. eff. July 1, 1989); Amended by Laws 1989, HB 1357, c. 58, § 3, emerg. eff. July 1, 1989; Amended by Laws 1991, SB 25, c. 117, § 134, eff. January 1, 1992; Amended by Laws 1991, SB 154, c. 107, § 1, emerg. eff. July 1, 1991 (repealed by Laws 1991, HB 1762, c. 335, § 37, emerg. eff. June 15, 1991); Amended by Laws 1991, HB 1762, c. 335, § 16, emerg. eff. June 15, 1991; Amended by Laws 1995, HB 1050, c. 126, § 1; Amended by Laws 1996, HB 2561, c. 38, § 1, eff. November 1, 1996; Amended by Laws 1999,

HB 1117, c. 92, § 3, eff. November 1, 1999 (superseded document available); Amended by Laws 2000, SB 1519, c. 371, § 173, eff. July 1, 2001; Amended by Laws 2001, SB 526, c. 25, § 1, emerg. eff. July 1, 2001; Amended by Laws 2001, HB 1203, c. 358, § 4, emerg. eff. July 1, 2001 (superseded document available); Amended by Laws 2002, SB 983, c. 417, § 2, emerg. eff. July 1, 2002 (superseded document available); Amended by Laws 2004, HB 2230, c. 85, § 1, emerg. eff. April 13, 2004 (superseded document available).

Citationizer© Summary of Documents Citing This Document

Cite	Name	Level
Cite Name	**Level**	
Oklahoma Supreme Court Cases		
2004 OK 57, 97 P.3d 639,	IN RE: GREGORY	Discussed at Length

Citationizer: Table of Authority

Cite	Name	Level
Cite Name	**Level**	
Title 47. Motor Vehicles		
47 O.S. 1110,	Security Interest, Perfection of	Cited
47 O.S. 1110,	Security Interest, Perfection of	Cited

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 05 2004
MICHAEL L. WILLIAMS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

LAWSON, Francis E. and
LAWSON, Peggy L.,

Debtors.

Case No. 01-05386-R
Chapter 7

PATRICK J. MALLOY, III, Trustee,

Plaintiff,

v.

Adv. No. 02-0119-R

THE WYANDOTTE BANK,

Defendant.

ORDER GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE BANK'S CROSS-MOTION FOR SUMMARY JUDGMENT

On June 13, 2002, Plaintiff Patrick J. Malloy III, Trustee (the "Trustee") filed a Complaint in which he seeks to avoid the security interest of The Wyandotte Bank (the "Bank") in the Debtors' 2000 Dodge RAM 1500 pickup truck (the "Vehicle") under Section 544(a)(1) of the Bankruptcy Code (the "Complaint").

Before the Court are the Trustee's Motion for Summary Judgment and Brief in Support ("Trustee's Motion"), the Bank's Response and Cross Motion for Summary Judgment and Brief in Support (the "Bank's Response/Cross Motion"), the Trustee's Reply and Response to the Bank's Response/Cross Motion, and the Trustee's Supplemental Reply and Response to the Bank's Response/Cross Motion. The Cherokee Nation filed an Amicus Curiae Brief, and the Bank and the Trustee each filed a response. The Cherokee Nation filed a motion to amend its Brief for the purpose of referencing two cases. The Court granted the motion to amend, but no amendment was filed.

JAN 05 2004
DOCKETED
Clerk, U.S. Bankruptcy Court
Northern District of Oklahoma

Jurisdiction

The Court has jurisdiction of this core proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2)(K); and Miscellaneous Order No. 128 of the United States District Court for the Northern District of Oklahoma: Order of Referral of Bankruptcy Cases effective July 10, 1984, as amended.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (made applicable herein by Fed. R. Bank. P. 7056). Substantive law determines which facts are material: "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Parties' Contentions

The Trustee contends that the Bank's security interest in the Vehicle should be avoided because the Bank failed to perfect its security interest under Oklahoma law. The Bank contends that the Vehicle was properly registered by the Wyandotte Nation, the Bank's lien was noted on the certificate of title issued by the Wyandotte Nation, and the Bank's lien has priority over the Trustee's lien.[1] The Bank argues that failure to recognize its lien is a "direct attack on the status of the Wyandotte Nation as a sovereign government." See Bank's Response/Cross Motion at 8. Many of the factual allegations raised by the parties relate to the applicability and effect of the Motor Vehicle Code adopted by the Wyandotte Nation. For example, because the Motor Vehicle Code

[1]The Bank also contends that the Trustee's Motion was filed out of time. On November 13, 2002, the Court extended the time to file dispositive motions until December 1, 2002, which fell on a Sunday. Pursuant to Fed. R. Bankr. P. 9006(a), the Trustee's Motion, which was filed on the following Monday, was timely.

applies to motor vehicles owned by a citizen of the Wyandotte Tribe who is a "resident of Oklahoma Indian Country," the Trustee and the Bank dispute whether the Debtors reside in Oklahoma Indian Country. Because the Court concludes that Oklahoma law applies, it is not necessary for the Court to address many of the factual and legal issues raised by the Trustee and the Bank.

Relevant Undisputed Material Facts

The following relevant undisputed material facts are supported by the record.

On November 29, 2001, the Debtors filed a Joint Voluntary Petition for Relief Under Chapter 7, Case No. 01-05386-R, and listed the Vehicle as an asset of the estate.

Pursuant to a "Simple Interest Note, Disclosure, and Security Agreement" between the Bank and Peggy Lawson, one of the Debtors, dated May 23, 2001 (the "Note and Security Agreement"), Peggy Lawson granted the Bank a security interest in the Vehicle to secure the loan she obtained to finance the Debtors' purchase of the Vehicle. The Note and Security Agreement provides that "[T]his note and any agreement securing this note will be governed by the law of the state of Oklahoma."[2]

Neither a lien entry form nor the existing certificate of title covering the Vehicle containing the name and address of the Bank and the date of the Note and Security Agreement (nor an application for a certificate and manufacturer's certificate of origin) and the required fee were delivered to the Oklahoma Tax Commission or to a motor license agent.

On July 13, 1999, the Wyandotte Tribe adopted an Ordinance Providing for the Establishment of a Motor Vehicle Code, effective September 1, 1999 (the "Wyandotte Nation Motor

[2] Although the Bank attempts to escape the effect of its stipulation that Oklahoma law governs the transaction, it does not contest the validity of the contractual choice of law.

Vehicle Code"). Section 226(B) of the Wyandotte Nation Motor Vehicle Code provides that "[t]his [Motor Vehicle Code] shall be voluntary for all new or used motor vehicles purchased."

Conclusions of Law

Section 544(a)(1) of the Bankruptcy Code "confers on a trustee in bankruptcy the same rights that an ideal hypothetical lien claimant without notice possesses as of the date the bankruptcy petition is filed." Pearson v. Saline Coffee House, Inc., 831 F.2d 1531, 1532 (10th Cir. 1987). The Court must examine the applicable law to properly assess the relative rights of the Bank and the Trustee. Section 226(B) of the Wyandotte Nation Motor Vehicle Code explicitly provides that compliance with the provisions of the code is voluntary. Moreover, Peggy Lawson and the Bank contractually agreed that Oklahoma law would govern their transaction. See Note and Security Agreement. Thus, Oklahoma law, not the Wyandotte Nation Motor Vehicle Code, is the applicable law.

Under Oklahoma law, a lien creditor has priority over an unperfected security interest. See 12A O.S. § 1-9-317. Thus, under Section 544(a)(1), the Trustee may avoid an unperfected lien on property of the estate. The issue before the Court is whether the Bank had a perfected security interest in the Vehicle under Oklahoma law on November 29, 2001, the date the Debtors filed bankruptcy. If the Bank's interest was not perfected, the Trustee will prevail.

Title 47 of the Oklahoma Statutes addresses perfection of security interests in vehicles in the first paragraph of Section 1110:

> Except for a security interest in vehicles held by a dealer . . . and a vehicle being registered in this state which was previously registered in another state and which title contains the name of a secured party on the face of the other state certificate or title, a security interest . . . in a vehicle as to which a certificate of title may be properly issued by the Oklahoma Tax Commission shall be perfected only when a lien entry form, and the existing certificate of title, if any, or application for a certificate of title and manufacturer's certificate of origin containing the name and

address of the secured party and the date of the security agreement and the required fee are delivered to the Commission or to a motor license agent.

47 O.S. § 1110A.1 (emphasis added).[3] Neither of the exceptions in Section 1110A.1 are applicable in this instance. Because the Bank failed to deliver the required documentation and fee to the Oklahoma Tax Commission, its security interest in the Vehicle is not perfected.

Conclusion

Because Oklahoma law governs the transaction between Peggy Lawson and the Bank and the Bank failed to perfect its security interest in the Vehicle under Oklahoma law, the Trustee's Motion for Summary Judgment is granted.[4] A judgment consistent with this Order will be entered contemporaneously herewith.

IT IS ORDERED.

Dated this 5th day of January, 2004.

DANA L. RASURE
UNITED STATES BANKRUPTCY JUDGE

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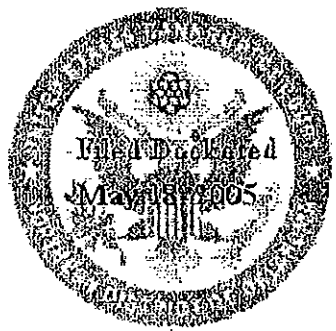
[3]Article 9 of the Oklahoma Commercial Code does not apply to the extent that another Oklahoma statute "expressly governs the creation, perfection, priority, or enforcement of a security interest created by this state. . . ." 12A O.S. § 1-9-109. Section 1110 of Title 47 of the Oklahoma Statutes addresses the creation and perfection of security interests in vehicles. Thus, Article 9 does not apply insofar as creation and perfection are concerned. (Although Section 1-9-109 became effective on July 1, 2001, subsequent to the date on which the Note and Security Agreement was executed, the controlling date used to determine whether the revised version of Article 9 applies is the date the bankruptcy case was filed (November 29, 2001). See Morris v. Gen. Motors Acceptance Corp. (In re Ball), 281 B.R. 706, 709 (Bankr. D. Kan. 2002).

[4]On April 29, 2003, the Court entered an Order Modifying Automatic Stay in the Debtors' Chapter 7 case, No. 01-5386. Pursuant to the terms of the Order, the Bank was authorized to sell the Vehicle and was ordered to remit the proceeds to the Trustee for deposit into an interest-bearing account. Since the Court has granted the Trustee's Motion for Summary Judgment, the Bank has no interest in the proceeds held by the Trustee.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA



IN RE:	
DALTON, Robert and DALTON, Donna,	Case No. 04-10025-R
	Chapter 7
Debtors.	
PATRICK J. MALLOY, III, Trustee,	
Plaintiff,	
v.	
	Adv. No. 04-1061-R
BANK OF COMMERCE,	
Defendant.	

ORDER DENYING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PARTIAL SUMMARY JUDGMENT TO BANK OF COMMERCE

On August 3, 2004, Plaintiff Patrick J. Malloy III, Trustee (the "Trustee"), filed a First Amended Complaint (Doc. 16) in which he seeks to avoid (1) the security interest of Defendant Bank of Commerce (the "Bank") in the Debtors' 1999 Chevy Blazer (the "Vehicle") and (2) the Bank's pre-petition repossession of the Vehicle, under Sections 544(a) and 547, respectively, of the Bankruptcy Code.

Before the Court are the Plaintiff/Trustee's Opening Brief in Support of Motion for Summary Judgment (Doc. 21) filed on October 12, 2004 ("Trustee's Motion for Summary Judgment"), Answer Brief of Bank of Commerce (Doc. 22) filed on October 28, 2004, Trustee's Supplemental Brief (Doc. 27) filed on December 20, 2004, Bank of Commerce's Supplement to Memorandum (Doc. 30) filed on February 16, 2005, the Joint Stipulation of Facts (Doc. 20) filed on September 30, 2004, and the Supplement to Parties' Joint Stipulation of Facts (Doc. 26) filed on November 30, 2004.

I. Jurisdiction

The Court has jurisdiction of this core proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2)(F) and (K); Miscellaneous Order No.128 of the United States District Court for the Northern District of Oklahoma: Order of Referral of Bankruptcy Cases effective July 10, 1984, as amended (effective prior to March 2, 2005); and Local Civil Rule 84.1(a) of the United States District Court for the Northern District of Oklahoma (effective as of March 2, 2005).

II. Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (made applicable herein by Fed. R. Bank. P. 7056). Substantive law determines which facts are material: "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In instances where there are no genuine issues of fact, "the court may enter summary judgment for either party, whether or not such party has made a motion therefor." Pueblo of Santa Ana v. Mountain States Tel. and Tel. Co., 734 F.2d 1402, 1408 (10th Cir. 1984), *rev'd on other grounds*, 472 U.S. 237 (1985), *citing* 10A Wright, Miller & Kane, *Federal Practice and Procedure*; Civil 2d § 2720 at 29-30.

III. Parties' Contentions

The Trustee contends that the Bank did not have a perfected security interest in the Vehicle on the date the Bank repossessed the Vehicle. He argues that the Bank's security interest should be avoided under Section 544(a) of the Bankruptcy Code and that the repossession constituted a preferential transfer under Section 547(b) of the Bankruptcy Code. The Bank contends that the Vehicle was properly registered by the Cherokee Nation, the Bank's lien was noted on the certificate of title issued by the

Cherokee Nation, Oklahoma recognizes the validity of titles issued by the Cherokee Nation, and the Bank's lien was perfected pursuant to The Cherokee Nation Motor Vehicle Licensing and Tax Code (LA 01-01) dated January 15, 2001 (the "Licensing and Tax Code") and the Tribal-State Motor Vehicle Licensing Compact between the Cherokee Nation and the State of Oklahoma dated May 15, 2002 (the "Compact"). The Bank also contends that its security interest in the Vehicle was automatically perfected as a purchase-money security interest under "Cherokee Nation UCC § 9-309(1)(LA 26-03, enacted September 30, 2003)."[1] Answer Brief of Bank of Commerce at 7. The Trustee disputes that the Vehicle was properly registered by the Cherokee Nation because Debtor Robert Dalton ("Dalton") did not live in "Indian Country," as defined in 18 U.S.C. § 1151, and contends that in any event, neither the Licensing and Tax Code nor the Compact provides a mechanism for the perfection of a security interest.

IV. Relevant Undisputed Material Facts[2]

The following relevant undisputed material facts are supported by the record.

On January 15, 2001, the Cherokee Nation Tribal Council enacted the Licensing and Tax Code. The Licensing and Tax Code provides that a citizen of the Cherokee Nation who resides within the territorial boundaries of the Cherokee Nation as they existed as of January 1, 1900, may register a vehicle principally garaged within said boundaries with the Cherokee Nation. See Sections 103(F), 103(M), 103(S), and 204 of the Licensing and Tax Code. In order to administer and enforce the Licensing and Tax Code, the Cherokee Nation adopted the Motor Vehicle Rules and Regulations (the "Regulations") on

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[1]The Cherokee Nation UCC is not applicable in this proceeding because at the time the Debtor granted the Bank a security interest in the Vehicle, the Cherokee Nation UCC had not yet been enacted.

[2]The Bank does not assert that a genuine issue exists with respect to any of the facts that are material to the disposition of the issues before the Court.

October 4, 2001. In an effort to coordinate the Cherokee Nation's motor vehicle licensing system with the licensing system of the State of Oklahoma, the Cherokee Nation and the State of Oklahoma entered into the Compact on May 15, 2002. In the Compact, the State of Oklahoma agreed that it would not challenge the registration of vehicles "provided they are registered to [enrolled members of the Cherokee Nation] by the Nation's Tax Commission in accordance with the [Licensing and Tax Code]" and the Compact. Section 4(b) of the Compact.[3]

Pursuant to a "Consumer Promissory Note" between the Bank and Dalton dated July 23, 2003 (the "Note and Security Agreement"), Dalton granted the Bank a security interest in the Vehicle to secure the loan Dalton obtained to finance his purchase of the Vehicle. At the time the Note and Security Agreement was executed and at the time the Debtors filed their bankruptcy petition, Dalton was an enrolled member of the Cherokee Nation.

The Cherokee Nation issued a certificate of title identifying Dalton as the owner of the Vehicle. The Bank executed and filed a lien entry form with the Cherokee Nation Tax Commission, and the Bank's lien was noted on Dalton's certificate of title.

On December 26, 2003, the Bank repossessed the Vehicle and continues to possess the Vehicle.

On January 5, 2004, the Debtors filed a Joint Voluntary Petition for Relief Under Chapter 7, Case No. 04-10025-R, and listed the Vehicle as an asset of the estate. In the Voluntary Petition, the Debtors acknowledged that their debts are "Consumer Non-Business" debts. The Trustee and the Bank have

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[3] The Trustee does not dispute that Dalton resided within the territorial boundaries of the Cherokee Nation as they existed as of January 1, 1900, or that the Vehicle was principally garaged within such boundaries. Accordingly, Dalton's registration of the Vehicle with the Cherokee Nation was not improper as alleged by the Trustee. See Section 204 of the Licensing and Tax Code and Section 4(b) of the Compact.

stipulated that the value of the Vehicle was $7,500.00 on the date it was repossessed by the Bank. The Trustee and the Bank have also stipulated that if the Bank's security interest in the Vehicle is avoided by the Trustee, the repossession by the Bank constituted a preferential transfer under Section 547(b) of the Bankruptcy Code.

V. Conclusions of Law

Section 544(a)(1) of the Bankruptcy Code "confers on a trustee in bankruptcy the same rights that an ideal hypothetical lien claimant without notice possesses as of the date the bankruptcy petition is filed." Pearson v. Salina Coffee House, Inc., 831 F.2d 1531, 1532 (10th Cir. 1987). Under Oklahoma law, a lien creditor has priority over an unperfected security interest. See 12A O.S. § 1-9-317. Thus, under Section 544(a)(1), the Trustee may avoid an unperfected lien on property of the estate. The issue before the Court is whether the Bank had a perfected security interest in the Vehicle on January 5, 2004, the date the Debtors filed bankruptcy. If the Bank's interest was not perfected, the Trustee will prevail.

In order to properly assess the relative rights of the Trustee and the Bank, the Court must examine the applicable law. Dalton and the Bank contractually agreed that Oklahoma law would govern the Note and Security Agreement "except to the extent that the UCC provides for application of the law where the Debtor or the collateral is located (if other than Oklahoma) as the case may be." Note and Security Agreement at 2. The "UCC" is defined in the Note and Security Agreement to mean the "Uniform Commercial Code, as adopted and revised from time to time in the State of Oklahoma." Id.

Scope of Article 9

Section 1-9-109 of the Oklahoma Uniform Commercial Code describes the scope of the Oklahoma Uniform Commercial Code. See 12A O.S. § 1-9-109. "Except as otherwise provided in

subsections (c) and (d) of this section [1-9-109], this article [9] applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract." 12A O.S. § 1-9-109(a)(1). Security interests in vehicles are not excepted from the scope of Section 1-9-109(a) by Section 1-9-109(c) or (d); thus, the subject transaction is governed by Article 9 of the Oklahoma Uniform Commercial Code.

Choice of Law

Section 1-9-303 of the Oklahoma Uniform Commercial Code addresses which law governs the perfection and priority of security interest in goods covered by a certificate of title.

> The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

12A O.S. § 1-9-303(c)(emphasis added).[4] "Certificate of title" is defined 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." 12A O.S. § 1-9-102(10) (emphasis added).

Pursuant to Section 205(A) of the Licensing and Tax Code, "[n]otice of liens against [vehicles registered with the Cherokee Nation] shall be placed upon said title upon request of the lending institution in accordance with regulations adopted by the [Cherokee Nation Tax] Commission pursuant to this Act. The procedures for placing and releasing liens on Vehicles and reflecting same on the certificate of title shall

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[4]To the extent that the collateral is subject to a certificate-of-title statute of another jurisdiction and that statute "provides for a security interest 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 property," the perfection rules of the other jurisdiction, rather than those found in the Oklahoma Uniform Commercial Code, govern perfection. 12A O.S. § 1-9-311(a)(3).

be provided by regulations adopted by the Commission pursuant to this Act." The Regulations provide that in order to perfect a lien on a vehicle covered by a Cherokee Nation certificate of title, the title along with a completed Lien Entry Form must be presented. See Chapter 3, Part F, Section MVC: 01-3-325, Paragraph A of the Regulations. "The name of the secured party will be entered on the face of the secured title exactly as it appears on the lien entry form." Id. at Paragraph D.

Although the Licensing and Tax Code and the Regulations provide for the "security interest in question to be indicated on the certificate," neither the Licensing and Tax Code nor the Regulations require such notation "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 Licensing and Tax Code simply does not address priority. Thus, the Cherokee Nation certificate of title covering the Vehicle does not constitute a "certificate of title," as defined in Section 1-9-102(10) of the Oklahoma Uniform Commercial Code. Because the deference rules at Sections 1-9-303 and 1-9-311(a)(3) are only applicable when collateral is covered by a "certificate of title" as defined by the Oklahoma Uniform Commercial Code, neither the Licensing and Tax Code nor the Regulations govern perfection or priority of the Bank's security interest in the Vehicle. See 12A O.S. § 1-9-303 and 1-9-311(a)(3).[5] Therefore, the Court must look to the Oklahoma Uniform Commercial Code rather than to the law of the jurisdiction that issued a certificate of title.

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[5]If the Licensing and Tax Code and/or the Regulations were (or could be) interpreted to provide for a security interest to be indicated on the Cherokee Nation certificate "as a condition or result of the security interest's obtaining priority over the rights of a lien creditor," then the law of the Cherokee Nation would govern perfection of the Bank's security interest in the Vehicle, and the Bank's security interest in the Vehicle would be perfected as of the date the Debtors filed bankruptcy and would have priority over the Trustee's lien.

Perfection of the Bank's security interest

Section 1-9-309(1) of the Oklahoma Uniform Commercial Code provides that a purchase-money security interest in consumer goods is perfected when it attaches "except as otherwise provided in subsection (b) of Section 1-9-311 of this title with respect to consumer goods that are subject to a statute or treaty described in subsection (a) of Section 1-9-311 of this title." 12A § 1-9-309(1). Section 1-9-311(a) refers to property "subject to" –

> (1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt subsection (a) of Section 1-9-310 of this title;
>
> (2) another statute of this state that provides for central filing of, or that requires indication on or delivery for indication on a certificate of title of, any security interest in the property as a condition or result of perfection, including, but not limited to, Section 1110 of Title 47 . . . ; or
>
> (3) a certificate-of-title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the right of a lien creditor with respect to the property.

12A O.S. § 1-9-311(a).

None of the exceptions to automatic perfection of purchase-money security interests in consumer goods contained in Section 1-9-309 is applicable in this case. The Vehicle is not subject to a statute, regulation or treaty of the United States, as required by paragraph (a)(1) of Section 1-9-311. Paragraph (a)(2) of Section 1-9-311 requires that the Vehicle be subject to 47 O.S. § 1110, the Oklahoma certificate-of-title statute that addresses the perfection of security interests in vehicles.[6] "Section 9-303(b)

[6]Although Section 1110 of title 47 was amended to exempt vehicles registered with certain federally recognized Indian tribes from the requirement that lien entry forms be filed with the Oklahoma Tax Commission and to validate liens on vehicles filed with such tribes, the amendment was not effective until April 13, 2004, and is therefore not applicable in this proceeding.

of the Oklahoma Uniform Commercial Code establishes when goods become subject to and cease to be subject to a certificate of title in a given state." Oklahoma Comments to 12A O.S. § 1-9-303. Section 303(b) provides that "[g]oods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority." Neither an application for a certificate of title nor the fee were delivered to the Oklahoma Tax Commission, the appropriate authority under Section 1110 of Title 47. Thus, the Vehicle was not "covered" by an Oklahoma certificate of title, and the transaction is not excepted from the automatic perfection provision of the Oklahoma Uniform Commercial Code by paragraph (a)(2) of Section 1-9-311. Finally, for the reasons discussed above, the Cherokee Licensing and Tax Code does not constitute a "certificate-of-title statute of another jurisdiction," so paragraph (a)(3) of Section 1-9-311 does not preclude the application of the rules for perfecting a purchase-money security interest in the Vehicle either.

Because the Vehicle is not subject to a statute or treaty described in Section 1-9-311(a), the Bank's security interest in the Vehicle was perfected if and when it attached. See 12A O.S. § 1-9-309(1). A security interest attaches to collateral when it becomes enforceable against the debtor. See 12A O.S. § 1-9-203(a). The statutory requirements for an enforceable security interest are as follows–

> (1) value has been given;
>
> (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) . . .the debtor has authenticated a security agreement that provides a description of the collateral.

12A O.S. § 1-9-203(b). There is no dispute that these requirements were met prior to the petition date. Accordingly, the Bank's security interest in the Vehicle was enforceable against Dalton and perfected as of the petition date.[7]

The Trustee's preference claim

The Trustee amended his Complaint to include a claim that the Bank's repossession of the Vehicle constituted a preferential transfer under Section 547 of the Bankruptcy Code. The Trustee contends that this relief is appropriate if the Court determines that the Bank's security interest in the Vehicle was not perfected on the date of repossession. In fact, the Trustee and the Bank stipulated that if the Bank's security interest in the Vehicle was avoided, the Bank's repossession constituted a preferential transfer. See Paragraph 10 of Joint Stipulation of Facts. There is no stipulation regarding the preference claim in the event the Court concludes that the Bank's security interest in the Vehicle was perfected and is not avoidable. Accordingly, the Court is not in a position at this time to address the Trustee's preference claim.

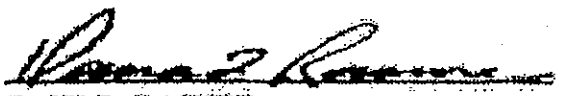
VI. Conclusion

For the reasons cited above, the Trustee's Motion for Summary Judgment is denied, and summary judgment is granted in favor of Bank of Commerce on the Trustee's Section 544(b) avoidance claim only. The parties will have twenty days from the entry of this Order to submit additional stipulations regarding the Trustee's preference claim or to request alternative relief regarding the disposition of the Trustee's preference claim.

---

[7]A secured party may perfect a security interest in goods by taking possession of the collateral. See 12A O.S. § 1-9-312(a). The Bank took possession of the Vehicle prior to the petition date and continued to possess the Vehicle on the petition date. As a result, the Bank's security interest is also perfected under Section 1-9-312(a) of the Oklahoma Uniform Commercial Code.

SO ORDERED this 18th day of May, 2005.



DANA L. RASURE
UNITED STATES BANKRUPTCY JUDGE

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Oklahoma Bar Journal Articles

Can a Buyer and Secured Party Rely on a Certificate of Title? Part III: Tribal CTs

By Alvin C. Harrell

Introduction

As suggested in the prior article in this series,1 Oklahoma has become a leading jurisdiction in the development of case law affecting certificates of title (CTs), and especially CTs created by Indian tribes. Since the prior article was published, two additional important bankruptcy court cases have been decided in Oklahoma, and the Oklahoma Legislature has enacted additional statutory amendments (this time nonuniform amendments to Oklahoma Uniform Commercial Code (Oklahoma UCC) Article 9), addressing tribal CTs.

Prior to these latest developments, a 2004 Oklahoma bankruptcy case2 had addressed challenging issues regarding the relation between the Oklahoma CT law,3 UCC Article 9,4 and tribal CT laws. The court concluded that, on the facts of that case, "lien entry" perfection pursuant to a tribal CT law was not sufficient under Oklahoma law. The Oklahoma Legislature responded later that year by amending the Oklahoma CT law5 in an attempt to make clear that "lien entry" perfection of a security interest pursuant to a tribal CT law is a permitted method of perfection under UCC Article 9.6

Unfortunately, that 2004 amendment was not directly effective, as it amended a law (the Oklahoma CT law, 47 Okla. Stat. section 1110) that does not apply to perfection of a security interest under the CT law of another jurisdiction, including an Indian tribe.7 This left the matter subject to increased uncertainty as of the beginning of 2005, prior to the latest developments.

The 2005 Statutory Amendment

Apparently in recognition of the limitations of the 2004 effort to address tribal CTs in the Oklahoma CT law, on May 5, 2005, Oklahoma UCC Article 9 was amended by adding nonuniform language at a new subsection 9-311(a)(4), recognizing perfection of security interests by means of the "law or procedure of a federally recognized Indian tribe...."8

This resolves the narrow issue addressed by the recent line of Oklahoma bankruptcy court cases (discussed below), at least as to transactions after May 5, 2005, and arguably as to transactions before that date to the extent this change can be viewed as partly a clarification of prior law.9 Moreover, since the 2005 Oklahoma amendment and the other language in section 9-311(a) and (b) describe what constitutes perfection, arguably all security interests previously perfected pursuant to tribal registration,

CT laws or procedures are now perfected as of May 5, 2005, under the 2005 Oklahoma Article 9 amendment, even if that amendment is deemed to make a change in the law so as to have no retroactive effect.

So for now the basic issue of perfection under tribal CT laws has been largely resolved in Oklahoma, by the 2005 Oklahoma amendment at section 9-311(a)(4) (though perhaps not in interstate scenarios involving other states that lack the 2005 Oklahoma amendment).10 In Oklahoma this leaves at issue only the possibility of bankruptcy cases filed before May 5, 2005. But the recently decided cases (discussed below) still retain a broader importance, because of their analyses of the relation between UCC Article 9, the Oklahoma CT law, and tribal CT laws, including, *e.g.,* the implications of automatic perfection for purchase money security interests in consumer goods. These analyses may survive resolution of the narrow issues in these cases, to affect basic CT law and transactions for decades to come.11

The *Dalton* Case

In a sense, *Malloy v. Bank of Commerce* (*In re Dalton*)12 is a follow-up to the 2004 *Lawson* case, discussed in the prior article of this series.13 In *Lawson*, the court allowed the bankruptcy trustee to avoid a security interest14 because it was perfected by lien entry on a tribal CT, holding that the security interest was not perfected under the Oklahoma CT law.15 *Lawson* misconstrued the relation between Article 9 and state and tribal CT laws, erroneously concluding that the Oklahoma CT law governs security interests perfected under Article 9 pursuant to some other (*e.g.*, a tribal) CT law.

In this respect, *Dalton* was a great improvement over prior Oklahoma case law in terms of demonstrating the relation between Article 9 and state and tribal CT laws. The facts (and issues) in *Dalton* were similar to those in *Lawson*: The bank perfected its security interest in the debtor's vehicle pursuant to the CT procedures of the Cherokee Nation (CN), and the trustee in bankruptcy argued that this did not constitute perfection under Oklahoma law.16

The *Dalton* opinion properly notes that, under section 9-109, Article 9 governs any security interest in a vehicle, and under section 9-303 the law of the jurisdiction that has created the CT covering the vehicle determines whether a security interest in the vehicle is perfected. Clearly the vehicle in *Dalton* was not covered by an Oklahoma CT, and therefore the Oklahoma CT law did not apply. As *Dalton* recognizes, the CN CT covering the vehicle meant that the CN CT lien entry procedure or other applicable CN law should be applied to govern perfection, if the CN CT qualified as a CT within the meaning of Article 9.17

Thus the first issue in *Dalton* was whether the CN CT was a "CT" as defined in Article 9.18 This "test" requires that the CT be created pursuant to a law providing for indication of the security interest on the CT "as a condition or result of the security interest's obtaining priority over the rights of a lien creditor...."19 According to the *Dalton* court, the CN CT law and procedures provided for indication of the security interest on the face of the CT, as a means of perfection, after presentation of a completed lien entry form, but did not specify that this constitutes priority over a competing lien creditor. The court concluded that a failure to specify this priority in the CN CT law precluded the CN CT from qualifying as a CT under Article 9.20

While the issue is arguable, the *Dalton* analysis on this narrow issue is far from a forgone conclusion under Article 9.21 The Article 9 definition of CT22 effectuates the deference in the uniform text of section 9-311(a) and (b) to state (and tribal) CT perfection laws and procedures, if those laws and procedures are designed to yield an indication of the security interest on the face of the CT as a means of perfection. But the priority that results from that perfection comes from Article 9 Part 3 (*e.g.*, section 9-317 or 9-322), not the CT law. Few CT laws provide for or even contemplate a comprehensive system of the priorities that result from CT perfection, nor should they. That is the job of Article 9, and extraneous priority rules in the CT law would likely set up unneeded conflicts between that law and Article 9.23 As a result CT law provisions relating to perfection are generally focused on the mechanics of lien entry, and Article 9 section 9-311(a) and (b) defer to the CT law only to that extent. So the purpose of the language in section 9-102(a)(10) and the uniform text of section 9-311(a), referencing the required elements of a CT lien entry in order to qualify the result as a "CT" under Article 9, is to be sure that Article 9 defers to a CT perfection system only if that system is indeed a means of CT perfection. (As noted, the 2005 Oklahoma nonuniform Article 9 amendment changes this to allow any tribal method of perfection, including a method other than notation on the CT.)

The parameters for a CT in the uniform text of Article 9 do not specifically require that the CT law provide for perfection as such, because perfection is an Article 9 concept not directly referenced in some CT laws. So the uniform text of sections 9-102(a)(10) and 9-311(a) reference (and require) a CT lien entry procedure designed to provide a means of obtaining priority over subsequent competing liens, as a proxy for the perfection concept. The language of the uniform text at sections 9-102(a)(10) and 9-311(a), describing the parameters of a CT for purposes of Article 9, was apparently intended to reference CT lien entry perfection systems without using the term perfection. Thus, the reference to the CT law as means of obtaining priority.

It was not intended that this require CT laws to include priority rules as a prerequisite to qualifying for CT status under Article 9. In fact most CT laws, including the Oklahoma CT law, do not contain comprehensive priority rules. Taking the *Dalton* interpretation of section 9-102(a)(10) to an illogical extreme, the Oklahoma CT law itself might not qualify as the source of a CT for purposes of Article 9 perfection. Of course the rebuttal argument is that the Oklahoma CT law (at section 1110.A.1) provides for perfection of security interests by delivery to the state CT office (the Motor Vehicle Department of the Oklahoma Tax Commission, or an authorized tag agent) of a lien entry form, and the CT perfection provided under section 1110 then results in priority as against subsequent competing liens under Article 9 Part 3, thus meeting the test in the uniform text of sections 9-102(a)(10) and 9-311(a). Circular as it may seem, this is the correct analysis under the Oklahoma CT law and Article 9; contrary to *Dalton*, this analysis is equally valid under the CN CT law. The circularity is inherent in the interdependence of Article 9 and the applicable CT law, and should not be viewed as a deficiency in the tribal CT law.

Having decided (perhaps erroneously) that the CN CT was not a CT under Article 9 because the CN CT law did not address priority, *Dalton* analyzed the perfection issue entirely under Article 9.24 The court applied the purchase-money security interest provision at section 9-309, noting that by its terms section 9-309 does not apply to collateral "subject to" a CT perfection statute under section 9-311. The court noted that the

exclusion from the Article 9 perfection rules (at section 9-311(a) of the uniform text) does not apply unless there is a CT covering the vehicle for purposes of Article 9. Thus if the CN CT did not qualify as a CT under Article 9, the vehicle was not "subject to" a CT under section 9-311(a), and the exclusion from section 9-309 did not apply. Thus, section 9-309 was applicable. Under section 9-309, the security interest was automatically perfected upon attachment under section 9-203, as a purchase money security interest in consumer goods. Had the goods been used commercially, some other Article 9 perfection method would be relevant, such as filing. Either way, perfection is achieved but effective notice is lacking, which again emphasizes the need for a "full-fledged" tribal CT law such as UCOTA, to make clear that the tribal CT qualifies as a CT under the uniform text of sections 9-102(a)(10) and 9-311(a). In *Dalton* the attachment and perfection occurred well before the beginning of the Bankruptcy Code preference period,25 so the security interest was perfected and could not be avoided in bankruptcy.

Dalton reached the correct result, was based on a plausible interpretation of the uniform text of sections 9-102(a)(10) and 9-311(a), and demonstrates a sound analysis of the relation between Article 9, state and tribal CT laws, and the Bankruptcy Code. The court's explanation of Article 9 sections 9-109, 9-303, 9-309 and 9-311 should be helpful to other courts considering these issues. Importantly, the *Dalton* court recognized that the Oklahoma CT law did not apply, as there had been no lien entry form or CT application delivered to the Oklahoma CT office; thus, the 2004 amendments to Title 47 Okla. Stat. section 1110 did not apply. Yet, as noted, there is no effective public notice from the section 9-309 automatic perfection of the security interest that determined the outcome of the case. This strongly suggests a need to resolve the issue another way, as by state and tribal enactment of UCOTA.

Dalton was appealed, and the United States Bankruptcy Appellate Panel of the 10th Circuit (BAP) affirmed the bankruptcy court's decision in an unpublished order dated Dec. 8, 2005.26 The sole issue considered by the BAP was whether the bankruptcy court erred in applying the automatic perfection rule of Article 9 section 9-309. The BAP rejected the trustee's argument that the court should have applied the Oklahoma CT law instead. The BAP correctly noted that the Oklahoma CT law does not apply to a CT created by another jurisdiction. The BAP further recognized that Article 9 governs the perfection of security interests in vehicles, except to the extent that Article 9 expressly defers to an applicable CT law. As there was no deference to the Oklahoma CT law in this case, the bankruptcy court's application of Article 9 was affirmed.

The only shortcoming of the bankruptcy court's decision in *Dalton* is the court's narrow interpretation of section 9-102(a)(10) to exclude the CN CT. This is admittedly an arguable point, with reasoned advocacy to be found on both sides. It is also another compelling argument for enactment of UCOTA, by both states and the tribes, as a tribal UCOTA would make clear that the tribe has a CT law for purposes of Article 9, and state enactment of UCOTA would provide an alternative means of perfection (without a state CT) where the only CT is one created by a tribe without the requisite, underlying CT law.27

The *Snell* Case

In *Mallory v. The Cornerstone Bank (In re Snell)*28 the question was

again whether a security interest in a vehicle was perfected under Article 9 pursuant to section 9-311(a), by compliance with the CT lien entry procedures of the Cherokee Nation (CN).29 The parties stipulated that: the security interest was perfected pursuant to CN CT procedures; the security agreement stated that it was governed by Missouri law and the law of the state where the vehicle was located; the vehicle was located in Oklahoma; the CN has adopted the UCC; and the bank defendant had a security interest under Article 9 section 9-203.

It should be noted initially that, for issues other than perfection, Article 9 is subject to the general choice of law rules in UCC Article 1.30 These defer to party autonomy, subject to some qualifications, and absent an effective choice by the parties apply a version of the significant relationship test generally thought to be consistent with the *Second Restatement*.31 Passing quickly over these issues, one can assume for purposes of the CT issues that the court was correct in choosing not to apply Missouri law.

But not in choosing to apply the Oklahoma CT law. Since the issues relate to the attachment, perfection, priority and enforcement of a security interest, the applicable law was UCC Article 9, not the Oklahoma CT law.32 The Oklahoma CT law is not a wide-ranging secured transactions law that applies to every debtor or vehicle located in Oklahoma. That honor belongs to Article 9, under section 9-109. A CT law applies to govern perfection only to the extent that sections 9-303 and 9-311(a) and (b) refer to that law. There is no such reference to the Oklahoma CT law on the facts in *Snell*; instead, the reference in section 9-311(a) is to the CN CT law. The only questions in *Snell* were whether a CN CT qualified as a CT under Article 9 and, if so, whether the security interest was perfected under the CN CT law. These issues do not involve any aspect of the Oklahoma CT law.

In *Snell*, the trustee apparently argued that the only method for perfection of a security interest in a vehicle "in the state of Oklahoma" is by lien entry under the Oklahoma CT law. If by this the trustee meant that a security interest becomes unperfected every time a vehicle titled in another state crosses the border into Oklahoma, it is an extraordinary argument indeed. There cannot be a rational basis for arguing that the Oklahoma CT law immediately imposes perfection requirements on CTs created by other jurisdictions, whether a state or an Indian tribe, each time such a vehicle enters the state. And even as to Oklahoma CTs, the Oklahoma CT law impacts security interests only to the extent that Article 9 so provides. Thus, contrary to the trustee's argument in *Snell*, lien entry perfection under the CN CT procedure need not pass muster under the Oklahoma CT law.

But the Oklahoma CT law is equally inapplicable as a means to bolster the CN CT procedure. It was a nice gesture for the Oklahoma Legislature to amend Title 47 Okla. Stat. section 1110 in 2004 to endorse the validity of CN CT lien entry perfection. And there is no doubt, as the *Snell* court notes, that the 2004 amendments to section 1110 were "...strong evidence of legislative intent..." to support the CN CT law. But the fact remains that section 1110 is not applicable to the facts of the *Snell* case, any more than it would be applicable to perfection by a lien entry on a Kansas or Texas CT.33

It is hard to go wrong following the clear intent of the state legislature as to an issue of state law, and in the 2004 amendments to section 1110

that intent is unmistakable, though it raises interesting issues of statutory interpretation when the legislature says the right thing in the wrong statute. Perhaps one can view the 2004 amendments to section 1110 as an exceptionally strong example of post-enactment Article 9 legislative history, or as an official legislative commentary, to confirm a legislative intent that the uniform text of section 9-311(a) and (b) apply to tribal CTs. Arguably that is a proper interpretation of the uniform text of Article 9, and therefore was the law even before the the 2004 amendments to section 1110 and 2005 Oklahoma amendments .34 It is, after all, an issue of state legislative intent and expression, though it should be in Article 9 (as in the 2005 Oklahoma amendment) rather than in the Oklahoma CT law (as with the 2004 amendments to section 1110). And despite being forced into a somewhat tortured path of statutory interpretation, *Snell* undoubtedly reached the correct result.

As the *Snell* court said, "...it is difficult for this court to find fault...in the laws of the state of Oklahoma which voluntarily recognize the validity of the laws of the Indian nations...."35 The entire matter reflects a high degree of comity and cooperation between institutions of federal, state and tribal government, which speaks well for all involved. The results in *Snell* (recognizing the CN CT law) and *Dalton* (recognizing perfection of the security interest) were undoubtedly correct, with little or no harm done along the way, so long as the proper relation between the applicable laws is not obscured.

Other Issues and Considerations

The 2005 Oklahoma amendment at section 9-311(a)(4) not only implements the intent of the 2004 amendments to Title 47 Okla. Stat. section 1110, but also corrects section 1110.G by making clear that perfection does not require notation on a tribal CT; like the Oklahoma CT law, under the uniform text of Article 9 actual CT notation is not required.36 Language to the contrary in section 1110.G is misleading and this is corrected in the 2005 Oklahoma amendment at section 9-311 (a)(4).

But the 2005 Oklahoma amendment at section 9-311(a)(4) resurrects some old choice of law problems like those noted years ago by Kent Meyers,37 generally not seen in this area of law since all states adopted CT perfection for security interests in motor vehicles. The residue of these old choice of law problems was mostly resolved by the 1998 uniform revisions to Article 9.38 But these kinds of choice of law problems may have been resurrected by the 2005 Oklahoma amendment to Article 9, because of the possibility that secured transactions law is now different in Oklahoma than in other states.

For example, suppose the *Snell* court had applied Missouri law as the contract stipulated,39 or the debtor had moved to Texas and filed bankruptcy there. The Missouri or Texas uniform text of Article 9 might not be interpreted to recognize the CN CT as a means of perfection.40 This is not a constitutional issue, as in the Kansas case noted in *Snell*.41 It is not a matter of recognizing the CN CT but rather whether a CN CT is a CT under the applicable Article 9 for purposes of perfection. As noted, enactment of UCOTA will resolve this, by making clear that a tribal CT is a CT under Article 9 if UCOTA has been enacted by the tribe, and by providing for an alternative means of perfection under the state CT law if the tribe has no CT law or perfection procedure.42

Conclusion

The 2005 Oklahoma amendment at section 9-311(a)(4) seems finally to have resolved the basic issue highlighted in *Lawson*, *Dalton* and *Snell*, as regards perfection by tribal CT procedures, though at some possible cost in terms of nonuniformity and choice of law uncertainty. As a result, the confusion caused by previous statutory ambiguities and any analytical lapses in these case decisions should do little harm, so long as there is no residual misunderstanding about the proper roles of the various laws involved.

But as has been demonstrated before,43 CT issues can quickly become more complicated than anticipated, and analytical errors in one case can be expanded years later in others. The enactment of UCOTA will hopefully prevent this, but in the meantime, the potential for mischief remains.

Among the residual questions left unanswered or needlessly lingering after these developments are: 1) Is section 1110 effective as to CTs created by other jurisdictions, including Indian tribes?; 2) does section 1110.A.1, which by its terms can be read to extend the Oklahoma CT law to every "vehicle as to which a [CT] may be properly issued by the Oklahoma Tax Commission," mean that the Oklahoma CT law governs CTs created by other jurisdictions any time an Oklahoma court has jurisdiction?; 3) does this mean that a security interest perfected by CT lien entry in Kansas (or any other state) becomes unperfected when the vehicle enters Oklahoma, or the owner moves to Oklahoma, because there is no equivalent to section 1110.G to protect Kansas CTs?; 4) does section 1110.G effectively contradict Article 9 sections 9-303 and 9-311?; 5) is a CT valid under section 9-102(a)(10) and 9-311(a) only if it is created under a statute that contains priority rules?; 6) if the prior question is answered yes, does this mean that Oklahoma CT perfection is invalid because the Oklahoma CT law has no priority rules?; and 7) are Oklahoma tribal CTs invalid for perfection purposes in bankruptcy cases filed in other states that have the uniform text of Article 9 section 9-311(a), or in cases filed here that involve a valid choice of another state's law that does not include Oklahoma's nonuniform section 9-311 (a)(4)? Clearly the answer to all of these questions is no, but this may not be apparent to a casual reader of the Oklahoma statues and case law.

Fortunately, enactment of UCOTA will clarify and resolve these issues. It can come none too soon.

Author's Note:

The author thanks Professor Fred H. Miller for his comments and assistance with this article and his contributions to development of the Uniform Certificate of Title Act (UCOTA), which if enacted will resolve most of the problems noted in this article.

1. Alvin C. Harrell, *Can a Buyer and Secured Party Rely on a Certificate of Title?* Part II, 76 OBJ 447 (2005).
2. Malloy v. The Wyandotte Bank (*In re* Lawson), No. 01-05385-R (Bankr. N.D. Okla. Jan. 5, 2004) (unpub.).
3. Title 47 Okla. Stat. §§ 1101-1151.
4. Title 12A Okla. Stat. §§ 1-9-101 - 1-9-709. Unless otherwise noted, citations hereafter are to the uniform text of Article 9, which is identical to Oklahoma Article 9 except as otherwise noted, and will be presumed to

be identical to a tribal enactment of Article 9.
5. *See* 47 Okla. Stat. § 1110.
6. *See* Article 9 § 9-311(a), (b).
7. *See* Article 9 §§ 9-109, 9-303, and 9-311; Harrell, *supra* note 1; and discussion *infra*. *But see* Malloy v. The Cornerstone Bank (*In re* Snell), No. 04-14329-M (Bankr. N.D. Okla. Sept. 5, 2005) (discussed *infra* at Pt. IV.) (finding the 2004 amendment to § 1110 to be "valid," though perhaps only in the sense of evidencing a legislative intent to recognize perfection under an appropriate tribal law).
8. Title 12A Okla. Stat. § 1-9-311(a)(4)(2005) (2005 Oklahoma amendment). Note that this nonuniform Article 9 amendment goes beyond recognition of tribal CT lien entry perfection; if the vehicle is registered by a qualifying tribe the effect is to recognize any method of perfection allowed by tribal law, potentially including filing on or even automatic perfection. Since the latter methods would not provide appropriate public notice, this argues for enactment by the tribes of a full-fledged CT law like UCOTA.
9. Arguably the 2005 Oklahoma amendment confirms that a tribal CT is a CT under Article 9 § 9-102(a)(10) and for the purposes of § 9-311(a) and (b), and thus clarifies that the applicable tribal CT law governs perfection in all of the cases discussed in this article, despite the misdirected 2004 amendments to § 1110. *See also* the discussion *infra* at Pt. III. *But see Snell*, No. 04-14329-M, discussed *infra* at Pt. IV. (2005 amendment was effective upon enactment and thus did not apply to the earlier *Snell* transaction, although the court recognized the 2004 and 2005amendments as an expression of intent to recognize tribal means of perfection).
10. *See infra* Part V.
11. For another example of this effect, *see* Bruce A. Campbell, *Ohio Car Buyers, Their Financers, and "Uniformers" Beware: Certificates of Title Control in Ohio*, 60 Consumer Fin. L. Q. Rep. __(2006).
12. No. 04-10025-R (Bankr. N.D. Okla. May 18, 2005).
13. *See* Harrell, *supra* note 1.
14. Under 11 U.S.C. § 544(a).
15. *See Lawson*, No. 01-05385-R, *supra* note 2.
16. The vehicle was repossessed by the bank just prior to the debtor's bankruptcy filing. This constituted perfection by possession under Oklahoma law. *See* UCC §§ 9-313(a),(b), and 9-316 (d), (e). But this was subject to avoidance as a preferential transfer under 11 U.S.C. § 547(b) if the security interest was previously unperfected.
17. The 2005 Oklahoma amendment confirms that perfection is allowed in any manner recognized under the law of the tribe that registers the vehicle, *e.g.*, even if that is by filing or automatic perfection. *See supra* note 8.
18. *See* §§ 9-102(a)(10) and 9-311(a).
19. *Id.*
20. The 2005 Oklahoma amendment rejects this view. *See supra* notes 8 and 17.
21. As noted *id.*, it is rejected in the 2005 Oklahoma amendment.
22. *Id.*
23. For example, UCOTA is carefully designed to defer to the Article 9 (and UCC Article 2) priority rules. The alternative is to invite analytical and priority chaos. *See, e.g.*, Campbell, *supra* note 11.
24. This is the correct approach in the absence of an applicable CT law. Article 9 § 9-311(a) defers to CT perfection only if the CT law qualifies under the Article 9 test discussed above, so in the absence of a qualifying CT law the perfection issues are governed entirely by Article 9. This is made clear under the 2005 Oklahoma Article 9 amendment, which also includes a deference to the tribal Article 9, whatever means of perfection the tribal law provides.

25. *See* 11 U.S.C. § 547.
26. Malloy v. Bank of Commerce (*In re* Dalton), BAP No. 05-052 (Dec. 8, 2005) (unpub.).
27. *See* UCOTA §§ 25, 26, allowing perfection by a filing with the CT office if no jurisdiction has created an applicable CT.
28. No. 04-14329-M (Bankr. N.D. Okla. Sept. 5, 2005).
29. The *Snell* court indicated at n. 7 that, although the parties extensively briefed the UCC issues, the court focused instead on the Oklahoma CT law. However, as noted here, the Oklahoma CT law did not apply to this case. As in *Lawson* and *Dalton*, the issues were governed largely by Article 9.
30. Title 12A Okla. Stat. § 1-105 (2004); UCC § 1-301 (2005 uniform text). Oklahoma has enacted revised UCC Article 1, effective January 1, 2006, but retained the substance of old § 1-105. Since the CN has a uniform version of Article 9, it is not necessary in this case to chose between the Oklahoma and CN Article 9.
31. Restatement Second Conflicts of Law § 187.
32. *See* UCC § 9-109, and *supra* this text Parts. I. and II.
33. *See* UCC § 9-303.
34. *See supra* Part III.
35. *Snell*, No. 04-14329-M, slip op. at 9.
36. Indeed, under the 2005 Oklahoma Article 9 amendment any method of perfection under tribal law is recognized.
37. *See* D. Kent Meyers, *Multi-State Motor Vehicle Transactions Under the Uniform Commercial Code: An Update*, 30 Okla. L. Rev. 834 (1977).
38. *See, e.g.,* Alvin C. Harrell, *A Roadmap to certification of Title Issues in Revised UCC Article 9*, 53 Consumer Fin. L. Q. Rep. 202 (1999).
39. *See, e.g.*, Title 12 Okla. Stat. § 1-105 (2004); *supra* this text at notes 30-31.
40. *See* discussion *supra* this text at Parts II. And III. Arguably, in a case like *Snell* the tribal Article 9 and not the Missouri or Texas state law might apply; however, the extent of tribal jurisdiction is less than clear.
41. Prairie Band Potawatomi Nation v. Wagnon, 402 F.3d 1015 (10th Cir. 2005). This case is also discussed in Harrell, *supra* note 1.
42. *See supra* note 23 and accompanying test.
43. *See, e.g.,* Campbell, *supra* note 11.

About the Author

Alvin C. Harrell is a professor of law at OCU School of Law and president of the Home Savings and Loan Association of Oklahoma City. He is a co-author of a dozen books, including "The Law of Modern Payment Systems and Notes" (with Professor Fred H. Miller). Professor Harrell chairs the UCC Legislative Review Subcommittee of the Oklahoma Bar Association. He also chairs an ABA UCC Committee Task Force on State Certificate of Title Laws, and is the Reporter for UCOTA.

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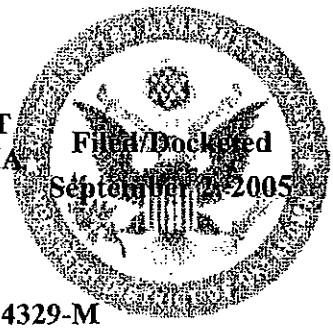

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: **STEVEN RAY SNELL,** **Debtor.**	**Case No. 04-14329-M** **Chapter 7**
PATRICK J. MALLOY, III, **Plaintiff,** **v.** **THE CORNERSTONE BANK,** **Defendant.**	**Adv. No. 04-01212-M**

MEMORANDUM OPINION

In this adversary proceeding, the Court is asked to determine whether the laws of the Cherokee Nation govern perfection of a lien on a motor vehicle owned by one of its citizens. Patrick J. Malloy III ("Malloy") argues that in Oklahoma, the only way to perfect a lien on a motor vehicle is to note the existence of the lien on a vehicle title created by the State of Oklahoma. The Cornerstone Bank ("Bank"), the lienholder in this case, takes issue with Malloy's position and notes that Malloy is asking for the impossible, since the title to the motor vehicle at issue was issued by the Cherokee Nation. The Cherokee Nation has weighed in on the issue, arguing that its laws regarding lien perfection are adequate and deserve respect. All in all, a very interesting and significant issue. The following findings of fact and conclusions of law are made pursuant to Federal Rule of Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 7052, made applicable to this contested matter by Federal Rule of Bankruptcy Procedure 9014.

Jurisdiction

The Court has jurisdiction over this bankruptcy case pursuant to 28 U.S.C.A. § 1334(b).[1] Reference to the Court of this contested matter is proper pursuant to 28 U.S.C.A. § 157(a). Issues relating to the validity, priority, and extent of liens are core proceedings as defined by 28 U.S.C.A. § 157(b)(2)(K).

Findings of Fact

This case arises out of the Chapter 7 bankruptcy case of Steven Ray Snell ("Snell"). The parties have submitted the matter upon the following stipulated facts:[2]

1. Snell is a member of the Cherokee Nation.

2. The Cherokee Nation is a federally recognized Indian tribe.

3. On October 4, 2001, the Cherokee Nation adopted its Motor Vehicle Rules and Regulations. The relevant portion of those regulations read as follows:

> **710:60-5-111. Perfecting liens**
>
> **A. Documents required for perfecting lien.** Before perfecting a lien, a Cherokee Nation title, boat or motor title, or an Application for Cherokee Nation Title accompanying a Manufacturer's Statement of Origin or out-of-state, tribe, or territory title must be presented, along with a completed Lien Entry Form.
>
> **B. Lien form to be typewritten.** All lien entry forms must be typed. No handwritten forms will be accepted.
>
> **C. Secured party information.** The secured party must have completed his part of the form, particularly the signature and date of execution. Strikeovers and off line printing are not acceptable.

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[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West 2005). All other references to federal statutes and rules are also to West 2005 publications.

[2] *See Docket No. 15.*

D. Title to conform to lien entry form. The name of the secured party will be entered on the face of the secured title exactly as it appears on the lien entry form.

E. Title receipt reflecting lien to be issued; fees. When recording a lien on a registered vehicle, boat or motor, used as collateral, a title receipt must be issued to reflect the lien. A title fee in addition to the lien fee will be charged.

F. Procedure for removal of lien entry from title. An owner may secure a new title omitting reference to a security interest by presenting the lien release and tendering payment for the new title.

G. Certain liens not perfectible under Motor Vehicle Code. Lien Entry Forms cannot be accepted on any vehicle that cannot be issued an [sic] Cherokee Nation Certificate of Title.[3]

4. On June 22, 2004, Snell executed and delivered to the Bank a document entitled "Note, Disclosure, and Security Agreement" (the "Agreement").

5. Pursuant to the Agreement, Snell granted the Bank a security interest in 1998 Ford Pickup Truck (the "Truck").

6. The Agreement states that it is governed by the laws of the State of Missouri, the United States of America, and, to the extent required, the laws of the jurisdiction where the Truck is located.

7. At the time Snell and the Bank entered into the Agreement, Snell did not reside on an Indian reservation, allotted land, or a dependent Indian community, nor has he so resided at any time thereafter.

8. At the time Snell and the Bank entered into the Agreement, Snell did reside within the jurisdictional area of the Cherokee Nation as described and recognized in the Tribal – State Motor Vehicle Licensing Compact dated May 15, 2002 (the

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[3] MV: 01-3-325, Motor Vehicle Rules and Regulations, Cherokee Nation Tax Commission (2001). *See Docket No. 15*, Exhibit D, p. 36.

"Compact"), entered into by and between the Cherokee Nation and the State of Oklahoma.

9. At the time of the execution of the Agreement, the Truck was located in Oklahoma.

10. On June 22, 2004, Bank executed a Lien Entry Form identifying the Truck (the "Lien Entry Form"). The Lien Entry Form was delivered to the Cherokee Nation Tax Commission on June 29, 2004.

11. After receipt of the Lien Entry Form, the Cherokee Nation issued a certificate of title for the Truck (the "Cherokee Title") which reflected the existence of the lien claimed by the Bank.

12. On September 30, 2003, the Cherokee Nation adopted the Uniform Commercial Code.

To the extent the "Conclusions of Law" contain any items which should more appropriately be considered "Findings of Fact," they are incorporated herein by this reference.

Conclusions of Law

Malloy admits that the Bank has a security interest in the Truck. The issue before the Court is one of perfection. The Bank and the Cherokee Nation contend that the notation of a lien upon a certificate of title issued by the Cherokee Nation operates to perfect the Bank's lien. Malloy contends that such efforts are meaningless. He argues that the only way to perfect a lien on a motor vehicle in the state of Oklahoma is by having the lien noted upon a title issued by the Oklahoma Tax Commission. If Malloy is correct, every car loan made to a member of the Cherokee Nation where the vehicle title was issued by the Cherokee Nation is vulnerable to attack. Although much is at stake in this case, the legal analysis is quite simple.

There is no dispute that Snell and the Bank complied with the law of the Cherokee Nation in noting the Bank's lien upon the Cherokee Title. The question is whether these efforts to perfect a lien are valid under Oklahoma law. The Oklahoma Legislature seems to think so:

> A. 1. ***Except for a security interest in*** vehicles held by a dealer for sale or lease, ***a vehicle registered by a federally recognized Indian tribe as provided in subsection G of this section***, and a vehicle being registered in this state which was previously registered in another state and which title contains the name of a secured party on the face of the other state certificate or title, a security interest in a vehicle as to which a certificate of title may be properly issued by the Oklahoma Tax Commission shall be perfected only when a lien entry form, and the existing certificate of title, if any, or application for a certificate of title and manufacturer's certificate of origin containing the name and address of the secured party and the date of the security agreement and the required fee are delivered to the Tax Commission or to a motor license agent.
>
> G. A security interest in vehicles registered by a federally recognized Indian tribe shall be deemed valid under Oklahoma law if validly perfected under the applicable tribal law and the lien is noted on the face of the tribal certificate of title.[4]

This statute was amended to provide for perfection under Indian law on April 13, 2004, and was effective on that date.[5] On May 5, 2005, the State of Oklahoma amended the Uniform Commercial Code to make it even more clear that liens perfected under Indian law are valid for all purposes:

> (a) Except as otherwise provided in subsection (d) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:
>
> * * *
>
> (4) the law or procedure of a federally recognized Indian tribe, if the security interest is in a vehicle registered or to be registered by the federally recognized Indian tribe and if within thirty (30) days after the security interest attaches, it is noted on the face of a certificate of title issued by the Indian tribe or, notwithstanding subsection G of

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[4] Okla. Stat. Ann. tit. 47, § 1110(A)(1) and (G) (West 2005) (emphasis added) (hereafter "§ 1110").

[5] 2004 Okla. Sess. Laws Ch. 85 § 2 (HB 2230).

> Section 1110 of Title 47 of the Oklahoma Statutes, the security interest is otherwise perfected under an applicable law or procedure of that tribe.[6]

While this amendment became effective immediately upon passage, it is not applicable to the case at bar. However, the statute stands as strong evidence of the intent of Oklahoma's lawmakers to recognize liens validly perfected under Indian laws such as those adopted by the Cherokee Nation.

The parties have stipulated that the Cherokee Nation is a validly recognized Indian tribe, and that Snell resided within the jurisdictional area of the Cherokee Nation as described and recognized in the Compact. Snell and the Bank entered into their transaction on June 22, 2004, well after the effective date of the amendments to § 1110. If the amendments to § 1110 are valid, the lien held by the Bank upon the Truck, validly perfected under the laws of the Cherokee Nation, is valid under the laws of the State of Oklahoma and not subject to attack by Malloy.[7] The argument is compelling.[8]

In response, Malloy argues that the interpretation of the Cherokee and Oklahoma laws advanced by the Bank and the Cherokee Nation is unconstitutional. Malloy contends that, at most, the Cherokee laws regarding lien perfection can apply only when the member of the Cherokee Nation resides on tribally owned land. Therefore, when a vehicle is owned by a member of the

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[6] Okla. Stat. Ann. tit. 12A, § 1-9-311 (West 2005).

[7] The parties have spent considerable time in their briefs arguing the merits of the Uniform Commercial Code as adopted by Oklahoma and the Cherokee Nation. Given the Court's focus on § 1110, a detailed discussion of the Uniform Commercial Code is not necessary in this case.

[8] The Court is aware that Professor Alvin C. Harrell, in a recent article, has argued that the amendments to § 1110 were superfluous. *See* Alvin C. Harrell, *Can a Buyer and Secured Party Rely on a Certificate of Title? Part II*, 76 Okla. B.J. 447 (2005). While the position advanced by Professor Harrell is an interesting one, the Court believes that the better path for it to follow is to recognize and respect the intent of the Oklahoma legislature.

Cherokee Nation who does not reside on tribally owned land, the vehicle must be titled with the State of Oklahoma, with the resulting issuance of an Oklahoma certificate of title, in order for a creditor to properly perfect a lien. Any other result, according to Malloy, violates the Supremacy Clause of the United States Constitution.

Malloy premises his argument upon a single case, *Oklahoma Tax Commission v. Sac and Fox Nation*.[9] He contends that this case "stands for the clear proposition that Indian Nation titles may only be issued to members of the Indian Nation who are residing on Indian land as defined by federal law."[10] Malloy did not cite to any particular portion of the *Sac and Fox* decision to support his bold statement. This Court has read and re-read the decision in hopes of finding the revelation relied upon by Malloy, but has failed to do so.

The *Sac and Fox* decision had nothing to do with lien perfection. Instead, the case dealt with the jurisdiction of a state over members of an Indian tribe. In that case, the Oklahoma Tax Commission (the "OTC") took the position that a title must be issued by the OTC for ***all*** motor vehicles located in the state of Oklahoma. The Sac and Fox Nation issued vehicle titles to members of the tribe who resided on tribal land. The OTC took the position that these vehicles were not legally titled, but took no action with respect to the deficiency unless and until a member of the Sac and Fox Nation sold a vehicle to a non-tribal member. When this occurred, the OTC required the new owner of the vehicle to pay all past due excise taxes, registration fees for the current year, and the fees and penalties due for the prior year in order to obtain an Oklahoma title for the vehicle. The Sac and Fox Nation filed suit seeking to permanently enjoin this practice, and to enjoin the OTC

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[9] 508 U.S. 114 (1993).

[10] *Plaintiff/Trustee's Reply Brief in Support of Motion for Judgment, Docket No. 20*, p. 2.

from collecting income taxes from anyone who earned their income from businesses located upon tribal territory.[11]

Upon cross motions for summary judgment, the district court held that while the OTC could not tax either the income or the vehicles of members of the Sac and Fox Nation who worked on tribal "trust lands," no such restriction applied to non-members of the tribe who either had vehicles titled by the Sac and Fox Nation or earned all of their income upon tribal trust lands.[12] The district court also ruled that the OTC could not require non-tribal members to pay registration fees and penalties on vehicles for years when the vehicle had been licensed by the Sac and Fox Nation. The United States Court of Appeals for the Tenth Circuit affirmed. Both parties appealed to the United States Supreme Court.

The United States Supreme Court, in a unanimous decision, reversed the decision of the Court of Appeals. The Supreme Court ruled that the OTC could not levy an income tax or a tax upon motor vehicles owned by members of the Sac and Fox Nation when "the relevant tribal members live in Indian country – whether the land is within reservation boundaries, on allotted lands, or in dependent communities."[13] The Supreme Court recognized the right of the Indian tribes to govern themselves in this area of taxation. The case was remanded for a factual determination of whether the tribe members lived in Indian country.

While the *Sac and Fox* decision may have limited the taxing ability of the State of Oklahoma when it comes to Indian nations, it did nothing to limit the ability of the State of Oklahoma to

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[11] 508 U.S at 120.

[12] *Id.* at 121.

[13] *Id.* at 126.

recognize the laws of Indian nations regarding lien perfection. Indeed, the issue of lien perfection is nowhere to be found in the *Sac and Fox* decision. This Court sees no restriction, constitutional or otherwise, upon the ability of the State of Oklahoma to respect the laws of the Cherokee Nation when it comes to lien perfection. To the extent the *Sac and Fox* decision supports the right of Indian nations to govern themselves, and the supremacy of such rights over the rights of a state to tax members of Indian nations, *Sac and Fox* seems to undermine, rather than support, Malloy's position.

Moreover, the judicial winds do not seem to be blowing in Malloy's favor. In a recent decision, the United States Court of Appeals for the Tenth Circuit upheld a district court order enjoining the State of Kansas from refusing to recognize the motor vehicle registration laws of the Prairie Band Potawatomi Nation.[14] In so ruling, the circuit court noted the interests of the tribe and the federal government in "promoting strong tribal economic development, self-sufficiency, and self-governance."[15] Given the existence of binding precedent forcing a state to recognize the laws of an Indian nation, it is difficult for this Court to find fault (let alone constitutional flaw) in the laws of the State of Oklahoma which voluntarily recognize the validity of the laws of the Indian nations on the issue of liens upon motor vehicles.

Finally, the practical effect of the position advanced by Malloy is not lost on the Court. If Malloy is correct, then lenders who choose to lend to members of Indian tribes cannot perfect a lien upon a motor vehicle unless they require the tribe member to register his or her vehicle with the State of Oklahoma. The tribal member will be forced to choose between loyalty to his or her tribe and the ability to obtain financing. Such a ruling would be directly contrary to the intent of the

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[14] *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (10th Cir. 2005).

[15] *Id.* at 1024.

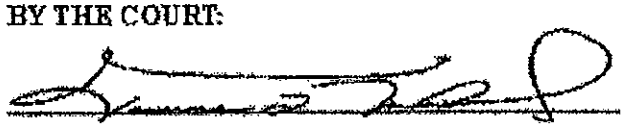
Oklahoma Legislature when it amended § 1110. It would serve no real purpose; liens noted upon titles issued by the Cherokee Nation are just as apparent as those on titles issued by the OTC. The primary beneficiary of Malloy's position would be unsecured creditors in bankruptcy cases, who could demand that the debtor-in-possession or bankruptcy trustee aggressively avoid purchase money security interests so that they might receive a dividend. When a creditor, such as the Bank in this case, has followed the law to the letter, such a result seems grossly inequitable.

Conclusion

The laws of the Cherokee Nation regarding the issuance of vehicle titles and the notations of liens thereon, and § 1110, are valid and constitutional. Bank holds a properly perfected lien upon the Truck, which Malloy may not avoid. This adversary proceeding is dismissed with prejudice. A separate judgment consistent with this Memorandum Opinion is entered concurrently herewith.

Dated this 2nd day of September, 2005.

BY THE COURT:



TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

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