

**News From OBA Bankruptcy
And Reorganization Law Section:**

**Oklahoma's Certificate Of
Title Law: The Tenth Circuit
Solves A Preference Problem**

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(Editor's Note: OBA Sections have been invited to submit short notes of Section information for publication in the Bar Journal.)

Introduction

The Tenth Circuit Court of Appeals has recently resolved a split of authority in Oklahoma concerning the interplay of 11 U.S.C. § 547(e)(2)(B) (the preference section) and 47 O.S. § 1110(A)(2) (the "lien entry" section). The recent decision solves the confusion between these two sections, and the previous pitfall creditors had encountered when they perfected their security interests in automobiles shortly before the debtor filed bankruptcy. The purpose of this article is to discuss the recent Tenth Circuit decision and the interplay of these two sections.

Hypothetical Scenario

On day one, buyer ("Debtor") purchases an automobile from a car dealer ("Dealer"), executing a security agreement and promissory note. On the same day, Dealer assigns the security agreement and promissory note to a bank ("Creditor"). On day 12, Creditor files a lien entry form with the Oklahoma Tax Commission. On day 30, Debtor files a voluntary Chapter 7 bankruptcy petition.

Thereafter, the Trustee of the Debtor's bankruptcy estate ("Trustee") brings an adversary proceeding against Creditor alleging a preferential transfer pursuant to 11 U.S.C. § 547 because Creditor filed the lien entry form more than 10 days after Debtor granted the security interest. The Creditor will rely on 47 O.S. § 1110(A)(2) which allows it 15 days to file a lien entry form after Debtor received possession of the automobile. The issue is whether the Creditor can rely on 47 O.S. § 1110(A)(2) as a defense to any preference action. The Tenth Circuit has answered yes.

Discussion

One of the fundamental policies of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*) is equality of distribution among creditors. For this reason, the Bankruptcy Code grants to the trustee or other representative of the bankruptcy estate the power to avoid certain

transactions or transfers occurring before the commencement of the bankruptcy case. Perhaps the most powerful and frequently used avoiding power in the trustee's arsenal is the preference section, 11 U.S.C. § 547, which is specifically designed to achieve the policy of fostering equality of distribution to the creditors of an insolvent debtor.

Section 547 allows a creditor 10 days to perfect its purchase money security interest after the debtor receives possession of the collateral. Under 47 O.S. § 1110(A)(2), a creditor in Oklahoma has 15 days to file the lien entry form. Accordingly, a conflict exists between 11 U.S.C. § 547 and 47 O.S. § 1110. The key question is whether the creditor has 10 days, or 15 days, within which to file the lien entry form after the execution of the security agreement by the debtor.

On January 19, 1993, the Tenth Circuit resolved the conflict between the Oklahoma courts with its decision in the case of *Webb v. General Motors Acceptance Corporation (In re Hesser)*, 984 F.2d 345 (10th Cir. 1993). The *Webb* case involves the same fact



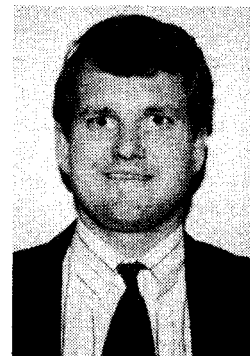
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pattern as the hypothetical. The bankruptcy court in *Webb* was the first court in Oklahoma to address this issue. *Webb v. General Motors Acceptance Corporation (In re Hesser)*, Adv. Pro. No. 90-394-L (Bankr. W.D. Okla. April 12, 1991). In *Webb*, Bankruptcy Judge Lindsey stated that the issue was whether the creditor's security interest in the vehicle was perfected on or before 10 days after the debtors received possession of the vehicle.

The Tenth Circuit in *Webb* distinguished between the conflicting decisions of two other circuit courts of appeal on this issue. The Tenth Circuit found that the sole issue in dispute is the appropriate timing and method of the perfection of a security interest provided for in § 547 of the bankruptcy code. The Tenth Circuit relied on the Eleventh Circuit decision in *In re Busenlehner*, 918 F.2d 928 (11th Cir. 1990), cert. denied, ____ U.S. ____, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991) for the proposition that the "bankruptcy code adopts state law to determine the date of perfection under § 547(e)(1)(B)." Thus, the Tenth Circuit held that it is necessary to determine when the perfected security interest can beat a judicial lien in a priority battle. This determination is made by reference to state law. After the date of perfection is determined, the time of the transfer must be ascertained and must fit within the 10 day grace period provided in § 547(e)(2).

Under Oklahoma law, when a lien entry form is presented to the Oklahoma Tax Commission or its agent within 15 days after execution of the security agreement, the perfection of the security interest relates back to the date of the execution of the security agreement. See Okla. Stat. Ann. 47 § 1110.A.2 (1981) and Supp. 1991. Therefore, in the *Webb* case where the lien entry form was delivered to the Commission on the fifteenth day after the execution of the security agreement, the perfection of the security interest related back to the date of the execution of the security agreement.

The Tenth Circuit in *Webb* concluded that "[b]ecause the date of the perfection coincides with the date in which the security interest was granted, the transfer of the security interest was not 'for or on account of an antecedent debt,' ... and also was 'perfected on or before 10 days after the debtor received [the] possession of the property.'" Thus, the trustee could not meet all of the elements necessary to avoid the transfer pursuant to § 547(b), and, further, GMAC could claim protection under § 547(c)(3). Therefore, the Tenth Circuit held that the transfer could not be avoided by the bankruptcy trustee.

The bankruptcy court in *Webb* had relied on the Fifth Circuit decision in *In re Hamilton*, 892 F.2d 1230

(5th Cir. 1990), which held that the 10 day "grace" period of § 547(c)(3)(B) represents an effort by Congress to create in a bankruptcy context a national uniform perfection period for enabling loans, and that § 547(e)(2) is consistent with and constitutes evidence of the effort in that regard. The Tenth Circuit distinguished the *Hamilton* case, finding that the issue in *Hamilton* was the conflict between the 20 day grace period in Texas and the 10 day grace period in § 547, and thus the case did not deal with the date of perfection.

The bankruptcy court in *Webb* held that how a creditor perfects its security interest is determined by state law and when a security interest is perfected is determined by federal law. Thus, the bankruptcy court reasoned that because the lien entry form was not delivered to the commission within 10 days after the debtors took possession of the vehicle, perfection of the security interest did not occur until the date the lien entry form was delivered to the commission. Therefore, the trustee could avoid the filing of the lien entry form as a preferential transfer. On appeal, the district court affirmed the bankruptcy court and found that the 10 day period was controlling.

The Tenth Circuit refused to accept these arguments. Instead, in support of its decision, the Tenth Circuit cited to *Busenlehner* for the policies underlying preference law:

Creditors are encouraged by our legal system to secure their loans. The general message to creditors is that should they follow state commercial law their secured loans will be protected in bankruptcy ... The creditor, moreover, [lends] the money in the expectation that the creditor's compliance with state law [is] sufficient to protect the loan. Debtors should not be given the ability to surprise and upset established commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest.

Conclusion

Creditors in Oklahoma now have some guidance from the Tenth Circuit as to how many days they have to file their lien entry form in order to properly perfect themselves in the event the debtor files bankruptcy shortly thereafter. As long as the lien entry forms are filed within the required 15 days, the perfection relates back to the date the security agreement was executed. Thus, the lien is properly perfected under state law and the bankruptcy code. While a split of authority still exists among the Circuit Courts of Appeal, the *Webb* decision should resolve, at least for now, the split of authority within the state of Oklahoma and the Tenth Circuit.