



**SO ORDERED.**

**SIGNED this 29 day of July, 2005.**

ROBERT E. NUGENT  
UNITED STATES CHIEF BANKRUPTCY JUDGE

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

**IN RE:**

**JOHN JOSEPH MORAVEC and,  
LINDA K. MORAVEC,  
  
Debtors.**

**Case No. 03-12623  
Chapter 7**

**J. MICHAEL MORRIS, Trustee,  
  
Plaintiff,**

**Adversary No. 03-5298**

**v.**

**BENNINGTON STATE BANK;  
ENGINE X-CHANGE, INC., and  
DON ALLISON,  
  
Defendants.**

**MEMORANDUM OPINION**

The trustee brought this adversary proceeding to avoid and recover three transfers to Bennington

State Bank (“BSB”) that he alleges were either preferential or occurred post-petition. The trustee asserts that BSB’s late perfection of its security interests in three vehicles belonging to the debtors occurred within the 90-day look-back period provided for in 11 U.S.C. § 547(b)(4)(A).<sup>1</sup> Alternatively, the trustee asserts that the transfers in the cumulative amount of \$33,635.14 made by defendant Engine X-Change (EX) to BSB after the vehicles were sold were unauthorized post-petition transfers and therefore avoidable under 11 U.S.C. § 549.

#### Jurisdiction

This is a core proceeding over which the Court has subject matter jurisdiction.<sup>2</sup>

#### Factual Background

The parties submitted this matter on stipulations and briefs. The stipulations established the following facts.<sup>3</sup>

On December 16, 2002, the debtor Linda Moravec purchased and took possession of a 1997 Ford Explorer from EX. On December 23, 2002, John and Linda Moravec purchased and took possession of a 1999 Chevrolet C-1500 Pickup from EX. The Moravecs entered into a Note and Security Agreement with the Bennington State Bank (BSB) on December 24, 2002 in the amount of \$23,756, the

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<sup>1</sup> Unless otherwise noted, all subsequent statutory references are to the Bankruptcy Code, Title 11 of U.S.C. § 101 *et seq.*

<sup>2</sup> 28 U.S.C. §§ 157(b)(2)(F) and 1334(b).

<sup>3</sup> *See* Dkt. 27, Stipulations of Fact; Dkt. 28, Supplemental Exhibit to Stipulations of Fact. As no trial was conducted, it is important to note that the stipulations are the only facts the Court will rely on for its decision.

purchase prices for the Ford Explorer and the Chevrolet C-1500 Pickup, plus insurance premiums.<sup>4</sup> Debtors granted BSB a security interest in both vehicles. Defendant Don Allison, president of EX, co-signed the note. In connection with both purchases, EX assigned the vehicle titles to the debtors by executing Kansas Dealer's Title Reassignment Addendums, which also showed BSB as the lienholder.

On January 22, 2003, the Moravecs purchased and took possession of a 1999 Chevrolet S-10 Pickup from EX for \$13,916. The next day the Moravecs executed another Note and Security Agreement with BSB for \$40,625, which constituted the payoff of the December 24, 2002 note (\$23,756) plus new money to purchase the Chevrolet S-10 Pickup (\$13,916) and insurance charges. As with the first note, the debtors granted BSB a security interest in the Chevrolet S-10 and Allison co-signed the note. EX assigned the title to Moravec by completing the reassignment form on the reverse side of the title. BSB was again shown as the lienholder on this reassignment.

Even though BSB claimed a security interest in all three vehicles, it took no action to perfect its interests and did not submit a notice of security interest to the Kansas Department of Revenue, Division of Vehicles. Debtors applied to the Division of Vehicles for a secured title for the Ford Explorer on March 18, 2003. On May 20, 2003, they applied for secured titles for both Chevrolet Pickups. The same day, the Moravecs filed their chapter 7 bankruptcy petition.

On July 20, 2003, they surrendered all three vehicles to EX without notifying the trustee or the Court. EX sold the vehicles in August, 2003, for a total of \$34,350, and remitted proceeds in the amount

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<sup>4</sup> The parties stipulated that “[f]unds advanced under the note were paid to EXC for the debtor’s purchase of the 1997 Ford and the 1999 Chevrolet C-1500 (\$23,700.00), credit and disability insurance (\$1,764.56) and prepaid finance charges (\$50.00).” Dkt. 27, Stipulations of Fact ¶ 9.

of \$33,635.14 to BSB, paying off the debtors' notes, and retained the balance of \$714.86.<sup>5</sup>

### Analysis

To establish that BSB's security interests in the debtor's three vehicles were preferences, the trustee has the burden to establish each of the following five statutory elements of a preferential transfer.<sup>6</sup> The trustee must show by a preponderance of the evidence that a transfer of an interest in the debtor's property (here, security interests in three vehicles)— (1) was made for the benefit of a creditor; (2) was for or on account of an antecedent debt; (3) was made while debtor was insolvent; (4) was made within 90 days before debtor filed bankruptcy; and (5) enabled BSB to receive more than it would have received in a chapter 7 liquidation, had the transfers not occurred.<sup>7</sup> The purpose of this statute is to facilitate an equal distribution of the debtor's assets to the debtor's creditors.<sup>8</sup>

The Court must determine whether BSB perfected its security interests in the three vehicles, and if so, when the perfection occurred. BSB urges that its notation as lienholder on the reassignment addendums (attached to the existing titles) and the assignment form on the reverse side of the existing title,

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<sup>5</sup> Of the balance retained by EX, some \$541.09 was applied to expenses of the sale, thus leaving EX with \$173.77. The trustee represents in his brief that he does not seek to recover the sale expenses from EX.

<sup>6</sup> Section 547(g); *Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190, 1196 (10<sup>th</sup> Cir. 2002); *Gonzales v. DPI Food Products Company (In re Furr's Supermarkets, Inc.)*, 296 B.R. 33, 38 (Bankr. D.N.M. 2003).

<sup>7</sup> See Section 547(b). The debtor is presumed insolvent on or during the 90 days immediately preceding the filing of the bankruptcy petition. § 547(f). The parties stipulated that "[u]nsecured creditors will receive less than a 100% dividend in this case, even if the full amount sought in this complaint is recovered," thus satisfying the fifth element that the transfer enabled BSB to receive more than it would have received in a chapter 7 liquidation. See Dkt. 27, Stipulation of Fact ¶ 26.

<sup>8</sup> See *In re Ogden*, 314 F.3d at 1196.

sufficed to perfect the security interests at the time the debtors acquired the vehicles.<sup>9</sup> The trustee argues that BSB could only perfect by complying with KAN. STAT. ANN. § 8-135 which it failed to do until shortly before the date of the petition. In analyzing whether the Bank’s interests were perfected within the statutory 90-day period preceding filing, the Court must decide whether BSB’s security interests were purchase-money security interests (PMSIs). If they were PMSIs, the Court must then determine whether the liens were perfected in accordance with KAN STAT. ANN. § 8-135(c)(5). If the liens were not PMSIs, the Court must decide whether the liens were perfected in accordance with § 8-135(c)(6) relating to “mortgage titles.”

A PMSI in goods has purchase-money attributes “[t]o the extent that the goods are purchase-money collateral with respect to that security interest.”<sup>10</sup> In other words, a security interest is “purchase money” in nature to the extent the goods it covers are purchased with the loan proceeds. The burden is on the secured party claiming a PMSI “to establish the extent to which the security interest is a [PMSI].”<sup>11</sup> The loans in this case were in the amounts of the purchase prices of the vehicles and taken out within a day of each purchase. In fact, the second note specified that the proceeds would be paid in part to EX. The stipulations make plain that the funds advanced by BSB on both occasions were used to pay EX for the vehicles and the Court concludes that the liens in this case are purchase-money security interests.

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<sup>9</sup> See KAN. STAT. ANN. § 8-135(c)(2) (2004 Supp.).

<sup>10</sup> KAN. STAT. ANN. § 84-9-103(b)(1) (2004 Supp.). “Purchase-money collateral” are goods that “secure a purchase-money obligation incurred with respect to that collateral.” *Id.* at (a)(1). A “purchase-money obligation” is an “obligation of the obligor incurred or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.” *Id.* at (a)(2).

<sup>11</sup> KAN. STAT. ANN. § 84-9-103(g) (2004 Supp.).

Kansas law requires that unless a debtor holds motor vehicles as inventory, a creditor must perfect its security interest in a motor vehicle by compliance with the motor vehicle certificate of title laws.<sup>12</sup> The record does not indicate that these vehicles were to be held as inventory. The Kansas Uniform Commercial Code provides that compliance with the applicable titling statute, here KAN. STAT. ANN. § 8-135, is the equivalent of filing a financing statement.<sup>13</sup> KAN. STAT. ANN. § 8-135(c)(5) specifies that in order to perfect a purchase money lien in a motor vehicle, the secured party must complete and execute a “notice of security interest” (“NOSI”) which must be mailed or delivered to the Division of Vehicles within 20 days of the sale and delivery of the vehicle. The Division holds the NOSI until the debtor files an application for a secured title, at which time the lien is shown on the title which, after January 1, 2003, is maintained electronically in the Division’s main office at Topeka, Kansas.<sup>14</sup> As the statute states and numerous courts have held, the proper completion and timely mailing or delivery of the NOSI by the secured party serves to perfect the interest in the motor vehicle on the date of mailing or delivery.<sup>15</sup>

The parties stipulate that the debtors received delivery of the Ford Explorer on December 16, 2002; the Chevrolet C-1500 Pickup on December 23, 2002; and the Chevrolet S-10 Pickup on January

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<sup>12</sup> KAN. STAT. ANN. § 84-9-311(a)(2) and (d) (2004 Supp.).

<sup>13</sup> KAN. STAT. ANN. § 84-9-311(b) (2004 Supp.). *See also*, KAN. STAT. ANN. § 83-9-310(b)(3) (2004 Supp.) (Filing of financing statement unnecessary to perfect a security interest in property subject to a state certificate of title law).

<sup>14</sup> KAN. STAT. ANN. § 8-135d.

<sup>15</sup> KAN. STAT. ANN. § 8-135(c)(5) (2004 Supp.); *Morris v. Advantedge Quality Cars, L.L.C. (In re Tholl)*, 2004 WL 2334543 at \*2 (Bankr. D. Kan. 2004).

22, 2003.<sup>16</sup> Therefore, according to the plain language of the statute, BSB had 20 days from December 16, December 23, and January 22, respectively, to submit NOSIs pertaining to these three vehicles.<sup>17</sup> BSB failed to ever submit NOSIs. The debtors applied for a secured title for the Ford Explorer on March 18, 2003 and for the Chevrolet Pickups on May 20, 2003, the date of their petition here. The Court concludes that BSB perfected its security interests inside of 90 days preceding the petition date and well in excess of twenty days from the date of sale and delivery of the vehicles.<sup>18</sup>

Because BSB perfected its security interests within the 90-day look-back period, and because perfection amounts to a transfer of the debtor's property interests to BSB, the transfers were preferences and must be avoided and preserved for the benefit of the estate. As the Tenth Circuit has previously stated, "[w]hen the law provides a simple and inexpensive way to protect the lien the creditor should be required to use it."<sup>19</sup> In this case, BSB failed to follow the simple rules provided in order to properly secure its interests by not submitting NOSIs to the Division of Motor Vehicles within the twenty day safe harbor period. The other elements of a preference being present, BSB's liens may be avoided and preserved for

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<sup>16</sup> See Dkt. 27, Stipulations of Fact ¶¶ 5, 8, 14.

<sup>17</sup> See KAN. STAT. ANN. § 8-135(c)(5). The twenty day time frame expired on January 5, January 12, and February 11, 2003 respectively.

<sup>18</sup> Had the Court determined that the liens were not PMSI, the Court would look to see if the liens were perfected in accordance with KAN. STAT. ANN. § 8-135(c)(6). Under this section, when a previously titled vehicle is sold, the transferor is required to assign and deliver the certificate of title to the transferee within 30 days. When a person acquires a security interest subsequent to the issuance of the original title on a vehicle, the secured party shall require surrender of the certificate of title, signature on an application for "mortgage title," and *immediately* deliver the certificate of title to the Division of Motor Vehicles. Even if these liens were not purchase money interests, the Bank failed to comply "immediately" as the statute requires.

<sup>19</sup> *Lentz v. Bank of Independence (In re Kerr)*, 598 F.2d 1206, 1209 (10th Cir. 1979).

the benefit of the estate.<sup>20</sup>

Having reached this conclusion, the Court considers that the vehicle proceeds paid by EX to BSB were the proceeds of property of the bankruptcy estate that were paid to BSB after the commencement of the case without authority either in Title 11 or an order of this Court and may be recovered from BSB and EX, jointly and severally.<sup>21</sup> The trustee is therefore entitled to the proceeds of the vehicles in the hands of BSB (\$33,635.14) and EX (\$173.77).

Judgment should therefore be entered for the trustee on his complaint, avoiding the preferential transfers of the liens in the vehicles to BSB, preserving those liens for the benefit of the estate pursuant to § 551, and granting the trustee a money judgment against BSB and EX, jointly and severally, in the amount of \$33,808.91 plus costs. A Judgment on Decision will issue this day.

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<sup>20</sup> Section 551.

<sup>21</sup> Section 550(a).