No. 07-5016

UNITED STATES COURT OF APPEALS
OF THE TENTH CIRCUIT

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

ANSWER BRIEF OF APPELLEE, PATRICK J. MALLOY III, TRUSTEE (TRUSTEE)

April 25, 2007

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ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPELLEE'S SUPPLEMENTAL STATEMENT OF THE CASE

Pursuant to Fed.R.App.Rule 28(b), the Appellee, Patrick J. Malloy III, the duly appointed bankruptcy Trustee in this matter (Trustee) would respectfully supplement the Appellant, WilServ Credit Union's (WilServ) "Statement Of Case" for the sole purpose of providing somewhat more detail regarding the Trustee's underlying claim. The Trustee commenced the underlying action in the United States Bankruptcy Court For The Northern District of Oklahoma seeking to avoid WilServe's security interest in and to the debtors' 2001 Chevrolet Pickup pursuant to 11 U.S.C. 544 on the basis that WilServ had failed to properly perfect its security interest in the vehicle in accordance with applicable Oklahoma law.

APPELLEE'S SUPPLEMENTAL STATEMENT OF FACTS

Commencing on page 4 of WilServe's Statement Of Facts, WilServ attempts to summarize the basis of the bankruptcy court's ruling. The Trustee does not believe the summary is entirely correct. The bankruptcy court's analysis can be summarized as follows:

a) The court first analyzed the choice of laws provisions contained in the Oklahoma Uniform Commercial Code (OUCC) sections 1-9-301 and 1-9-303 and noted that 1-901 provided in material part that:

> "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 nonperfection,

> 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."

The court then went on to analyze the provisions of 1-9-303 and noted that 1-9-303(c) provided that:

> "The 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..."

b) The court then concluded that this section only applied if the vehicle was covered by a "certificate of title" as that term is defined in OUCC section 1-9-102(10) -- which provides that a 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."**

c) That after reviewing the applicable Creek Nation laws, the court concluded that the title in question did not constitute a "certificate of title" as defined by the OUCC.

d) As a result of this conclusion, the court then returned to 1-9-301 and the requirement that the court look to the law of the jurisdiction where the debtors

were located (rather than the laws of the jurisdiction that issued the title). As a result of the parties' stipulation that the debtors did not reside on Indian land and, instead, lived in Oklahoma, the court concluded that Oklahoma perfection laws applied.

e) The court then expended considerable time discussing the possible application of an amendment to OUCC section 1-9-311(4) which became effective on May 5, 2005. The court noted that 1-9-311(a) provided in material part that 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 secured 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."

In applying this section to the facts of this case, the court found that the Creek nation had no laws dealing with creating or perfecting a security interest in a vehicle and further found that WilServe's security interest was noted on the title

more than 30 days after the security interest attached. More importantly, however, the court found that this amendment to the OUCC was substantive in nature and should be applied prospectively-not retroactively to the WilServ transaction which occurred in 2001.

f) The court next concluded that pursuant to OUCC Section 1-9-309(1) 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. However, the court went on to conclude that WilServe's security interest was not a purchase money security interest and, therefore, WilServe's lien was not automatically perfected upon attachment under OUCC Section 1-9-309(1). As a result of this conclusion the court further concluded that pursuant to OUCC Section 1-9-310 "a financing statement must be filed to perfect all security interests." As a result of the fact that WilServ failed to file a financing statement in Oklahoma county, WilServ did not have a perfected lien in the vehicle and the Trustee could avoid its security interest pursuant to 11 U.S.C. 544.

SUMMARY OF ARGUMENT

The Trustee contends that the Indian Nation title at issue in this matter was issued in violation of state and federal law and that pursuant to applicable Oklahoma law the vehicle in question should have been registered with the Oklahoma Tax Commission. More importantly WilServ was required to file a lien

entry form with the Oklahoma Tax Commission in order to perfect its security interest in the vehicle -- which it failed to do.

Secondly, WilServ cannot rely upon Amended Title 47 Okla. Stat. 1110 on the basis that the Amendment became effective in 2004; represented a substantive change in the applicable law; and, therefore, cannot be applied to the instant transaction which occurred in 2001.

Thirdly, the bankruptcy court correctly concluded that the Indian title in question did not constitute a “certificate of title” as defined by the OUCC and the Creek Nation has no laws dealing with the creation or perfection of a security interest in a vehicle.

Fourthly, Wilserv's security interest did not constitute a purchase money security interest as a result of the fact that WilServe's loan proceeds were not used to purchase the vehicle in question but rather to payoff the purchase money lender.

Fifthly, 42 Okla. Stat. 19(2) does not apply by virtue of the fact that WilServ did not have an inferior lien in the vehicle when the loan proceeds were advanced.

Finally, equitable subrogation does not apply in the instant case as a result of the fact this case does not involve a void mortgage or security interest; fraud, deception, or other wrongdoing; and no promise of an assignment of a prior lien.

ARGUMENT

1) THE BANKRUPTCY COURT DID NOT ERR IN DETERMINING THAT WILSERV FAILED TO PERFECT ITS SECURITY INTEREST IN THE VEHICLE.

WilServ commences its argument by discussing issues of sovereignty. Interestingly, sovereignty issues were raised by the Trustee in his briefs filed in the bankruptcy court and at the Bankruptcy Appellate level but were for all practical purposes not addressed by either court -- nor were such issues the basis for either court's ultimate ruling. However, as argued more fully herein, the Trustee is more than willing to address sovereignty issues in this case.

WilServ next discusses the application of amended 47 Okla. Stat. 1110 which was amended in April 2004 and which admittedly had the apparent effect of exempting vehicles registered with certain federally recognized Indian tribes from the requirement that a lien entry form be filed with the Oklahoma Tax Commission in order to validate liens on vehicles filed with such tribes. As argued more fully herein, Amended Title 47 is inapplicable to the facts of this case on the basis that such amended statute did not become effective until approximately 2 1/2 years after the subject security agreement was executed. In the alternative, the Trustee asserts that Amended Title 47 violates at least one Oklahoma constitutional provisos.

WilServ next contends that the bankruptcy court erred in concluding that the Creek Nation title in the instant case did not constitute a certificate of title as defined by the Oklahoma version of the UCC. As argued more fully herein, the Trustee contends that the bankruptcy court correctly concluded that the certificate of title issued was not, in fact, a certificate of title as defined by the UCC. In the alternative, the Trustee argues that regardless of whether or not the subject title was a certificate of title as defined by the UCC, the Creek Nation has no laws dealing with the creation or perfection of lien as to vehicle and, therefore, WilServ cannot rely on Creek Nation laws in order to establish that it properly perfected its interest in the vehicle.

WilServ next complains that the bankruptcy court failed to apply 42 Okla.Stat. 19(2). The Trustee contends that this statutory provision has no applicability to the facts of this case.

Finally, WilServ contends that it is entitled to rely on equitable subrogation to establish perfection of its interest. The Trustee argues that the court correctly concluded that equitable subordination did not apply.

a) <u>The Creek Nation Title In The Instant Case Was Issued In Violation Of Federal And State Law And, Therefore, Oklahoma Law In Effect At The Time Required WilServ To Perfect Its Interest By Filing A Lien Entry Form With The Oklahoma Tax Commission.</u>

WilServ commences its argument portion by stating that "There is little doubt that Oklahoma recognizes the validity of Indian titles and liens. WilServ then cites the case of Prairie Band Potawatomi Nation v. Wagnon, 402 F3d 1015 (10th Cir. 2005) wherein the 10th Circuit upheld a Kansas District Court order enjoining the State of Kansas from refusing to recognize the motor vehicle registration laws of an Indian nation. However, a close reading of the case reveals that it does not, in fact, support WilServ and, in fact, clearly supports the Trustee's entire position with respect to the issuance of Indian titles in the State of Oklahoma. In the Prairie Band case, members of an Indian nation **residing on Indian land to-wit: an Indian nation reservation**, registered vehicles properly with the Indian nation. Thereafter, these members of the Indian nation traveled off the Indian land and entered the State of Kansas driving on Kansas highways. At that point, Kansas Highway patrolmen stopped and ticketed the Indian Nation members on the basis that they were operating vehicles registered to the Indian nation and not the State of Kansas. The 10th Circuit essentially acknowledged the right **under these facts** for the Indian Nation to issue vehicle titles. That is, the titles in this case were being issued to members of the Indian nation **who resided on Indian land**. [see also Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993)]. Under these facts, the Trustee does not question the right of the Indian Nation to issue a vehicle title. The Trustee likewise does not quarrel with

the proposition that the Prairie Band of Potawatomi Nation was entitled to proceed in Federal District Court to protect its sovereignty. However, the facts in the instant case are absolutely the reverse of the facts in Prairie Band Potawatomi case. In the instant case, it is stipulated that the debtors **did not** reside on Indian Nation land. In the Potawatomi Nation case it was the Potawatomi Nation's sovereignty which was being attacked and disregarded. In the instant case, it was the sovereignty of the State of Oklahoma which was being attacked and disregarded by both the debtors, the Creek Nation, and WilServ. Under these facts and under the rationale of the Prairie Band Potawatomi case, the State of Oklahoma could proceed in Federal District Court to enjoin the Creek Nation from issuing titles to **persons residing in the State of Oklahoma**. After reviewing these federal cases in their totality, it is simply an over simplification, if not a misstatement of applicable law, to state as WilServ has "That states have no choice but to recognize the validity of Indian titles on vehicles." That is simply not the law. States are required to recognize the validity of Indian titles **properly issued pursuant to applicable federal and state law**. In essence, both Indian Nations and states should recognize each other's sovereignty and rights with respect to persons residing within the boundaries of either the Indian nation or the state. In the instant case, the Creek Nation issued a title to persons living within

the State of Oklahoma -- not on Indian land -- in blatant disregard for the sovereignty of the State of Oklahoma.

If we combine the ruling and rationale of the Sac and Fox Nation and the Prairie Band Potawatomi cases with the intent of the Uniform Commercial Code, it simply cannot be said that the State of Oklahoma would defer to the laws of a jurisdiction within the boundaries of the state which issued a vehicle title to citizens of the state living within the jurisdiction of the state. The version of Title 47 in force when the subject security agreement was executed was applicable to vehicles **"as to which a certificate of title may be properly issued by the Oklahoma Tax Commission."** The Trustee contends that this language applies to a title which **may be issued by the Oklahoma Tax Commission** and not merely to titles actually issued by the Oklahoma Tax Commission. Again, the version of Title 47 in force at the time the subject security agreement was executed required WilServ to perfect its security interest in the subject vehicle by filing a lien entry form with the Oklahoma Tax Commission -- which WilServ failed to do.

b) <u>Amended Title 47 Okla. Stat. 1110 Does Not Apply To The Instant Case.</u>

As pointed out by WilServ, 47 Okla. Stat. 1110 was amended in **April 2004** to provide that a security interest in vehicles registered by federally recognized Indian tribes shall be deemed valid under Oklahoma law if valid and perfected

under the applicable tribal law and the lien is noted on the face of the tribal certificate of title. Leaving aside for the moment the fundamental fact that the Creek Nation has no laws governing the creation and perfection of a security interest in vehicles, amended Title 47 has no applicability to the facts of this case. As noted in the parties' Joint Stipulation the security agreement, the document was executed on 10/18/01 -- approximately 2.5 years **prior** to the Amendment to Title 47. (Appellant's Appendix at 76). The general rule is that statutes are to be applied prospectively only. Oklahoma Bd. of Medical Licensure and Supervision v. Oklahoma Bd. of Examiners in Optometry, 893 P2d 498, 499 (Okla. 1995). 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, 19 P3d 856, 860 (Okla. 2001). The 2004 amendment to Title 47 represents a substantive change in the law regarding perfection of a security interest in a vehicle and, therefore, must be applied prospectively and not retroactively.

The Trustee feels compelled to address a prior bankruptcy case which WilServ references in its opening brief. WilServ referenced the case of In re Stephen Ray Snell, Case No. of 04-14329-M United States Bankruptcy Court For The Northern District of Oklahoma; Patrick J. Malloy v. Cornerstone Bank, Adversary No. 04-01212-M. It is true that the court in this matter did apply

Amended Title 47 to that case. However, as the bankruptcy court noted the security interest in that matter was entered into on **June 22, 2004**, well after the effective date of the amendments to Section 1110. In addition, the Trustee would provide the following comments regarding the Cornerstone Bank court's interpretation of two federal court cases:

i) Oklahoma Tax Commission v. Sac and Fox, 508 U.S. 114(1993)-The court concluded that the case had nothing to do with determining whether or not Cornerstone had properly perfected its security interest. The Trustee agrees that that case does not directly address perfection of liens in a vehicle. However, the U.S. Supreme Court clearly addressed issues of jurisdiction and sovereignty which the Trustee asserts have a direct bearing on perfection of a security interest in a vehicle. The bankruptcy court in Cornerstone correctly noted that the United States Supreme Court prohibited the Oklahoma Tax Commission from levying 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.**" The case was remanded for a factual determination of whether the tribal members actually lived in Indian country as

defined by the United States Supreme court. The obvious and clear significance of this ruling is that in the event the tribal members did not, in fact, live in Indian country i.e. reservation boundaries, or allotted land, or in dependent communities, the State of Oklahoma would have jurisdiction and the Oklahoma Tax Commission could require registration of the vehicle under Oklahoma law -- and levy a tax on the vehicle.

The bankruptcy court further concluded that the case did not limit the State of Oklahoma from recognizing the laws of Indian Nations regarding lien perfection. In fact, by implication it did. If, as stated above, the tribal members were determined to live in Oklahoma -- and not on Indian land (and it is stipulated in this case that the debtors do not reside on Indian land) -- then the State does have jurisdiction over the vehicle and need not recognize Indian laws re perfection of liens. To the extent new section 1110 is interpreted to apply to all Indian titles regardless of whether or not the tribal member resides on Indian land, this amendment would appear to violate at least one state constitutional provision. Article V section 50 of the Oklahoma State Constitution prohibits the legislature from passing a law exempting any property within the state from taxation.

(See addendum page 1). An unrestricted interpretation of new 1110 has the indirect effect of exempting vehicles located in the State of Oklahoma which are subject to the jurisdiction of Oklahoma from registration and taxation by the state.

ii) Prairie Band Potawatomi Nation v. Wagnon, 402 F3d 1015 (10th Cir. 2005) -- The court in Cornerstone provided that "Moreover the judicial winds do not seem to be blowing in Malloy's favor." The court then cited the referenced case. The court concluded that this case represented "binding precedent forcing a state to recognize the laws of an Indian nation..." The bankruptcy court's conclusion in this regard is simply not supported by the 10th Circuit's ruling. As previously argued, Prairie Band stands for the mutual recognition of both state and Indian Nation sovereignty and jurisdiction. As already argued herein, the facts in Prairie Band are the complete converse of the facts in this case. Clearly under the 10th Circuit ruling, if the facts were reversed i.e. Indian titles were issued to Tribal members living in the State of Kansas -- not on Indian land -- the State of Kansas could proceed in District Court to enjoin the Indian nation from issuing such titles in violation of Kansas jurisdiction and laws. The

State of Kansas would also be free to ticket tribal members who used Indian titles but did not live on Indian land.

Finally, the court in Cornerstone concluded that the effect of the Trustee's argument was to require Tribal members to register vehicles in the State of Oklahoma to obtain financing. "The tribal members will be forced to choose between loyalty to his or her tribe and the ability to obtain financing." Again, and with all due respect, that is not the effect of the Trustee's argument. Tribal members are also citizens of the State of Oklahoma. They drive on Oklahoma highways which require tax dollars to build and maintain. The effect of the Trustee's argument is that Tribal members have duties of loyalty to both the state and their tribe and should obtain Indian titles only in those instances when they reside on Indian land. To do otherwise, is to ignore the laws and jurisdiction of the State of Oklahoma.

One final comment on section 1110 -- even if section 1110 were applicable and constitutional the amendment requires that the lien be "**valid and perfected under the applicable tribal law** and the lien is noted on the face of the tribal certificate." As argued more fully herein, the Creek Nation has no applicable law regarding the creation and/or perfection of liens in vehicles. As a result, even new section 1110 would not assist WilServ in this matter.

c) The Creek Nation Title Did Not Constitute A Certificate Of Title As Defined By The Oklahoma Uniform Commercial Code And The Creek Nation Has No Laws Dealing With The Creation Or Perfection Of Its Security Interest In A Vehicle.

WilServ correctly points out that the bankruptcy court concluded that the Creek Nation Title in the instant case was not a "Certificate of Title" as defined by the OUCC as a result of the court's finding that no Creek Nation law requires 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." As a result of this determination, the court, thereafter, concluded that under the applicable conflict of law rules set forth in 12A Okla.Stat. 1-9-301 the court was required to apply the laws of the jurisdiction where the debtors are located. The court, therefore, proceeded to analyze the case under the purchase money perfection rules of the OUCC.

WilServ contends that the court's conclusion relative to the Creek Nation title was incorrect. WilServ initially argues that the title itself contains language which references the words "1st" or "2nd" liens. WilServ then argues "There cannot be any serious dispute that the result of the Creek Nation lien notation, which was made in accordance with its statutes, clearly and simply confers a first lien upon the vehicle to the credit union." The problem with this argument is that

WilServ cannot point to a single Creek Nation statutory provision which sets forth the specific steps that must be taken in order for a lender to perfect a security interest in a vehicle. The form of the title itself clearly does not rise to the level of a statutory requirement or legal provision.

WilServ then references Creek Nation Statute Title 46 Section 3-104 (B) which provides "notice of liens against said vehicle shall be placed upon said title upon request of a lending institution." Again, this language merely instructs the Creek Nation to place upon the title notice of any liens **"upon request of the lending institution."** This language does not mandate that the lending institution provide notice of its lien on the Indian Nation title in order to perfect a security interest in the vehicle.

Finally, WilServ references Title 24 section 7-405 of the Creek Nation Statutes which provides that liens have priority according to the time of their creation so long as the instruments creating the liens are duly recorded." Again, this statutory provision provides no instruction and sets forth no requirements for the perfection of a security interest in a vehicle.

As a result of the fact that the Creek Nation laws do not address the steps which must be taken in order to perfect a security interest in a vehicle the bankruptcy court correctly concluded that the subject title was not a certificate of title as defined by the Uniform Commercial Code.

As noted above, the Trustee argued at the bankruptcy court level and is now arguing to this Court that as a result of the fact that the debtors resided in Oklahoma and not on Indian land that the title should have been registered with the Oklahoma Tax Commission and, therefore, pursuant to old Title 47 an appropriate lien entry form should have been filed with the Oklahoma Tax Commission. Clearly, the bankruptcy court rejected this argument on the basis that Title 47 only applies when an actual Oklahoma title has been issued -- not in situations where were a title "may be issued." Having concluded that the Creek Nation laws did not address perfection of a security interest in a vehicle, the bankruptcy court thereafter proceeded to apply applicable Oklahoma law as set forth in Article 9 to determine whether or not WilServ had a perfected security interest.

d) WilServ's Security Interest Did Not Constitute A Purchase Money Security Interest And Therefore The Security Interest Was Not Perfected Upon Attachment.

WilServ relies, in part, on the case of In re Russell, 29 B.R. 270 (Bankr.W.D. Okla. 1983). However, the facts of that case are clearly distinguishable from the facts of this case. Among other matters, there was a single lender in this case which provided purchase money to the debtor relative to a particular asset in consideration for a purchase money security interest in that asset. Thereafter, the lender refinanced the original transaction and advanced new

money. The bankruptcy court essentially concluded that the refinance did not result in a loss of the purchase money nature of the original transaction to the extent the earlier transaction was incorporated into the refinance and a balance due relative to the original transaction existed. The Trustee does not quarrel with this result. It would have been inequitable to conclude otherwise. However, in the instant case there are two separate lenders. Only the original lender provided funds necessary to purchase the vehicle. WilServ did not provide "purchase money" but merely refinanced the original transaction. The court in Russell provided the following discussion:

> "**Comment 2 to 9-107 prohibits the taking of purchase money security interests in antecedent debts, and could likewise apply to future advances**, but it does not demand that purchase money status be denied in its entirety because an item secures both its own price and antecedent debts or future advances." (emphasis added)

In Russell, a portion of the debt constituted purchase money and a portion did not. **None** of the moneys advanced by WilServ constituted "purchase money."

e) <u>42 Okla. Stat. 19(2) Has No Applicability To This Case.</u>

WilServ also relies on 42 Okla.Stat. 19(2) in an attempt to protect its interest. The statute provides as follows:

> "One who has a lien inferior to another upon the same property has a right:
>
> 2) To be subrogated to all the benefits of the superior lien

> when necessary for the protection of its interest, upon satisfying the claim secured thereby."

The bankruptcy court correctly concluded that this statutory remedy was not available to WilServ as a result of the fact that WilServ 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. WilServ contends that the moment that it advanced money to the debtors pursuant to the subject note and security agreement it had an inferior lien to the lien of Union Acceptance Corp. The Trustee believes that WilServ misunderstands the intent of the reference statutory provision. Again, the Uniform Commercial Code clearly prohibits granting purchase money security interest status in the context of payments of antecedent debts. The intent of Title 42 section 19(2) is to permit an existing lien holder who holds an inferior position by virtue of prior advances of money the right to advance additional monies for the purpose of satisfying a prior and superior lien in order to protect its position in the property. The intent of the statutory provision is to provide the junior lien holder standing to satisfy the debt of a superior lien holder. Again, the statute is not intended to represent a circumvention of the UCC requirements regarding the definition of a purchase money security interest.

f) <u>Equitable Subrogation Does Not Apply To The Facts Of This Case.</u>

Finally, WilServ attempts to rely on the doctrine of equitable subrogation to protect its interest in the vehicle. In essence WilServ contends that pursuant to the doctrine of equitable subrogation it stands in the shoes of the prior lien holder. The bankruptcy court correctly declined to apply the doctrine of equitable subrogation to protect WilServ's position in this case. In doing so the court noted that "The Credit Union has not referred the Court to any 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 a lien on its own behalf, however." The court then went on to discuss Landis v. State ex rel. Commissioners of Land Office, 66 P2d 519 (Okla. 1937). The court concluded that:

> "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 P2d at 522. ...The Court also 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 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...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 receive against the debtor's property, and nothing in Landis indicates that equitable subrogation

> should be applied to enhance the rights of a refinancing lien holder to the detriment of third party lien holders who had done nothing to cause the failure or invalidity of lender's security interest."[1]

The court went on to discuss a line of cases that have applied equitable subrogation when the refinancing lender presented evidence to establish a belief that he would be substituted for the original lender but 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 P2d at 433-34."

The court further addressed the requirement that a 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. Citizens State Bank v. Pittsburg County Broadcasting Co., 271 P2d 725, 727.

Finally, the court found that the instant case does not involve a void mortgage or security interest; does not involve fraud, deception or other wrongdoing; and no promise of an assignment of the prior lien. As result, equitable subrogation did not apply.

[1] The court noted in a footnote that it is not at all clear in Oklahoma that equitable subrogation even applies to transactions involving personal property.

CONCLUSION

Based upon the forgoing, the Bankruptcy Court and the BAP correctly concluded that WilServ failed to perfect its interest in the subject vehicle and, therefore, its lien in the vehicle was avoidable pursuant to 11 U.S.C. 544. The judgments of the BAP and the Bankruptcy Court should be affirmed.

STATEMENT OF REASONS WHY ORAL ARGUMENT IS NOT REQUIRED

In its Statement Of Reasons Why Oral Argument Is Required WilServ provides the following:

> "The effect of the Trial Court's decision upon automobile lending in the State of Oklahoma is widespread. The local legislature, in response to the Trial Court's previous decisions on these issues, has twice amended relevant Oklahoma Statutes. In addition, the Trial Court's decision has a serious and severe impact upon the numerous Indian tribes in the State of Oklahoma that have chosen to issue automobile titles. The Trial Court's decision potentially could effectively negate the thousands of titles that have been issued by these tribes, thereby depriving them of a government source of revenue. In addition, Tribal members who choose to finance their vehicles might find themselves unable to secure financing if a Tribal title is used. Finally, the bankruptcy court's decision is in conflict with the decision of the other judge to the Northern District."

The Trustee is at a loss to understand the basis for these extreme statements. To begin with the bankruptcy ruling in this instant case addressed facts and circumstances that long preceded the amendments to Title 47 and the Oklahoma

Uniform Commercial Code. Given the fact that those amendments were substantive in nature and, therefore, must be applied prospectively, the long-term effect of those amendments must be determined in future cases. Secondly, the bankruptcy court's decision is not in conflict with the other judge in the northern district. WilServe's reference to the "other judge" apparently relates to the Honorable Judge Terrance Michael's opinion in Malloy v. Cornerstone Bank, an unpublished opinion in Adv. No. 04-14329-M (N.D. Okla.). However, as already established, that opinion represented the application of Amended Title 47 -- which is simply not applicable to the facts of this case. Secondly, to the extent that opinion also stands for the proposition that the Prairie Band Pottawatomie case (supra) constitutes "binding precedent forcing the state to recognize the laws of an Indian Nation" Judge Michaels, with all due respect, was wrong. That statement was simply overbroad. The clear intent of **this Court's** ruling in that matter is that the states must recognize the validity of Indian titles **issued to members of the tribe who reside on Indian land.** Nothing in the opinion supports an argument that a state is required to recognize the validity of an Indian title issued to members of the tribe who live within the jurisdiction of the state. Finally, the bankruptcy court in this matter addressed additional issues which were never addressed in the Cornerstone Bank case e.g. whether or not the subject Indian title constituted a certificate of title as defined by the Oklahoma Uniform Commercial Code.

What is particularly disconcerting about WilServe's hyperbole is its apparent lack of any concern or sensitivity to the fundamental jurisdictional and sovereignty issues inherent in the issuance of this particular Indian title to citizens of the state of Oklahoma who reside in the state of Oklahoma -- not on Indian land. It is the state of Oklahoma that is losing substantial revenues as a result of this practice-- revenue that could be used to maintain state roads, highways, bridges etc. which these debtors utilize on daily basis. The Trustee further contends that WilServ was on notice that the debtors in this case did not live on Indian land when the debtors sought financing from WilServ. In essence, WilServ financed the purchase of a vehicle that was titled in violation of applicable state and federal law.

The Trustee asserts that the bankruptcy court's opinion in this case represents a thorough, reasoned and complete analysis and application of somewhat complicated Oklahoma Uniform Commercial Code provisions and that this Court may review that decision based upon the substance of the bankruptcy court's opinion and the briefs filed herein.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Patrick J. Malloy III, hereby certify that on the 25th day of April, 2007, I sent 2 copies of the foregoing ANSWER BRIEF OF APPELLEE, PATRICK J. MALLOY III, TRUSTEE (TRUSTEE), to:

David K. Wheeler
BUTLER & WHEELER, PLLC
104 East A Street, Suite 200
Jenks, OK 74037

the last known address, by way of United States Mail.

s/Patrick J. Malloy III
_____
Patrick J. Malloy III

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 6,108 words. I relied on my word processor to obtain the count and it is Microsoft Word. I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Patrick J. Malloy III

_____

Patrick J. Malloy III

CERTIFICATE OF COUNSEL

In accordance with FRAP Rule 25, I hereby certify that on the 25th day of April, 2007, this Answer Brief was delivered to Fed-Ex, for subsequent delivery to the Court within three calendar days.

s/Patrick J. Malloy III

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Patrick J. Malloy III

ADDENDUM

108 of 459 DOCUMENTS

OKLAHOMA CONSTITUTION, ANNOTATED BY LEXISNEXIS (R)

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2004 LEGISLATION ***
*** JUNE 2005 ANNOTATION SERVICE ***

CONSTITUTION OF THE STATE OF OKLAHOMA
ARTICLE V. LEGISLATIVE DEPARTMENT
THE LEGISLATURE
LIMITATIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Okl. Const. Art. V, § 50 (2004)

§ 50. Exemption of property from taxation

The Legislature shall pass no law exempting any property withis this State from taxation, except as otherwise provided in this Constitution.

LexisNexis (R) Notes:

CASE NOTES

1. Upon review of *Okla. Const. art. 10, § 6* and *Okla. Const. art. 5, § 50*, case law was determined to be palpably wrong in regard to the test to be applied for determination of eligibility for state tax exemption status for a building owned by a charitable organization; the former test of "use of money" derived from the property to define the nature of the property itself was rejected for a pro rata test of actual use of the property for charitable and non-charitable purposes where, for example, a building has separate and various uses in different parts of the building. *Okla. County v. Queen City Lodge, I. O. O. F., 1945 OK 55, 195 Okla. 131, 156 P.2d 340, 1945 Okla. LEXIS 656* (Feb. 13, 1945).

2. Former Okla. Stat. tit. 69, § 667 (now *Okla. Stat. tit. 69, § 1714*), exempting the Oklahoma Turnpike Authority from the payment of taxes or assessments upon any turnpike project or property acquired or used by it, and exempting the bonds from taxation, does not violate the provisions of *Okla. Const. art. V, § 50*, which provides that the legislature shall pass no law exempting any property within this state from taxation except as otherwise provided in the *Constitution. In re Application of Okla. Turnpike Auth., 1950 OK 208, 203 Okla. 335, 221 P.2d 795, 1950 Okla. LEXIS 612* (July 21, 1950).

3. Former Okla. Stat. tit. 69, § 667 (now *Okla. Stat. tit. 69, § 1714*), exempting the Oklahoma Turnpike Authority from the payment of taxes or assessments upon any turnpike project or property acquired or used by it, and exempting the bonds from taxation, does not violate the provisions of *Okla. Const. art. V, § 50*, which provides that the legislature shall pass no law exempting any property within this state from taxation except as otherwise provided in the *Constitution. In re Application of Okla. Turnpike Auth., 1950 OK 208, 203 Okla. 335, 221 P.2d 795, 1950 Okla. LEXIS 612* (July 21, 1950).

4. Former provisions governing the Oklahoma Wheat Utilization Research and Market Development Commission (now *Okla. Stat. tit. 2, § 18-300* et seq.), which assessed a fee on wheat grown and marketed in the state but exempted wheat