

# **Exhibit A**

**No. 07-5016**

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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IN RE RUSSELL T. HARPER, SHANNON C. HARPER, DEBTORS  
PATRICK J. MALLOY, III TRUSTEE  
*Plaintiffs – Appellees*

vs.

WILSERV CREDIT UNION  
*Defendant – Appellant.*

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APPEAL FROM BANKRUPTCY APPELLATE PANEL AFFIRMANCE OF  
HONORABLE DANA RASURE, UNITED STATES BANKRUPTCY  
JUDGE FOR THE NORTHERN DISTRICT OF OKLAHOMA.  
BAP NO. NO-06-076

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BRIEF OF AMICI CURIAE  
OKLAHOMA CREDIT UNION LEAGUE  
& OKLAHOMA BANKERS ASSOCIATION  
IN SUPPORT OF APPELLANT AND REVERSAL

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Jason C. Boesch, OBA #19756  
*Counsel for Amici Curiae*  
2325 East I-44 Service Rd  
Oklahoma City, OK 73111  
Telephone: (405) 478-0046  
Telecopy: (405) 478-1279

Alvin C. Harrell, OBA #3882  
*Professor of Law*  
Oklahoma City University School of Law  
2501 N. Blackwelder  
Oklahoma City, OK 73106  
Telephone: (405) 208-5361  
Telecopy: (405) 208-5089

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, *Amici Curiae* hereby state that there is no corporation that owns ten percent (10%) or more of the stock of the *Amici*, as the *Amici* are solely owned by the individual banks and credit unions comprising their membership.

## **INTEREST OF AMICI CURIAE**

The Oklahoma Credit Union League & Oklahoma Bankers Association are non-profit voluntary associations of credit unions and banks in Oklahoma. They represent 353 credit unions and banks on shared industry concerns of Regulations and Compliance. These financial institutions currently hold millions of dollars in automobile loans which could be in jeopardy according to the initial ruling in this Case. Additional automobile loans are being made daily on top of the currently existing loans. This ruling has the potential to have a significant impact on the Tribal Tax Commissions who rely on Title Revenues. Every credit union and bank has loan assets at risk due to this ruling, but the ultimate burden will be shouldered by the Oklahoma Financial Consumer. This Brief was preceded by an Order granting Motion For Leave to File out of Time.

## **ANALYSIS OF ARGUMENT**<sup>1</sup>

### **I. Introduction -- Applicable Law**

A basic issue in this case is whether the certificate of title created by the Muscogee (Creek) Nation covering the subject vehicle is a “certificate of title” for purposes of Oklahoma Uniform Commercial Code (UCC) Article 9, pursuant to Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3)(2007). Assuming that Oklahoma law applies,<sup>2</sup>

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<sup>1</sup> Qualifications of Co-Author: Alvin C. Harrell is Professor of Law at Oklahoma City University School of Law. He was Reporter for the Uniform Certificate of Title Act (UCOTA), approved by the National Conference of Commissioners on Uniform State Laws in 2005, and is the author of a three-part series of articles on certificate of title laws published in the Oklahoma Bar Journal.

<sup>2</sup> There is a basic choice of law issue, as to whether Oklahoma or tribal law should apply as a foundational matter. The parties to this case apparently have proceeded on the basis that Oklahoma law applies. This is a matter left largely to the choice of the parties. *See* Okla. Stat. tit. 12A § 1-301 (2007). Your author does not opine on this issue.

Oklahoma UCC Article 9 governs the issues relating to a security interest in the vehicle, pursuant to Okla. Stat. tit. 12A § 1-9-109(a), including: issues relating to the scope of the applicable law (Okla. Stat. tit. 12A § 1-9-109(a)); attachment of the security interest (Okla. Stat. tit. 12A § 1-9-203); choice of law (Okla. Stat. tit. 12A § 1-9-303); possibly (depending on the application of § 1-9-303) the priority of the security interest as against the lien of the bankruptcy Trustee (Okla. Stat. tit. 12A § 1-9-317(a)(2)); and enforcement of the security interest (Okla. Stat. tit. 12A §§ 1-9-601 – 1-9-628). Oklahoma UCC Article 9 also governs perfection of the security interest, either directly or through incorporation by reference of the applicable certificate of title law (pursuant to Okla. Stat. tit. 12A §§ 1-9-303(c) and 1-9-311 (a)(3)).

Two fundamental points are clear: (1) Oklahoma UCC Article 9 does not require that there be priority provisions in the applicable certificate of title law; and (2) the Oklahoma certificate of title provisions at Okla. Stat. tit. 47 § 1110 A.I. and G. (2007) have no applicability to this case, as there has been no application for an Oklahoma certificate of title covering the vehicle pursuant to Okla. Stat. tit. 47 and Okla. Stat. tit. 12A § 1-9-303(b). Except as otherwise provided in Article 9, a certificate of title law does not apply to a security interest in the vehicle in this case, and nothing in Oklahoma UCC Article 9 indicates that Okla. Stat. tit. 47 is applicable, or that a priority rule in the applicable certificate of title law is necessary. The Okla. Stat. tit. 12A § 1-9-311(a)(3) incorporation by reference of the applicable certificate of title law (determined under Okla. Stat. tit. 12A § 1-9-303) is limited to recognition of the certificate of title law's perfection mechanism; § 1-9-311(a)(3) does not reference, require, or recognize any

priority rules in the applicable certificate of title law. If the bankruptcy court and Bankruptcy Appellate Panel concluded that the Muscogee (Creek) certificate of title law is deficient under Article 9 because it lacks priority rules, this is not correct. Not only would this conclusion misinterpret Article 9, under this view many state certificate of title laws would not qualify as such.

A significant question in this case is whether the certificate of title perfection procedure of the Muscogee (Creek) Nation is incorporated into Oklahoma UCC Article 9 by reference at Okla. Stat. tit. 12A § 9-311(a)(3). If so, the security interest is perfected pursuant to Okla. Stat. tit. 12A §§ 1-9-308(a), 1-9-310, and 1-9-311(b) and presumably has priority over the lien of the Trustee pursuant to the universally recognized “first-in-time, first-in-right” priority rule, *e.g.*, as illustrated in Okla. Stat. tit. 12A § 1-9-317(a)(2).<sup>3</sup> This, in turn, requires that the Muscogee (Creek) certificate of title qualify as a certificate of title under Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3), requiring application of the Article 9 standard for a “certificate of title statute” or law, as provided in §§ 1-9-102(a)(10) and 1-9-311(a)(3) (and in similar language at § 1-9-311(a)(4)).

## **II. The Definition of “Certificate of Title”**

The pertinent language in Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3), defining “certificate of title” for purposes of § 1-9-311(a)(3), may seem odd, and may benefit from an overall view of the history and context of this definition. Problems

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<sup>3</sup> *But see* Okla. Stat. tit. 12A § 1-9-303(c), providing for application of the law of the jurisdiction whose certificate of title covers the vehicle, and discussion *infra* at Parts III., IV., and V. As noted in these discussions, resolutions of the priority issues may require further reference to Muscogee (Creek) law.



sometimes focus on the language in § 1-9-102(a)(10) and § 1-9-311(a)(3) requiring a certificate of title law that “provides” for the security interest to be indicated on the certificate of title as a “condition or result” of obtaining priority. It is, perhaps, understandable that this language could be misinterpreted to require a certificate of title law that includes priority provisions. But this interpretation would be incorrect. Sometimes (as in this case) allegations are made that an applicable certificate of title law (such as the Muscogee (Creek) Nation law at issue in this case) is deficient under Article 9 because it includes only procedures that permit indication of the security interest on the certificate of title rather than “providing” for priority of the security interest. This too is incorrect.

These arguments misconstrue the Article 9 requirements at §§ 1-9-102(a)(10) and 1-9-311(a)(3). These sections require the certificate of title law to provide for an indication on the certificate of title as a “condition or result” of a procedure that results in priority for the security interest under the applicable priority rule (which normally will be in Article 9, *e.g.*, Okla. Stat. tit. 12A § 1-9-317(a)(2)). Thus, the system of law providing priority is normally Article 9, not the certificate of title law.<sup>4</sup> Article 9 uses the indication of the security interest on the certificate of title as a means of public notice, in

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<sup>4</sup> Note that this assumes the choice of applicable law under § 1-9-303(c) is a jurisdiction that has enacted UCC Article 9. This will be the case if the certificate of title has been created by a state, as all states have enacted the UCC; it may not be the case if the certificate of title was created by an Indian tribe that has not enacted the UCC. *See, e.g.*, Okla. Stat. tit. 12A § 1-9-303(c). Thus, if the security interest was created under Oklahoma UCC Article 9 pursuant to Okla. Stat. tit. 12A §§ 1-9-109(a) and 1-9-203, and the collateral is a vehicle covered by an Indian tribal certificate of title as defined in Okla. Stat. tit. 12A § 1-9-102(a)(10), then under *id.* § 1-9-303(c) the priority of the security interest will be determined under the law of the tribe that created the certificate of title. If that tribe has not adopted UCC Article 9 or an equivalent priority statute, the applicable priority rules will include the common law of that tribe. Thus, recognition of a tribal certificate of title under Okla. Stat. tit. 12A §§ 1-9-102(a)(10) means not only recognition of tribal perfection under *id.* § 1-9-311(a)(3) but also application of tribal priority rules under § 1-9-303(c). *See* further discussion *infra* at Parts III., IV., and V.

effect the equivalent of an Article 9 financing statement (*see* Okla. Stat. tit. 12A § 1-9-311(b)), as a means to achieve perfection under Article 9 and thus priority under the applicable priority rules, which may be in Article 9 or other law. It is not necessary or customary for these priority rules to appear in the certificate of title law.

As noted above, few if any state certificate of title laws provide priority rules governing security interests. It would be superfluous to do so, given the exclusive and comprehensive priority system in Article 9. But all (including the Muscogee (Creek) law) provide a means to achieve perfection which then may result in priority under Article 9 or other law.<sup>5</sup> Thus Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3) require a certificate of title law with a perfection mechanism based on public notice (the equivalent of an Article 9 financing statement -- *see* Okla. Stat. tit. 12A § 1-9-311(b)), which then constitutes perfection and creates priority in conjunction with Article 9 or other applicable law (*e.g.*, the otherwise applicable priority law, pursuant to § 1-9-303(c)); the certificate of title law must include a provision for giving public notice, by means of a requirement that the certificate of title law provide for indication of the security interest on the certificate of title as a result of this process. The certificate of title law need not, and normally will not, provide priority rules. Thus the Muscogee (Creek) certificate of title law, though not a model of clarity on these issues, is sufficient under the standards of Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3). Of course, it would be better if the tribes (and states) would avoid this problem by enacting certificate of title laws (such as the Uniform Certificate of Title Act) that “fit” better with Article 9,

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<sup>5</sup> *Id.*

but in the meantime it is not helpful for the courts to misinterpret the Article 9 standards, *e.g.*, as provided in Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3).

The references in Article 9, at Okla. Stat. tit 12A §§ 1-9-102(a)(10) and 1-9-311 (a)(3), to an indication on the certificate of title as “a condition or result” of the process leading to perfection, recognizes that some certificate of title laws require an indication on the certificate of title as a prerequisite to perfection, while others (the majority) do not, the majority providing instead that an indication on the certificate of title is a result (not a condition) of the process leading to perfection and priority. So the “condition or result” language in Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311 (a)(3) is there to pick up both types of statutes. Clearly Article 9 does not require an indication on the certificate of title as a precondition to perfection; it is sufficient if the security interest is indicated on the certificate of title as a result of the process leading to perfection and priority. Similarly, Okla. Stat. tit. 12A §§1-9-102(a)(10) and 1-9-311(a)(3) cannot logically be read to require the certificate of title law to include or reference the Article 9 perfection and priority rules; no state certificate of title law is likely to meet that requirement. It is enough that the certificate of title law provides a mechanism resulting in perfection for purposes of Article 9 and priority under Article 9 or other law, and an indication of the security interest on the certificate of title as a result. Sections 1-9-102(a)(10) and 1-9-311(a)(3) do not require any other linkage between Article 9, the applicable priority rule, and the certificate of title law, other than a certificate of title law that meets the requirements of §§ 1-9-102(a)(10) and 1-9-311 (a)(3); this merely requires a certificate of title law with a mechanism that results in perfection and priority and an indication on

the certificate of title, so as to provide public notice and lead to priority under Article 9 or the otherwise applicable law.

The language at §§ 1-9-102(a)(10) and 1-9-311(a)(3) is cumbersome, but it does not require a certificate of title law expressly stating that an indication of the security interest on the certificate of title is a condition or result of having priority under Article 9. It is enough that the certificate of title law provide for an indication of the security interest on the certificate of title, and that such indication results from procedures creating perfection and priority in conjunction with other law. In other words, it is required that the certificate of title law provide a procedure that results in priority under other law, not that the certificate of title law articulate an explanation of how that result is achieved.

Thus, the applicable certificate of title procedure need not (and should not, and rationally cannot) provide priority rules for security interests. That is the job of Article 9 or other law (*see* Okla. Stat. tit. 12A §§ 1-9-109 and 1-9-303(b)); the deference to the applicable certificate of title law at Okla. Stat. tit. 12A § 1-9-311(a) is limited to the mechanics of perfection, and does not include priority. So an argument that Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3) require a certificate of title law with priority provisions is not correct. This is an important matter, as a misstatement on this point could cast doubt on virtually every certificate of title law in the United States. Instead, in order to understand what is required, and the implications for this case, a further consideration of these rules in the overall context of Article 9 and secured transactions law is required.

### III. The Article 9 Context

As noted above, the requirement in Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3), for a certificate of title law that provides for the security interest to be indicated on the certificate of title as a condition or result of obtaining priority, does not require a certificate of title law that references, duplicates, or incorporates the Article 9 perfection and priority rules. The language at §§ 1-9-102(a)(10) and 1-9-311(a)(3) is merely a way of saying that the certificate of title law must provide a mechanism to create perfection for purposes of Article 9. *See* Okla. Stat. tit. 12A §§ 1-9-303(c), 1-9-308(a), 1-9-310, and 1-9-311(a), (b). The word “perfection” could not be used in the Article 9 references to the certificate of title law at §§ 1-9-102(a)(10) and 1-9-311(a)(3), because most certificate of title laws predated the original Article 9 and therefore (when the original Article 9 was written) did not use or recognize the term “perfection.” Instead they used obsolete terminology such as “lien entry” to describe perfection of a security interest. The terminology used in certificate of title laws also varied greatly (and still does) from state to state. So it was necessary for the original Article 9 to use generic language describing the result of perfection (*i.e.*, priority over a lien creditor), rather than requiring the certificate of title law to be a means of “perfection.” This language in the definition of “certificate of title” in old Article 9 caused no problems and was carried forward from old Article 9 into revised Oklahoma UCC Article 9 at §§ 1-9-102(a)(10) and 1-9-311(a)(2).

Thus in effect §§ 1-9-102(a)(10) and 1-9-311(a)(3) require a certificate of title law that provides: (1) a mechanism for creating the equivalent of Article 9 perfection which,

in conjunction with Article 9 or the other applicable priority rules, results in priority over a subsequent lien creditor; and (2) an indication of the security interest on the certificate of title so as to give public notice, as a condition or result of such perfection.

The statutory analysis is as follows: Oklahoma UCC Article 9 covers the initial security interest issues, including the scope of the law and creation (attachment) of the security interest, pursuant to Okla. Stat. tit.12A §§ 1-9-109(a) and 1-9-203. Article 9 then defers to an applicable certificate of title perfection mechanism via Okla. Stat. tit.12A § 1-9-311(a)(3), which requires a certificate of title law that qualifies under that section and Okla. Stat. tit. 12A § 1-9-102(a)(10). This requires a certificate of title law that provides a mechanism for achieving perfection and results in an indication of the security interest on the certificate of title. It does not require a certificate of title law that states or expressly provides priority rules. Okla. Stat. tit. 12A § 1-9-303 then determines which certificate of title law is applicable for purposes of achieving perfection pursuant to § 1-9-311(a)(3). The applicable certificate of title law provides the mechanism for achieving perfection, in conjunction with Okla. Stat. tit.12A §§ 1-9-308(a), 1-9-310(b), and 1-9-311(a) and (b). The security interest is thus perfected for purposes of Article 9 by means of compliance with the requirements of the applicable certificate of title law, pursuant to the choice of law rules at Okla. Stat. tit. 12A § 1-9-303(c) and 1-9-311(a)(3), and priority is then determined pursuant to the priority rules of the jurisdiction whose certificate of title covers the vehicle, pursuant to § 1-9-303(c). The resulting priority is recognized under Article 9, pursuant to Okla. Stat. tit.12A § 1-9-303(c). Again, this does not require the certificate of title law to include priority provisions, only that it be a means of

achieving priority under other law. In the case of a certificate of title created by the State of Oklahoma, for example, § 1-9-303(c) will reference the priority rules of Article 9 (*i.e.*, at Okla. Stat. tit.12A § 1-9-317), providing priority for the perfected security interest over a subsequent lien creditor.

#### **IV. The Impact of Tribal Law**

The analysis in this case is complicated by the fact that here the reference in Okla. Stat. tit. 12A § 1-9-303(c), to the priority rules of the jurisdiction that created the certificate of title, is a reference to the priority law of the Muscogee (Creek) Nation. As the bankruptcy court and BAP pointed out, no evidence of such law has been provided in this case.<sup>6</sup>

However, there is no requirement, in Oklahoma UCC Article 9 or elsewhere, for a comprehensive Muscogee (Creek) commercial code (although of course such would be helpful). Okla. Stat. tit. 12A § 1-9-303(c) defers to Muscogee (Creek) law only as to the mechanics of perfection, the effect of perfection or nonperfection, and priority issues. Regarding perfection, this conforms to Okla. Stat. tit.12A § 1-9-311(a)(3). Perfection has been achieved pursuant to Okla. Stat. tit. 12A §§ 1-9-308(a), 1-9-310, and 1-9-311(a)(3), by reference the Muscogee (Creek) certificate of title procedure. Oklahoma UCC Article 9 governs issues relating to scope attachment and enforcement, pursuant to Okla. Stat. tit. 12A §1-9-109(a). The remaining reference to Muscogee (Creek) law is the Article 9

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<sup>6</sup> See Patrick J. Malloy, III, Trustee v. Wilserv Credit Union, BAP No. N0-06-76 (Order and Judgment, filed Jan. 9, 2007), slip op. at 5: “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”; Patrick J. Malloy, III, Trustee v. Wilserv Credit Union, No. 05-13352-R (Bankr. N.D. Okla. June 7, 2006), slip. Op. at 11: “The parties did not supply any Creek Nation law resembling a commercial code or procedure that governs creations, perfection, priority, or foreclosure of liens on personal property.”

deference to the tribal priority rules (and other effects of perfection) via Okla. Stat. tit. 12A § 1-9-303(c). This requires an inquiry into Muscogee (Creek) law to determine how that law would resolve a priority conflict between an Article 9 security interest perfected on a Muscogee (Creek) certificate of title and a state law lien creditor.

It is not enough to say that the Muscogee (Creek) Nation has no law or procedure governing such priority disputes, or that such evidence has not been provided. The choice of law rule at Okla. Stat. tit. 12A § 1-9-303(c) requires an Oklahoma court to apply the local law of the referenced jurisdiction (here, the Muscogee (Creek) Nation) to resolve this priority conflict, no matter what that law says or does not say. In the absence of a tribal commercial code, that apparently requires an inquiry into the “common law” of the Muscogee (Creek) Nation.

Thus, in this case, Article 9 perfection was achieved via Oklahoma UCC Article 9 and the Muscogee (Creek) certificate of title procedure, and the analysis then shifts back to Article 9 to determine priority and the other effects of perfection, pursuant to the choice of law provision at Okla. Stat. tit. 12A § 1-9-303(c). Section 1-9-303(c) requires an analysis of Muscogee (Creek) law to resolve the priority conflict. There is no requirement in all of this that the Muscogee (Creek) certificate of title procedure (or any other certificate of title law) include a parallel set of Article 9 perfection and priority rules, or state what law governs priority, or incorporate the Article 9 rules on perfection and priority; Article 9 clearly applies, by its own terms, to resolve these issues or to direct the analysis to other applicable law. The deference to the certificate of title law at Okla.



Stat. tit.12A § 1-9-311(a) is specifically limited to the mechanics of perfection, and providing those mechanics is all the Muscogee (Creek) certificate of title law need do.

Requiring the Muscogee (Creek) certificate of title law to incorporate or reflect the Article 9 perfection or priority rules would essentially duplicate much of Article 9 in the Muscogee (Creek) procedure. This would be backward, as it is Article 9 that incorporates the certificate of title law, at Okla. Stat. tit.12A § 1-9-311(a), not vice versa. Similarly, requiring the Muscogee (Creek) law or procedure to expressly state that an indication of the security interest on the certificate of title is a result of or a condition to perfection and priority would go far beyond what Article 9 requires.

## **V. Conclusion**

There is nothing in Oklahoma UCC Article 9 that requires the Muscogee (Creek) certificate of title procedure (or any certificate of title law) to expressly reference the applicable perfection and priority rules or the consequences that result from providing an indication of a security interest on the certificate of title. If this were the test, other state certificate of title laws currently in force would fail to qualify, and the perfection of vehicle security interests all over the United States could be called into question.

When Oklahoma UCC Article 9 says at §§ 1-9-102(a)(10) and 1-9-311(a)(3) that the applicable certificate of title law must “provide” for an indication of the security interest on the certificate of title as a means of obtaining priority, it simply means the certificate of title law must provide an avenue to that result. It does not mean the certificate of title law must restate the law of security interests, or replicate the applicable perfection and priority system, or reaffirm the limited incorporation of the certificate of

title law into Article 9, as all of that is already specified at Okla. Stat. tit. §§ 1-9-311(a) and 1-9-303(c). The language in question, at Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3), simply requires the indication of a security interest on the certificate of title as a means to provide public notice, *i.e.*, the equivalent of filing an Article 9 financing statement, as means to create perfection and priority pursuant to Article 9 and other law. *See* Okla. Stat. tit. 12A §§ 1-9-308(a), 1-9-310, and 1-9-311(a)(3) and (b). Whether that results in priority in a given case then depends on Article 9 or other law, pursuant to the choice of law rule at Okla. Stat. tit. 12A § 1-9-303(c).

Any other interpretation of Okla. Stat. tit. §§ 1-9-102(a)(10) and 1-9-311(a)(3) and (b) would mean that almost any state certificate of title law could potentially meet the same fate as the Muscogee (Creek) Nation law did in the lower courts, because few if any state certificate of title laws include specific priority rules or expressly provide for perfection under the applicable rules of Article 9 or other law. Certificate of title laws don't need to do this, because that is the role of Article 9, not the certificate of title law. Any other view would mean that every state would apply an unrealistic and inappropriate test to every other state's certificate of title law, *e.g.*, under Oklahoma UCC Article 9 §§ 1-9-102(a)(10) and 1-9-311(a)(3). This could lead to every state questioning the certificate of title law of every other state, and potentially refusing to recognize security interests perfected in other states, creating unnecessary problems in the vehicle financing industry nationwide. This cannot be the intended interpretation of Oklahoma UCC Article 9.

As noted above at Part I., the Oklahoma legislature spoke to this issue in a statute that is not applicable to this case. Okla. Stat. tit. 47 § 1110 A.1. and G. do not apply because there has been no application for a certificate of title under that section. But § 1110.G. does stand as evidence of legislative intent to recognize Indian tribal certificates of title under Oklahoma law. This is consistent with a proper interpretation of Okla. Stat. tit. 12A §§ 1-9-102(a)(10) and 1-9-311(a)(3). This supports the conclusion that the Muscogee (Creek) Nation certificate of title procedure should be recognized as a certificate of title law that provides a mechanism for indicating a security interest on the certificate of title as a means to obtain priority under Oklahoma UCC Article 9 or other applicable law (*e.g.*, the law of the Muscogee (Creek) Nation), pursuant to Okla. Stat. tit. §§ 1-9-102(a)(10), 1-9-303(c), 1-9-308(a), 1-9-310, and 9-311(a)(3) and (b).

This requires application of the Muscogee (Creek) Nation certificate of title procedure to determine whether the mechanics of perfection have been achieved, and application of tribal priority law to resolve the priority conflict in this case. This means an analysis of the Muscogee (Creek) law governing secured transaction priorities, to determine how a tribal court would rule in this case. This may require consideration of tribal common law, including, if applicable, application by analogy of the universal “first in time, first in right” priority rule, *e.g.*, as illustrated in Muscogee (Creek) law at Title 24 § 7-405(c) of the Creek Nation Code and in Okla. Stat. tit. 12A § 1-9-317. Okla. Stat. tit. 12A § 9-303(c) requires application of the local law of the Muscogee (Creek) Nation to resolve the priority conflict in this case. Thus it is necessary to determine what that law

is. It is not enough to decide this case (in favor of either party) simply by saying that no such showing (as to tribal priority law) has been made.

DATED: May 8, 2007

Respectfully submitted,

/s/ Jason C. Boesch

Jason C. Boesch, OBA # 19756

*Counsel for Amici Curiae*

2325 East I-44 Service Rd

Oklahoma City, OK 73111

Telephone: (405) 478-0046

Telecopy: (405) 478-1279

And

Alvin C. Harrell, OBA#3882

*Professor of Law*

Oklahoma City University School of Law

2501 N. Blackwelder

Oklahoma City, OK 73106

Telephone: (405) 208-5361

Telecopy: (405) 208-5089

**CERTIFICATE OF COMPLIANCE**

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 4,641 words. I relied on my word processor to obtain the count and it is Microsoft Word.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Jason C. Boesch  
Jason C. Boesch

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 8, 2007, he caused the original and seven copies of the attached brief to be delivered by overnight commercial carrier to:

Office of the Clerk  
U.S. Court of Appeals for the Tenth Circuit  
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and caused the digital PDF version of the foregoing brief to be filed with the clerks office via e-mail to [esubmission@ca10.uscourts.gov](mailto:esubmission@ca10.uscourts.gov).

and two true copies to also be delivered by overnight commercial carrier to:

Counsel for Appellant  
David K. Wheeler  
Butler & Wheeler, PLLC  
104 East A Street, Suite 200  
Jenks, OK 74037

Counsel for Appellee  
Patrick J. Malloy III, Trustee  
111 W. 5<sup>th</sup>, Suite 700  
Tulsa, OK 74103

Jason C. Boesch  
Jason C. Boesch

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I hereby certify the following:

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/s/ Jason C. Boesch  
Jason C. Boesch