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signed 9-19-02

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**ROGER WAYNE MODELMOG,**

**DEBTOR.**

**J. MICHAEL MORRIS, Trustee,**

**PLAINTIFF,**

**v.**

**BOEING WICHITA CREDIT UNION, and  
ROGER WAYNE MODELMOG,**

**DEFENDANTS.**

**CASE NO. 01-13150-7  
CHAPTER 7**

**ADV. NO. 02-5015**

**MEMORANDUM OF DECISION**

This lien avoidance proceeding is before the Court for decision based on agreed facts and briefs. The plaintiff-trustee (“the Trustee”) appears by counsel Erin Syring of Klenda, Mitchell, Austerman & Zuercher, L.L.C., of Wichita, Kansas. Defendant Boeing Wichita Credit Union (“BWCUC”) appears by counsel Eric D. Bruce of Bruce, Bruce & Lehman, L.L.C., of Wichita. Defendant-debtor (“the Debtor”) Roger Wayne Modellmog appears by counsel Donald C. Astle of Wichita. The Court has reviewed the relevant materials and is now ready to rule. The Trustee is trying to avoid BWCUC’s lien on the Debtor’s truck and preserve its value for the estate.

**FACTS**

The relevant facts are these. In February 1998, the Debtor and his wife bought a 1997 Ford F-350 truck from a dealership on credit, granting a lien on the truck to secure the loan. The dealership

immediately assigned its interests to BWCU. A properly executed notice of security interest was mailed to the Division of Vehicles of the Kansas Department of Revenue. When the Debtor applied to title and register the truck, BWCU's lien was properly noted on the certificate of title that was issued.

The Debtor and his wife later moved to Colorado. In January 2000, the Debtor applied for a Colorado title for the truck, surrendering the Kansas title as part of that process. About a month later, Colorado issued a new title that mistakenly did not show BWCU's lien. The Debtor later moved back to Kansas, and in April 2001, applied for a new Kansas certificate of title. The certificate that was issued about one month later did not show BWCU's lien.

BWCU did not learn of the application for or the issuance of either the Colorado title or the second Kansas title until sometime after June 29, 2001, when the Debtor filed a chapter 7 bankruptcy petition. The Debtor claimed the truck as exempt and no one has objected to that claim. Believing that BWCU's lien was not perfected, the Trustee brought this proceeding to try to avoid the lien under 11 U.S.C.A. §544(a) and to preserve the lien for the benefit of the bankruptcy estate under §551.

## DISCUSSION

Section 544(a) of the Bankruptcy Code provides in pertinent part:

The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists.

Section 101(36) defines "judicial lien" to mean "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." So, when the Debtor filed for bankruptcy, §544(a)(1) gave

the Trustee the rights of a judicial lien creditor of the Debtor (whether or not such a creditor actually existed), authorizing the Trustee to avoid any transfer of the Debtor's property that such a creditor could defeat. Under §551, any transfer the Trustee avoids under §544 is preserved for the benefit of the bankruptcy estate.

The relevant events in this case all took place before July 1, 2001, so the versions of Article 9 ("Old Article 9") of the Uniform Commercial Code ("UCC") in effect in Kansas and Colorado before that date apply here.<sup>1</sup> Under 84-9-301(1)(b) and (3) of Kansas' Old Article 9, the lien of a judicial lien creditor had priority over another creditor's unperfected lien.<sup>2</sup> So if BWCU's lien on the Debtor's truck was, as the Trustee contends, not perfected when the Debtor filed for bankruptcy, the Trustee can avoid the lien under §544(a)(1) of the Bankruptcy Code.

It is clear that before the Debtor moved to Colorado and obtained the Colorado title, BWCU's lien was properly perfected by being noted on the Kansas title to the truck.<sup>3</sup> The question the Court must decide is whether the lien continued to be perfected after the Debtor moved to Colorado and obtained a new certificate of title with no lien notation, and then moved back to Kansas and obtained another certificate of title that also had no lien noted on it.

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<sup>1</sup>Revised Article 9 of both the Kansas and Colorado Uniform Commercial Codes took effect on July 1, 2001. *See* 2000 Kan. Sess. Laws, ch. 142; 2001 Colorado Sess. Laws, ch. 321. The Court will not consider whether the result in this case would be different under Revised Article 9.

<sup>2</sup>K.S.A. 84-9-301(1)(b) & (3) (Furse 1996).

<sup>3</sup>*See, e.g., In re Reed*, 147 B.R. 571, 572-75 (D. Kan. 1992) (under Old Article 9, notation of lien on title was only way to perfect lien on vehicle in Kansas); *Beneficial Finance Co. v. Schroeder*, 12 Kan. App. 2d 150, 153-54, *rev. denied* 241 Kan. 838 (1987) (same).

When the Debtor moved to Colorado and applied for a certificate of title there, as a result of what was apparently an administrative error by the Motor Vehicle Division of the Colorado Department of Revenue, BWCU's lien was not noted on the newly-issued Colorado title. At the time, section 4-9-103 of Colorado's Old Article 9 provided in pertinent part:

(2) Certificate of title. (a) Except to the extent that motor vehicle titles are governed by [Colo. Rev. Stat. Ann. §] 42-6-133 . . . this subsection (2) applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.

(b) Except as otherwise provided in this subsection (2), perfection and the effect of perfection or nonperfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.<sup>4</sup>

Under this statute, the first Kansas certificate of title ceased to be effective to perfect BWCU's lien when the Debtor surrendered the certificate and obtained the Colorado substitute.<sup>5</sup> Under Colorado law, in order to be perfected, BWCU's lien had to be noted on the Colorado certificate of title.<sup>6</sup> So BWCU's lien became unperfected when the Colorado title that showed no lien was issued.

When the Debtor moved back to Kansas and applied for a new title here, BWCU's lien was not noted on the new title issued by the Division of Vehicles of the Kansas Department of Revenue,

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<sup>4</sup>Colo. Rev. Stat. Ann. §4-9-103(2) (2000).

<sup>5</sup>See 2 Barkley Clark & Barbara Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, ¶12.03[2][b] at 12-32 (rev. ed. 2002).

<sup>6</sup>See *Yeager Trucking v. Circle Leasing of Colorado Corp. (In re Yeager Trucking)*, 29 B.R. 131, 133-34 (Bankr. D. Colo. 1983) (under Colorado law, unless exception for inventory held for sale applies, lien must be noted on vehicle's title to be perfected).

presumably because the Colorado title did not show the lien. At that time, under 84-9-103(2) of Kansas' Old Article 9,<sup>7</sup> identical in all relevant respects to the Colorado version quoted above, Colorado law continued to govern the status of BWCUC's lien until whichever event identified in the statute first occurred. The time of the specific event that made Kansas law once again control the status of the lien does not matter here because the lien was unperfected under Colorado law and remained unperfected under Kansas law after the Debtor returned here. Since Kansas law once again controlled the status of BWCUC's lien by the time the Debtor filed for bankruptcy and provided that the lien was unperfected, 84-9-301(1)(b) and (3) of Kansas' Old Article 9 made the lien inferior to a judicial lien, so the Trustee's rights under §544(a)(1) are superior to BWCUC's lien.

BWCUC cites several decisions involving questions about the perfection of liens on vehicles under Kansas law, but none of them concerned a debtor who moved the vehicle to another state, surrendered the Kansas title, and obtained a title from the other state that showed no liens.<sup>8</sup> As a result, those cases provide no guidance on the question before the Court in this case. Instead, as indicated above, under Colorado's Old Article 9, the lien became unperfected when the Debtor obtained the Colorado title that showed no liens, and under Kansas' Old Article 9, the lien remained unperfected when the Debtor returned to Kansas and obtained the Kansas title that showed no liens.

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<sup>7</sup>K.S.A. 84-9-103(2)(a) & (b) (Furse 1996).

<sup>8</sup>*See Commerce Bank v. Chambers (In re Littlejohn)*, 519 F.2d 356, 357-59 (10th Cir. 1975); *Lentz v. St. Mary's State Bank (In re Kern)*, 443 F.Supp. 219 (D.Kan. 1977); *Morris v. Exchange State Bank (In re Melcher)*, Case No. 97-15098-7, Adv. No. 98-5016, Memorandum Opinion and Order Denying Trustee's Complaint to Avoid Security Interest and Preferential Transfer (Bankr.D.Kan. Mar. 30, 2000) (Robinson, J.).

BWCU suggests that it did all that it could to perfect its lien, so the Court should declare that the lien remained perfected through both of the Debtor's moves. But the question before the Court is whether BWCU or a third-party lien creditor with no knowledge of BWCU's lien (a hypothetical one created by 11 U.S.C.A. §544(a)) should have priority in a dispute over liens on the Debtor's truck. Under Kansas law, that lien creditor would have been justified in relying on the unencumbered certificate of title that the Debtor obtained following his move back to Kansas. BWCU does not suggest that such a lien creditor would have had any way to discover BWCU's lien, and thus, the creditor would also have done "all that it could" to ensure that the truck was unencumbered. While BWCU's situation is unfortunate, the fact is that BWCU might have had opportunities to protect its lien after the Debtor moved. When he moved to Colorado, the Debtor may have informed BWCU of his new location, or at least given it clues that he had moved, such as by making payments with checks drawn on a Colorado bank or mailing the payments in envelopes with a Colorado return address. Knowing that under the UCC in many, if not most, states, the Debtor's move could pose a threat to the perfection of its lien, BWCU could have insisted that the Debtor help it get its lien noted on any Colorado title that might be issued or face having his truck repossessed, and then done the same if and when it learned that the Debtor moved back to Kansas.<sup>9</sup> Even if BWCU had no clue that the Debtor had moved, Kansas law clearly provided that BWCU's lien was unperfected because it was not noted

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<sup>9</sup>See Old Article 9 §9-103, Official Comment to 1972 Official Text, ¶4(e) (noting that repossession may be only solution for secured creditor after its debtor moves out of state and obtains new title with no lien notation), *reprinted in* Uniform Commercial Code Reporting Service, 2 *Uniform Commercial Code and Official Comments*, ¶9103 at UCC Art. 9—page 24 (West Group 2000). This Comment appears in the Colorado and Kansas statute books following each state's version of Old Article 9 §9-103.

on the truck's title,<sup>10</sup> and would therefore, under Kansas' Old Article 9, lose priority to an intervening judicial lien creditor.

The Debtor<sup>11</sup> seems to suggest that the notice of security interest ("NOSI") that BWCU filed in Kansas in February 1998 remained in force after the first Kansas title was issued and effectively perfected the lien on the truck when the Debtor re-titled it after he moved from Colorado back to Kansas. This suggestion is wrong. An NOSI perfects a creditor's lien only for the time between the creation of the lien in connection with the vehicle's sale and the issuance of a certificate of title by the Division of Vehicles of the Kansas Department of Revenue.<sup>12</sup> In *Mid American Credit Union v. Board of Sedgwick County Commissioners*, the Kansas Court of Appeals explained:

The lien must be noted on the certificate of title to be perfected. Allowing perfection without such a notation would endanger the reliability of sales of vehicles by assignment of title. Here [the creditor's] security interest was not perfected because it was not listed on the certificate of title. . . . While notifying the [Kansas Department of Revenue] of a security interest is a method of perfecting a lien on a vehicle, it is only meant to perfect the lien until the certificate of title is issued. [Citation omitted.] Allowing it to be a method of perfection beyond this period would again diminish the reliability of a certificate of title.<sup>13</sup>

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<sup>10</sup>See *Reed*, 147 B.R. at 572-75; *Beneficial Finance Co. v. Schroeder*, 12 Kan. App. 2d at 153-54.

<sup>11</sup>The Court notes in passing that the Debtor's interest in this dispute is less than clear. Whether the Trustee can avoid and preserve BWCU's lien or not, the Debtor will still have to pay someone in order to keep his truck. At the least, it would appear that the Debtor will have no standing to appeal the Court's ruling on the lien avoidance question. See *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989) (debtors had no standing to appeal order that simply allocated some of money they would pay under chapter 13 plan, but did not alter amount they would have to pay).

<sup>12</sup>*Mid American Credit Union v. Board of Sedgwick County Comm'rs*, 15 Kan. App. 2d 216, 223, *rev. denied* (1991).

<sup>13</sup>15 Kan. App. 2d at 223.

So BWCU's NOSI was superseded by the issuance of the first Kansas certificate of title, and could not have any effect later.

Both BWCU and the Debtor rely on a bankruptcy court decision, *In re Beaudoin*, applying New York law in a case involving facts similar to those present here.<sup>14</sup> There, the court held that the creditor's lien remained perfected despite having been omitted from the New York certificate of title through clerical error.<sup>15</sup> However, in reaching its conclusion in *Mid American Credit Union* that a secured creditor could sue two governmental entities for failing to note the creditor's lien on a certificate of title they were involved in issuing, the Kansas Court of Appeals rejected the view that a lien could be perfected despite its omission from a certificate of title, declaring that the omission had rendered the lien unperfected, thus damaging the creditor.<sup>16</sup> Because 84-9-302(3)(c) of Kansas' Old Article 9 and §4-9-302(3)(b) of Colorado's Old Article 9 both provided that perfection of liens on vehicles (other than inventory) was controlled by the statutes governing certificates of title for vehicles and because courts in both states have held that a lien must be noted on the vehicle's certificate of title to be perfected, the Court is convinced that Colorado state courts would agree with the *Mid American Credit Union* ruling that a lien became unperfected when a certificate of title was, through clerical error, issued with no notation of the lien. However, because the second Kansas title ultimately controls whether BWCU's lien remained perfected, the Court would conclude that BWCU's lien was unperfected

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<sup>14</sup>160 B.R. 25, 29-31 (Bankr. N.D.N.Y. 1993).

<sup>15</sup>*Id.*

<sup>16</sup>15 Kan. App. 2d at 222-24.

because it was not noted on that title, even if the Colorado courts might choose to follow the lead of the bankruptcy court in *Beaudoin* rather than that of the Kansas court in *Mid American Credit Union*.

The Debtor suggests that the Trustee could not obtain a judicial lien against his truck because he claimed it as exempt. However, when the Debtor filed for bankruptcy, the truck became property of the bankruptcy estate under 11 U.S.C.A. §541(a)(1). While §522(b) gave the Debtor the right to exempt property from that estate, his exemption claims were not effective until the time to object to them had passed and any objections to them were resolved. The Trustee's rights under §544(a)(1) were fixed "as of the commencement of the case," that is, before the Debtor's exemptions became effective. Thus, the Debtor's exemption claims could not affect the Trustee's rights under §544(a)(1). Because the Trustee's rights are superior to BWCU's lien rights, the Trustee can avoid BWCU's lien. Under §551, then, that lien was automatically preserved for the benefit of the bankruptcy estate, and the Trustee can now enforce the lien rights that formerly belonged to BWCU. The Debtor's exemption rights could not defeat BWCU's purchase-money lien,<sup>17</sup> and the Trustee's avoidance and preservation of the lien does not change that fact.

For these reasons, the Court is convinced that the Trustee is entitled to avoid BWCU's unperfected lien on the Debtor's truck. Under §551, the lien is automatically preserved for the benefit of the bankruptcy estate, and remains superior to the Debtor's exemption of the truck.

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<sup>17</sup>*See* 11 U.S.C.A. §522(f) (debtors can avoid fixing of certain judicial liens and nonpossessory, nonpurchase-money liens on exempt property that impair exemption).

The Debtor correctly asserts that §551 preserves for the estate only BWCU's lien rights, not BWCU's rights to collect under its promissory note with the Debtor.<sup>18</sup> Having avoided and preserved it, the Trustee can foreclose on the lien.<sup>19</sup> The amount of the lien is either the value of the truck on the day the Debtor filed for bankruptcy or the amount of the debt owed to BWCU on that date, whichever is less.<sup>20</sup>

The Trustee has indicated that he is willing to negotiate with the Debtor to reach an agreement for the Debtor to make payments rather than have the lien foreclosed on. The Court sees no problem with this proposal.

For these reasons, the Court concludes that BWCU's lien on the Debtor's truck was unperfected when the Debtor filed for bankruptcy, so the Trustee is entitled to avoid the lien under §544(a)(2), preserve it for the estate under §551, and enforce it against the truck. Judgment on these points is hereby granted to the Trustee.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of September, 2002.

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<sup>18</sup>See *Morris v. Vulcan Chemical Credit Union (In re Rubia)*, 257 B.R. 324, 327 (10th Cir. B.A.P.), *aff'd by unpub. op.* 2001 WL 1580933 (10th Cir. 2001).

<sup>19</sup>See 5 *Collier on Bankruptcy* ¶551.01[2] (15th ed. rev., Lawrence P. King, ed. in chief, 2002).

<sup>20</sup>*Rubia*, 257 B.R. at 328.

JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE