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

**In Re:**

**JON D. RAMSEY,  
JODY L. RAMSEY,**

**DEBTORS.**

**J. MICHAEL MORRIS, Trustee,**

**PLAINTIFF,**

**v.**

**SUNFLOWER BANK, N.A.,**

**DEFENDANT.**

**CASE NO. 02-14044-7  
CHAPTER 7**

**ADV. NO. 02-5305**

**MEMORANDUM OF DECISION**

This proceeding is before the Court for decision based on stipulated facts and briefs.

Plaintiff-trustee J. Michael Morris appears by counsel J. Michael Morris and Sarah L.

Newell of Klenda, Mitchell, Austerman & Zuercher, L.L.C., of Wichita, Kansas. Defendant

Sunflower Bank, N.A., appears by counsel Terry C. Cupps of Foulston Siefkin LLP of

Wichita, Kansas. The Court has reviewed the relevant materials and is now ready to rule.

Sunflower Bank has a lien on debtor Jon Ramsey's all-terrain vehicle that the Trustee is trying to avoid and preserve for the benefit of the bankruptcy estate. Sunflower contends that its lien was properly perfected shortly after the Debtor bought the ATV either by Sunflower's filing of a financing statement or by a notation on a manufacturer's statement of origin that was assigned to the Debtor around the time of the purchase. When

the Debtor finally applied for a certificate of title nearly a year later, apparently in connection with refinancing his loan, Sunflower filed a notice of security interest, and the Debtor listed Sunflower's lien on his title application. As a result, the first certificate of title ever issued for the ATV showed Sunflower's lien. These later steps, Sunflower argues, merely continued the earlier perfection of its lien, and so cannot be avoided as preferential.

The Court concludes that Sunflower's lien was not perfected before the additional steps were taken when the Debtor refinanced the loan, and for purposes of the Trustee's attack, the Debtor's grant of the lien to Sunflower is not considered to have been made before the refinancing occurred. Sunflower would be able to recover more by enforcing its lien against the ATV than it would receive from the Debtors' bankruptcy estate if it did not have the lien, so the Debtor's grant of the lien constitutes a preference that the Trustee can avoid and preserve for the benefit of the bankruptcy estate.

## **I. FACTS**

In September 2001, the Debtor bought an Arctic Cat brand ATV from a dealer in Hesston, Kansas. He financed the purchase with a loan from Sunflower Bank for \$6,106, and gave the bank a security interest in the ATV. Arctic Cat had issued the dealer a manufacturer's statement of origin for the ATV that indicated the ATV was not manufactured for highway use. The dealer, though, never signed the MSO to assign it to the Debtor. Within 20 days of the purchase, Sunflower filed a financing statement that listed the ATV as its collateral. From the time of the purchase through July 31, 2002, the Debtor

did not apply for a certificate of title, and Sunflower did not send any notice of security interest to the Division of Vehicles of the Kansas Department of Revenue (the Division).

On July 31, 2002, when he had reduced the balance he owed on the ATV by about \$840, the Debtor refinanced the loan. At this time, someone partially completed an assignment section on the MSO by writing in the Debtor's name as the assignee, and Sunflower's name as the holder of a lien. The amount of the lien, though, was written in as the exact amount refinanced, not the original loan amount, and the date of the lien was written in as the date of the refinancing, not the original loan date. All the writing appears to have been done by one person at one time, so the Court is convinced that these aspects of the handwritten additions to the MSO establish that the additions were made at the time of the refinancing. Several important parts of the assignment section were left blank: (1) no one signed the MSO for the assignor-dealer; (2) no one inserted the dealer's license or permit number; and (3) no one notarized the section.

Besides the note and security agreement for the refinancing, the Debtor signed a notice of security interest form showing that Sunflower had a lien on the ATV. The NOSI reports the date of the sale and delivery of the ATV to be the refinancing date, not the date the dealer actually sold the ATV to the Debtor. Within a week of the refinancing, the Debtor applied for a nonhighway title. The parties have stipulated that Sunflower filed the NOSI at the same time. The receipt the Debtor got from the Division when he applied for the title showed Sunflower's lien on the ATV. It also showed that he had bought the ATV a year earlier, so he apparently told the Division that the sale date on the NOSI was incorrect.

A search of the Division's records shows that a certificate of title for the ATV was issued almost a month after the Debtor applied for it, and that Sunflower's lien was noted on the title.

The Debtors filed their Chapter 7 bankruptcy petition on August 19, 2002, about two weeks after Debtor Jon Ramsey applied for the title for the ATV. The Trustee filed a complaint to avoid Sunflower's lien on the ATV several months later, and the parties have submitted that proceeding for decision on stipulated facts and briefs. The Trustee also attached his own affidavit to his brief, and Sunflower has not complained about that addition or questioned any facts asserted in it.

Materials filed in the main case provide some additional relevant information. As shown by Sunflower's proof of claim, when the Debtors filed for bankruptcy, they owed Sunflower a total of about \$12,700, secured by the ATV and another vehicle. Sunflower's claim against the ATV then totaled \$5,284.38, but Sunflower did not specify a value for the ATV in its proof of claim. In their bankruptcy schedules, the Debtors valued the ATV at \$4,800, and did not claim it as exempt. According to the Trustee's interim report, as of November 30, 2003, the only asset the estate had besides its claim to avoid the lien on the ATV was a tax refund of \$1,173.98. As shown by the claims register, Sunflower filed the only secured proof of claim, and the other timely filed proofs of claim assert unsecured, nonpriority claims totaling \$31,522.83.

## **II. DISCUSSION**

**A. The Parties Are Arguing Only about When Sunflower Perfected Its Lien on the ATV**

The Bankruptcy Code gives Chapter 7 trustees various avoiding powers, and the Trustee is relying here on his power under §547(b) to avoid certain transfers of interests in property of the Debtor, known as “preferences” or “preferential transfers,” that were made within 90 days before the Debtor filed for bankruptcy. Although other elements are required for a transfer to qualify as a preference, the parties here are arguing only about when Sunflower perfected its lien on the ATV. Section 547(e)(1)(B) explains that a transfer of property like the ATV “is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.” With exceptions not involved in this case, §547(e)(2) adds that for purposes of §547, a transfer is not considered to have been made until it was perfected.

So under §547, the Debtor’s grant of the security interest in the ATV to Sunflower is treated as having been made when Sunflower’s lien was perfected, even though the security interest was effective between the Debtor and Sunflower as soon as the Debtor gave it.<sup>1</sup> Generally, as in this case, state law determines what a creditor who has been given a lien must do to prevent a contract creditor from obtaining a subsequent judicial lien that is superior to the creditor’s lien.<sup>2</sup> State law provisions that make such perfection relate back

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<sup>1</sup>See 5 *Collier on Bankruptcy* ¶547.05 at 547-77 (Resnick & Sommer, eds.-in-chief, 15th ed. rev. 2003).

<sup>2</sup>See 5 *Collier* ¶547.05[2] at 547-79 to -81.

to some time before the creditor completed the last step required for its lien to be perfected can operate to a limited extent under §547,<sup>3</sup> but no relation-back is involved here. Instead, the question is when Sunflower took the last step required by Kansas law to perfect its lien — that is, to preclude any contract creditor from obtaining a subsequent judicial lien with priority over Sunflower’s lien — in the Debtor’s ATV.

The Trustee concedes that Sunflower’s lien on the ATV became perfected a couple of weeks before the Debtor filed for bankruptcy when Sunflower filed its NOSI with the Division, and the Debtor listed Sunflower’s lien on the application for a certificate of title that he finally submitted. But the Trustee argues that the lien was never perfected before that time, and the perfection of the lien within 90 days of the Debtor’s bankruptcy filing means that the Debtor’s grant of the lien is treated under §547 as having been made at that time and qualifies as an avoidable preference. Sunflower responds that the lien was perfected almost a year earlier, and the NOSI and the title application merely continued the prior perfection. Sunflower has not suggested that it has any other defense to the Trustee’s preference claim, in effect conceding that the Trustee can avoid its lien if the lien was not already perfected more than 90 days before the Debtor filed for bankruptcy.

**B. Neither the Financing Statement Nor the Notation on the MSO Perfected the Lien Before July 31, 2002.**

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<sup>3</sup>See *Fidelity Financial Servs., Inc., v. Fink*, 522 U.S. 211, 216-21 (1998) (only 20-day relation-back allowed under §547(c)(3) and (e)(1)(B), not longer period allowed by state law).

The Court must determine, then, whether Sunflower’s lien was perfected in any way before August 2002, when the NOSI was filed and the security interest was noted on the title application. Sunflower’s security interest was created after Revised Article 9 of the Kansas version of the Uniform Commercial Code took effect,<sup>4</sup> so the revised article applies in this case. Sunflower argues that either the financing statement it filed in 2001 or the notation of its lien on the assignment portion of the MSO perfected the lien soon after the Debtor bought the ATV in September 2001.

Under 84-9-311(a)(2)<sup>5</sup> of Revised Article 9, the filing of a financing statement like the one Sunflower filed is “not necessary or effective to perfect a security interest in property subject to: . . . (2) any certificate-of-title law of this state covering [the property] which provides for a security interest to be indicated on the certificate as a condition or result of perfection.” Instead, subsection (b) continues, “a security interest in property subject to a statute . . . described in subsection (a) may be perfected only by compliance with [the requirements of that statute].”<sup>6</sup> Under Revised Article 9 (with exceptions not applicable here), an unperfected security interest in property is subordinate to the rights of a creditor that has acquired a judicial lien on the property.<sup>7</sup>

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<sup>4</sup>See 2000 Kan. Sess. L. ch. 142, §156 (July 1, 2001, is effective date of Revised Article 9).

<sup>5</sup>K.S.A. 2003 Supp. 84-9-311(a)(2). 2002 Kan. Sess. Laws, ch. 159, §11, amended §84-9-311, but did not change any subsections cited in this opinion.

<sup>6</sup>K.S.A. 2003 Supp. 84-9-311(b).

<sup>7</sup>See K.S.A. 2003 Supp. 84-9-317(a)(2)(A) (“lien creditor” has priority over unperfected security interest) & 84-9-102(52) (defining “lien creditor”). 2002 Kan. Sess. Laws, ch. 159, §13, amended 84-9-317(a)(2)(B), but did not change (a)(2)(A); §7 amended 84-9-102, but did not change subsection (52).

Sunflower contends that the Debtor's ATV was not "covered" by a certificate of title until the Debtor applied for one in August 2002, so 84-9-311(a)(2) and (b) did not govern perfection of its lien until then. To support this argument, it points to 84-9-303,<sup>8</sup> a provision that specifies when property is "covered" by a certificate of title for purposes of choice of law rules for the perfection and priority of security interests in property covered by a certificate of title. But this provision is designed to answer the question which state's law controls the perfection and priority of conflicting security interests in property that is covered by a certificate of title in at least one of the states whose law might apply.<sup>9</sup> It would be relevant here only if the Debtor had obtained a certificate of title from another state before he applied for the Kansas one. But there is no question here that Kansas law applies and controls. Instead, the questions the Court must answer are: (1) whether Kansas law required the Debtor to obtain a certificate of title for the ATV as soon as he bought it, or (2) whether filing a financing statement was effective to perfect a security interest in the ATV. To answer these questions, 84-9-311 directs the Court to review any Kansas certificate-of-title law that applies to the ATV.

Neither party has suggested that the Debtor's ATV is not an "all-terrain vehicle" as defined for purposes of Kansas statutes dealing with vehicles.<sup>10</sup> Such an ATV is a

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<sup>8</sup>K.S.A. 2003 Supp. 84-9-303.

<sup>9</sup>See K.S.A. 2003 Supp. 84-9-303, Official UCC Comment 3; K.S.A. 2003 Supp. 84-9-311, Official UCC Comment 3.

<sup>10</sup>See K.S.A. 2003 Supp. 8-126(bb). 2001 Kan. Sess. L. ch. 19, §2, and 2002 Kan. Sess. L. ch. 16, §2 & ch. 134, §1, amended 8-126, but did not change this subsection.

“nonhighway vehicle.”<sup>11</sup> A nonhighway vehicle is not required to be registered,<sup>12</sup> but a Kansas statute, 8-198(c), does require a person who buys one to apply for a certificate of title for it:

Every purchaser of a nonhighway vehicle . . . shall make application to the county treasurer of the county in which such person resides for a new nonhighway certificate of title . . . in the same manner and under the same conditions as for an application for a certificate of title under K.S.A. 8-135, and amendments thereto. Such application shall be in the form prescribed by the director of vehicles and shall contain substantially the same provisions as required for an application under subsection (c)(1) of K.S.A. 8-135, and amendments thereto.<sup>13</sup>

This provision makes most of 8-135’s certificate of title provisions apply to nonhighway vehicles. Among other things, 8-135(c)(1)<sup>14</sup> requires a title application to “state all liens or encumbrances” on the vehicle, and provides that the certificate of title that is issued will contain a statement of the liens or encumbrances shown by the application.

Because 8-198(c) incorporates most of 8-135’s certificate of title provisions, including those about noting liens on them, the Court is convinced that decisions concerning the perfection of liens under 8-135 also apply to the perfection of liens under

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<sup>11</sup>K.S.A. 8-197(b)(1)(C).

<sup>12</sup>K.S.A. 2003 Supp. 8-198(a). 2002 Kan. Sess. L., ch. 134, §10, and 2003 Kan. Sess. L., ch. 30, §7, amended 8-198, but made no changes affecting the analysis here.

<sup>13</sup>K.S.A. 2003 Supp. 8-198(c).

<sup>14</sup>K.S.A. 2003 Supp. 8-135(c)(1). Section 8-135 was amended 5 times in 2002, but none of the amendments made any changes that would affect a certificate of title issued before Jan. 1, 2003, with a lien noted on it. *See* 2002 Kan. Sess. L. ch. 24, §1; ch. 34, §2; ch. 48, §4; ch. 134, §2 (eff. July 1, 2002) & §3 (eff. Jan. 1, 2003). It was amended again in 2003, but only to change the amounts of various fees. *See* 2003 Kan. Sess. L. ch. 30, §1.

8-198. Under the predecessor to 84-9-311 of Revised Article 9,<sup>15</sup> courts applying Kansas law declared that notation on the certificate of title as required by 8-135 was the only way to perfect a security interest in a vehicle covered by that statute.<sup>16</sup> This requirement ensures that potential buyers can rely on the titles to show them whether any liens they need to worry about exist.<sup>17</sup>

While 84-9-311 is not identical to the old Article 9 provision, the Court believes the differences in the new provision were not intended to lead to a different result in a dispute like the one between the Trustee and Sunflower. Consequently, the Court is convinced that Sunflower's financing statement was "not necessary or effective"<sup>18</sup> to perfect its security interest in the ATV. The ATV was "subject to" 8-198's titling requirements when the Debtor bought it in September 2001, so 84-9-311(a)(2) and (b) required Sunflower's lien to be noted on the certificate of title for it to be perfected.

As indicated, Sunflower also suggests that its lien should be deemed to have been perfected before the Debtor refinanced his loan in July 2002 because Sunflower "substantially complied" with the perfection requirements of Kansas law by getting its lien

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<sup>15</sup>K.S.A. 1999 Supp. 84-9-302(3)(c) (repealed by 2000 Kan. Sess. Laws, ch. 142, §155, eff. July 1, 2001).

<sup>16</sup>*In re Reed*, 147 B.R. 571, 572-75 (D.Kan. 1992); *Beneficial Finance Co. v. Schroeder*, 12 Kan. App. 2d 150, 152-54, *rev. denied* 241 Kan. 838 (1987).

<sup>17</sup>*See Mid American Credit Union v. Board of Sedgwick County Comm'rs*, 15 Kan. App. 2d 216, 223, *rev. denied* (1991) (allowing lien perfection without notation on title would endanger reliability of sales by title assignment).

<sup>18</sup>K.S.A. 2003 Supp. 84-9-311(a).

noted on the MSO. In *In re Charles*,<sup>19</sup> predicting that the Kansas Supreme Court would do the same, the Tenth Circuit applied a substantial compliance standard under 8-135 in order to determine whether a security interest had been perfected. Under 8-135(c)(3),<sup>20</sup> a dealer can transfer ownership of a vehicle for which no certificate of title has been issued by assigning an MSO to the buyer. This may be permissible under 8-198 for nonhighway vehicles as well.

But, as indicated in the “Facts” section of this opinion, a careful review of the MSO involved in this case makes clear that the lien notation was not added to the MSO until the refinancing was done. As a result, even assuming the writing on the MSO was sufficient to have effectively perfected Sunflower’s lien, the perfection could not have occurred any earlier than the refinancing did, namely on July 31, 2002, a mere three weeks before the Debtors filed for bankruptcy. So any perfection that might have been accomplished by the writing on the MSO occurred within 90 days of the bankruptcy filing, and is as vulnerable to the Trustee’s preference attack as the perfection accomplished in August 2002 by Sunflower’s NOSI and the Debtor’s title application.

The Court concludes that neither the financing statement nor the notation on the MSO perfected Sunflower’s lien any earlier than July 31, 2002. As a result, for purposes

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<sup>19</sup>*Morris v. CIT Group/Equip. Fin., Inc. (In re Charles)*, 323 F.3d 841, 843-46 (10th Cir. 2003).

<sup>20</sup>K.S.A. 2003 Supp. 8-135(c)(3). The 2002 and 2003 amendments cited in note 14 did not alter the relevant portions of this subsection of 8-135.

of the Trustee's preference claim, the transfer that created the lien is not considered to have been made before that date.

**C. Sunflower's Security Interest in the Debtor's ATV Satisfied All the Requirements to Make It a Preference that the Trustee Can Avoid under §547(b).**

Although the parties have not addressed many of them, §547(b) specifies five elements that make a transfer a preference that the Trustee can avoid:

- (b) . . . the trustee may avoid any transfer of an interest of the debtor in property—
  - (1) to or for the benefit of a creditor;
  - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
  - (3) made while the debtor was insolvent;
  - (4) made—
    - (A) on or within 90 days before the date of the filing of the petition; . . . ; and
  - (5) that enables such creditor to receive more than such creditor would receive if—
    - (A) the case were a case under chapter 7 of this title;
    - (B) the transfer had not been made; and
    - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.<sup>21</sup>

A quick review of these elements makes clear that the Trustee can avoid Sunflower's lien on the Debtor's ATV, bearing in mind, of course, that as a result of §547(e)(2), the Debtor's grant of the lien to Sunflower is deemed not to have been made until July 31, 2002, the earliest date the Court has found the lien might have been perfected.

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<sup>21</sup>11 U.S.C.A. §547(b).

First, the Debtor transferred the lien to Sunflower — this satisfies subsection (b)(1). Because the Debtor incurred his debt to Sunflower in September 2001, but the transfer of the lien is not considered to have been made until at least July 31, 2002, the lien was given for an antecedent debt — this satisfies subsection (b)(2). Under §547(f), the Debtor is presumed to have been insolvent during the 90 days before he filed for bankruptcy, and Sunflower has presented nothing to try to rebut the presumption, so the Court must deem the Debtor to have been insolvent on July 31, 2002 — this satisfies subsection (b)(3). The transfer is considered to have been made no earlier than July 31, 2002, well within 90 days before the Debtor filed for bankruptcy on August 19, 2002 — this satisfies subsection (b)(4).

Determining whether subsection (b)(5) of §547 is satisfied requires a more extended analysis. The question that element requires the Court to answer is whether Sunflower would receive more as a result of the transfer that created its lien than it would receive in a Chapter 7 liquidation without that transfer. Where the transfer at issue is the creation of a lien on the debtor's property and the bankruptcy estate cannot pay unsecured creditors in full, the creditor would always receive more with the lien than without it, unless the property is worthless. With the lien, the creditor would receive 100% of its claim up to the value of the collateral, plus whatever percentage the bankruptcy estate has to distribute to unsecured creditors on the balance of its claim. But without the lien, the value that would have paid the creditor 100% of part of its claim would instead be distributed pro rata among all the unsecured creditors, and the percentage the estate has to distribute would

not increase enough to overcome the creditor's loss of the full payment of part or all of its claim, unless the estate has enough to pay 100% on the claims. Suppose, for example, the ATV in this case is worth only \$1. The following table shows what Sunflower would receive with and without its lien on the ATV:

	a. Sunflower unsecured claim if ATV is worth \$1	b. Unsecured claims shown on claims register + Sunflower's unsecured claim	c. Estate assets	d. % estate pays unsecured claims (c. divided by b.)	e. Total Sunflower would receive (d. times a.) (with lien, also add ATV's value)
with lien	\$5,283.38	\$36,806.21	\$1,173.98	3.1896%	\$168.52 + 1 = <b>\$169.52</b>
without lien	\$5,284.38	\$36,807.21	\$1,174.98	3.1923%	<b>\$168.69</b>

Although Sunflower's distribution from the estate would be slightly less with the lien than without it, its receipt of all of the \$1 value of the ATV would more than make up for the difference. Of course, as these calculations are redone using higher values for the ATV, Sunflower's receipts with the lien would exceed by increasing amounts its receipts without the lien. Although Sunflower can never receive more than the full amount of its claim, the ATV cannot be worth more than the \$6,000 the Debtor paid for it in September 2001, so adding its value to the assets to be distributed by the estate cannot enable the estate to pay in full all the unsecured claims shown on the claims register for this case. Given these considerations, the Court is convinced that subsection (b)(5) is satisfied.

The Court concludes that all the elements of an avoidable preferential transfer are established. Consequently, the Trustee is entitled to avoid Sunflower's lien.

### **III. Conclusion**

Sunflower failed to perfect its lien at any time before July 31, 2002. As a result, for purposes of preferences under §547 of the Bankruptcy Code, the transfer that created the lien is considered not to have been made before that date. The transfer therefore satisfies all the elements required for it to constitute a preference that the Trustee can avoid pursuant to §547(b). The transfer is automatically preserved for the benefit of the bankruptcy estate by §551.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated this \_\_\_\_ day of April, 2004.

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DALE L. SOMERS  
BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the above **MEMORANDUM OF DECISION** were mailed via regular U.S. mail, postage prepaid, on the \_\_\_\_ day of April, 2004, to the following:

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