United States Bankruptcy Court
Western District of Wisconsin

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In re Stevens Point Associated, Inc., d/b/a Associated Sales & Leasing, Debtor
Bankruptcy Case No. 91-52925-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

December 24, 1991

E. John Buzza and Gary L. Dreier, for Bank One, Stevens Point, NA.
Stephan A. Pezalla and Lee W. Mosher, for Manheim Auto Auctions.
Peter F. Herrell, trustee.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This case presents two matters for the Court's consideration. The first is a motion of Bank One, Stevens Point, NA (Bank One), for the application of funds for the payment of its secured claim against the debtor, Stevens Point Associated, Inc., d/b/a Associated Sales & Leasing. Manheim Auto Auctions (Manheim), another creditor, filed an objection to Bank One's motion. The second matter is a motion of Manheim for turnover and for allowance of § 506(c) fees and disbursements. Objections to this motion were filed by Bank One and the trustee. Bank One is represented by E. John Buzza and Gary L. Dreier. Manheim is represented by Stephan A. Pezalla and Lee W. Mosher; the trustee is Peter F. Herrell.

Because these two matters involve a priority dispute over the same escrowed funds and are grounded on essentially the same factual background, they will be dealt with together.

FACTS

Stevens Point Associated, Inc., d/b/a Associated Sales & Leasing (Associated), is a Wisconsin corporation engaged in the sale of used cars. Its car sales lot and principal place of business is located at 3115 Church Street, Stevens Point, Wisconsin. In order to purchase inventory for its business, Associated obtained a secured line of credit from Bank One. Associated delivered the original master draw note to Bank One on December 6, 1990. This note was last renewed and modified on July 15, 1991, in the principal amount of $250,000.00. This note is secured by collateral which includes the debtor's inventory, equipment, accounts and proceeds thereof as specified in the security agreement between the debtor and Bank One. The Bank perfected its security interest in the collateral by filing a financing statement

with the Wisconsin Secretary of State's office on December 19, 1990.

As part of its business operations, Associated purchased cars from various dealers through Manheim Auto Auctions. Minneapolis Auto Auction (MAA) and Florida Auto Auction of Orlando, Inc. (FAA) both part of Manheim, delivered cars to Associated pursuant to the terms of credit arrangements between the debtor and MAA and FAA, respectively. Associated placed the cars on its sales lot in Stevens Point for sale to the general public.

On August 26, 1991, Johnson Towing Service of Stevens Point, Inc., removed certain vehicles from Associated's sales lot at the direction of FAA and MAA. Neither Associated nor Bank One authorized this removal. The vehicles were secured at the premises of Johnson Towing Service at 3801 Patch Street, Stevens Point.

MAA and FAA assert a claim on the impounded cars by virtue of their credit agreements with the debtor.

Associated filed for relief under Chapter 7 of the Bankruptcy Code on August 27, 1991. After an expedited hearing on September 4, 1991, this Court authorized MAA to conduct a liquidation of the debtor's motor vehicle inventory on September 18, 1991. This sale resulted in net proceeds of $296,125.00. Pursuant to the Court's order of September 6, 1991, these proceeds were placed in an escrow account at Bank One pending further order of this Court. A hearing was held before the Court on the current motions on October 7, 1991. No testimony was presented at that hearing; the parties stipulated that the priority dispute between Bank One and Manheim (through its affiliates FAA and MAA) could be decided on the basis of the parties' legal memoranda, affidavits and documents submitted to the Court. The Court accordingly took the issue as to the entitlement to the escrowed sale proceeds under advisement.

Pursuant to the Court's order of October 7, 1991, Bank One filed a supplemental affidavit setting forth the exact amount of its secured claim with the debtor. As of October 9, 1991, Bank One asserts a claim totalling $256,365.96 against the bankruptcy estate. In its motion for turnover, Manheim asserts the following claims against the bankruptcy estate: $37,105.00 on behalf of MAA, representing the proceeds of the sale of its cars in the debtor's inventory; $258,275.00 on behalf of FAA, representing the proceeds of sale of its cars in the debtor's inventory; and $6,728.00 on behalf of MAA, representing expenses in connection with the transportation and sale of the debtor's vehicles pursuant to the Court's order of September 6, 1991.

Turning to the arguments of the parties, MAA and FAA (collectively, the "Auto Auctions") assert that the debtor had no rights in the vehicles in which it could have granted Bank One a security interest. As part of this argument, the Auto Auctions allege that the debtor held their vehicles in an express or constructive trust. As such, the argument continues, the vehicles never became part of the debtor's bankruptcy estate. See generally 4 Collier on Bankruptcy para. 541.13 (15th ed. 1991).

In support of their trust argument, the Auto Auctions cite language in their auction sale documents to the effect that ownership of a vehicle shall not transfer until that specific vehicle is paid for. Specifically, the MAA sales document states in relevant part:

> [t]he buyer agrees . . . that the title and ownership of said vehicle . . . shall remain in the seller until any check or draft given for the Sale Price of said

vehicle or any part of the same, has been honored and paid in full; and until said check or draft shall have been honored and paid in full, title to the above described vehicle shall be retained by the seller and not pass to the buyer nor shall this said sale be considered consummated . . . .

See Affidavit of Thomas McDermott, Exhibit 2A.

FAA has submitted a document entitled "Dealer Registration and Guaranty Agreement" which is less clear in this regard; it states in relevant part:

> If Dealer [Associated Sales & Leasing] fails to pay Auction for a vehicle purchased by Dealer through Auction, Auction will be allowed to sell the vehicle to mitigate its loss without notice to [Associated] and [Associated] will be fully liable to Auction for any deficiency, including incidental and consequential damages. Notice of resale required by the Uniform Commercial Code or any other law is waived.

See Affidavit of Joseph Greco, Exhibit 3.

As further evidence of the existence of a trust relationship with the debtor, the Auto Auctions have submitted affidavits of Joseph Greco and Thomas McDermott, employees of FAA and MAA, respectively. These affidavits state in nearly identical language that it was the intention of the Auto Auctions that no title or ownership would transfer until payment was received and that the vehicles would be held in trust pending payment. In order to insure compliance, both affidavits continue, "[i]t was specifically agreed between FAA [or MAA] and Associated that the certificates of title to the vehicles would be retained by FAA [or MAA] until such time as payment for each vehicle was delivered to FAA [or MAA]." See Affidavit of Joseph Greco at 2; Affidavit of Thomas McDermott at 2.

It is solely on the basis of the aforementioned language in the various documents and the statements of the Auto Auction employees in the submitted affidavits that the existence of a trust is asserted. The Court has examined the submitted documents and affidavits and concludes that they are insufficient to warrant finding a trust relationship between the Auto Auctions and the debtor.

As an initial proposition, the Court notes that the burden of establishing a trust relationship is on the party claiming the benefits of such a relationship -- here the Auto Auctions. See, e.g., United States v. Bicoastal Corp. (In re Bicoastal), 125 B.R. 658, 662 (M.D. Fla. 1991), citing with approval, Georgia Pacific Corp v. Sigma Service Corp., 712 F.2d 962, 969 (5th Cir. 1983).

The Court concludes that the Auto Auctions have not met this burden because several of the requisite elements for finding the existence of a trust have not been sufficiently established. First, a trust requires a reasonably certain manifestation of intention to create a trust. See, e.g., In re Elrod, 42 B.R. 468, 473 (Bankr. D. Tenn. 1984); 76 AM. JUR. 2d Trusts § 38 (1975). None of the documents signed by the parties and submitted to the Court make any mention of a trust or a trust relationship whatsoever. The Court is aware that the word "trust" need not be used to establish a legitimate trust. See generally 76 AM. JUR. 2d Trusts § 41 (1975). Nevertheless, the intention to create a trust must be apparent. Id. Aside from the unsupported statements of the two employees contained in the submitted affidavits, the Court can find no other evidence supporting the existence of an intent to create a trust in this case. In addition, David Hefko, president of Associated, asserted in an affidavit before the Court that he never spoke about the terms of sale or dealer registration

requirements with those employees of FAA and MAA who submitted affidavits. This affidavit, moreover, contains no assertions whatsoever that the debtor, through its president, understood that a trust arrangement was anticipated with FAA and MAA. See Affidavit of David Hefko for October 7, 1991 Hearing.

Second, the requisite separation of the legal title from the beneficial interest necessary for a trust does not appear to be present here. See In re Elrod, 42 B.R. at 473; 76 AM. JUR. 2d Trusts § 36 (1975). The Auto Auctions argue strenuously here that no ownership rights passed and that legal title to the subject vehicles remained with them at all times. Legal title remaining with the settlor is inconsistent with a true trust relationship and contending that it remained with the Auto Auctions certainly does not manifest an intention to create a trust.

Aside from these trust requisites being absent here, there are several other factors present here which do not bespeak a trust relationship. All of the documents before the Court speak of the vehicles as the subject matter of a purchase, rather than the res of a trust. The dealers involved in each transaction are clearly identified as "seller" and "purchaser" or "buyer." The fine print on MAA's document contains the heading "Bill of Sale of Motor Vehicle." The debtor's president asserted in his affidavit that it was his understanding that the vehicles were purchased on 45-day terms. See Affidavit of David Hefko at 2 (emphasis added). He further asserted that all of the vehicles purchased by him through FAA were from a dealer identified as "Miller Motors." This undoubtedly refers to the "Miller Motors" of Albertville, Alabama, identified as the "seller" on FAA's odometer disclosure statement for each car. The debtor also submitted copies of FAA's sales advertisements which, in a section announcing an auction by Miller Motors, states "45 days to pay, or $200.00 cash on every purchase." See Affidavit of David Hefko, Exhibit A, at 2 (emphasis added).

Both the MAA and FAA sales documents, moreover, minimize the role that each auction company played in the transactions involving the subject vehicles. The MAA document states that "[b]oth Seller and Buyer acknowledge that [MAA] has acted as a broker in this transaction and agree to hold the Auction harmless . . . ." See Affidavit of Thomas McDermott, Exhibit 2D. The FAA document states that "[t]his sale is solely a transaction between the buyer and selling dealers . . . ." See Affidavit of Joseph Greco, Exhibit 2A. This language does not support the Auto Auctions' contentions that they served the important function of settlor in a trust relationship with the debtor as trustee.

In addition, the key language cited earlier upon which MAA relies here -- whereby title and ownership purportedly remains with the "seller" -- does not even pertain to MAA, since the selling dealer, not the auto auction, is clearly identified as the "seller" on the documents. The language relied upon by FAA -- allegedly giving it the right to sell vehicles which are not paid for -- is much more oblique than the MAA language in purportedly establishing a trust relationship here. Such oblique language does not manifest with reasonable certainty an intent to create a trust.

Finally, both MAA's and FAA's sales documents contain the language that "[t]his vehicle [is] subject to a lien." This language is more indicative of an intended security relationship between the parties here than it is of a trust relationship. For these reasons, then, the Court holds that a trust relationship does not exist between the Auto Auctions and Associated in regard to the vehicles at issue here.

Having eliminated a trust relationship between the parties, the Court is then faced with determining the true nature of the commercial relationship between the Auto Auctions and Associated. The Court has examined the myriad of labels that can be

applied to this commercial relationship, including pledge, bailment, assignment, consignment, and consignment intended as security. The language in the various documents and the assertions of the employees in the affidavits before the Court present a confused and unclear picture as to the nature of the relationship between the Auto Auctions and Associated. Nevertheless, on the basis of the documents and affidavits before it, the Court initially concludes that, at most, the Auto Auctions would have retained a security interest in the subject vehicles. As an initial proposition here, "[w]hether a transaction is intended as a security agreement or a true consignment agreement depends on the intent of the parties at the time they entered into the transaction." Underwriters at Lloyds v. Shriver (In re Ide Jewelry Co.), 75 B.R. 969, 977 (Bankr. S.D.N.Y. 1987), citing with approval NYNEX BISC v. Baker Industries Corp. (In re Baker Industries Corp.), 69 B.R. 937, 939 (Bankr. S.D.N.Y. 1987). "Intent should be determined by an objective standard which takes into account the economic realities of the transaction rather than the subjective intent of the parties." In re Ide Jewelry Co., 75 B.R. at 977 (citations omitted).

The Auto Auctions' purported retention of title and all ownership rights in the vehicles notwithstanding, the Court finds that this arrangement has many of the characteristics of a traditional secured transaction. Numerous cases involving purported consignments under facts similar to those at issue here have identified factors which indicate the existence of a security interest rather than a consignment. See, e.g., In re Sullivan, 103 B.R. 792, 795 (Bankr. N.D. Miss. 1989); In re Ide Jewelry Co., 75 B.R. 969, 977-78 (Bankr. S.D.N.Y. 1987).

> Facts which support the notion that a consignment was intended as security include: (i) setting of price by the consignee . . . (ii) billing consignee upon shipment . . . (iii) commingling of proceeds and failure to keep proper accounts by the consignee . . . (iv) "mixing consigned goods with goods owned" . . . and (v) consignor purporting to retain title to goods until paid . . .
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> Conversely, the following facts indicate that a transaction was not intended as security and that it constitutes a true consignment: (i) consignor retained control over price . . . (ii) consignee "was given possession with authority to sell only upon the express consent of [the consignor] as to the sale price" . . . (iii) consignor may recall the goods . . . (iv) consignee "was to receive a commission and not a profit on the sale" . . . (v) consigned property was segregated from other property of the consignee . . . (vi) consignor was entitled to inspect sales records and physical inventory of the goods in the consignee's possession . . . and (vii) consignee has "no obligation to pay for the goods unless they are sold," . . .

In re Sullivan, 103 B.R. at 795, citing with approval In re Ide Jewelry Co., 75 B.R. at 978 (citations omitted).

Examining the facts at issue here in light of these factors leads the Court to conclude that some type of security arrangement was intended by the Auto Auctions. Although the evidence presented as to the actual course of dealing between the Auto Auctions and the debtor is minimal, it appears that the debtor enjoyed significant autonomy as to the disposition of the subject vehicles. David Hefko, debtor's president, asserted in his affidavit that FAA and MAA knew that Associated intended to sell the cars it received from them before they would receive payment for the cars. See Affidavit of David Hefko at 2. As already noted, Hefko further asserted it was his understanding that the vehicles were purchased on 45-day terms. See id. The debtor could thus presumably set the selling price of each vehicle and retain whatever profit was realized from each sale. There is no evidence that the Auto Auctions required

the debtor to keep sale proceeds of the cars obtained from them separate from the accounts and proceeds of the debtor. In addition, there is no indication that the Auto Auctions' consent was required to sell any of the subject vehicles at a particular price. Likewise, there is no showing that the debtor was required to keep the vehicles obtained from the Auto Auctions separate from vehicles from other sources. It is therefore likely that the subject cars as well as proceeds from their sale were commingled with other cars and proceeds of the debtor. Finally, as noted, every Auto Auctions' sale document before the Court contains the notation that "[t]his vehicle [is] subject to a lien." This indicates an intent to create a security interest. If the Auto Auctions truly believed that they were retaining full legal title and all ownership rights in the cars, then this explicit assertion of the existence of a lien would be unnecessary and incongruous with that belief.

The Court holds, therefore, that the transfer of possession of the vehicles to the debtor by the Auto Auctions, the debtor's autonomy and control over the vehicles' ultimate sale, combined with the lien and title retention language on the sale documents, compel the conclusion that a security agreement was intended here. The Auto Auctions intended to transfer possession of the vehicles to the debtor for eventual sale and keep the title for each vehicle solely for the purpose of securing payment of the amount paid to the original selling dealer.

The Court further finds, however, that the Auto Auctions failed to retain a valid security interest in the vehicles transferred to the debtor. Neither MAA nor FAA has presented any documents showing that the debtor granted either of them a security interest in the vehicles it received from them. As already noted, the language in the documents executed between FAA and MAA on the one hand and the debtor on the other present a very confusing and unclear picture as to the rights between the parties. As previously shown, the language of MAA's "Bill of Sale" documents explicitly states that title and ownership of the subject vehicle are to remain with the seller until the car is paid for in full. The "seller" is clearly identified on the document as the selling dealer, not MAA.[(1)] This language, aside from its actual retention of the vehicle titles, is the principal basis upon which MAA asserts the existence of a security interest. The Court finds this language wholly inadequate for purposes of finding a security interest in favor of MAA. The language on FAA's documents is equally inadequate. It merely provides that "[i]f [Associated] fails to pay [FAA] for a vehicle purchased by [Associated] through [FAA], [FAA] will be allowed to sell the vehicle to mitigate its loss without notice to [Associated] . . . ." The wording of this provision, especially the notice provision, indicates that it was most likely meant to cover the situation where a dealer had agreed to buy a vehicle (the auction company having retained possession, however), and then later reneged on its agreement. It is difficult to see how this language could apply to the current situation where the auction transferred possession of the vehicles from Florida to a dealer in Wisconsin. It would be very difficult for a Florida auction company to sell vehicles located in Wisconsin without notice to the Wisconsin dealer in possession of those vehicles. Such considerations aside, however, the Court finds the aforementioned language in the FAA "Dealer Registration and Guaranty Agreement" to be insufficient for purposes of finding a security agreement in favor of FAA.

Nor is the aforementioned "this vehicle subject to a lien" language contained on both FAA's and MAA's documents, without more, sufficient to warrant a finding of a valid security interest in favor of either auto auction.

Finally, -- as to the issue of whether the Auto Auctions retained a valid security interest in the vehicles transferred by them to the debtor -- the Court finds that the

mere retention of possession of a vehicle's certificate of title does not automatically result in a security interest attaching to the vehicle. See Hillman, McDonnell & Nickles, Common Law and Equity Under the Uniform Commercial Code para. 18.07 n.310 (1985), citing Nat'l Exch. Bank of Fond du Lac v. Mann, 81 Wis. 2d 352, 260 N.W.2d 716 (1978); McDonald v. Peoples Auto Loan & Fin. Corp. of Athens, Inc., 115 Ga. App. 483, 154 S.E.2d 886 (1967).

Even if this Court were to find a security interest in favor of the Auto Auctions, that would still not save their objection to Bank One's motion from dismissal by this Court. As will be seen, any security interest the Auto Auctions might have obtained would have been unperfected and thus subordinate to the interest of Bank One. The Auto Auctions originally conceded that Bank One possesses a perfected security interest in the debtor's inventory, which included the vehicles at issue here. See Objection to Bank One Stevens Point, N.A., Motion and Application of Funds for Payment of Secured Claim and Request for Hearing at 1. In their subsequent Memorandum of Law, however, the Auto Auctions argue that, since the debtor received no ownership rights in the vehicles, it had nothing in which it could grant Bank One a security interest. The Auto Auctions' contradictory assertions aside, the Court finds that the debtor did possess sufficient rights in the vehicles to enable it to grant a security interest in them to Bank One. In defense of their claim to the contrary, the Auto Auctions assert that, pursuant to WIS. STAT. § 409.103, ownership and status of the security interest in the cars is to be determined by the law of Florida and Minnesota. That provision provides in relevant part:

> (2) Certificate of title. (a) This subsection 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, 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 4 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.

WIS. STAT. ANN. § 409.103(2) (West Supp. 1991).

This provision does indeed provide that, with certain limitations, perfection and its effects as to a motor vehicle are to be determined under the law of the state which issued a certificate of title for the subject vehicle. The Auto Auctions presented no evidence, however, concerning where the vehicles transferred by FAA were titled. Without a showing that those vehicles were titled in Florida (which is far from clear given the fact that all of them were sold to Associated by an Alabama dealer (through FAA)), the Auto Auctions' assertion that Florida law applies is without merit. As to the cars in which MAA claims an interest, the submitted documents reveal that those vehicles were titled in Minnesota, Wisconsin, Pennsylvania and Florida. The Auto Auctions' claim that Minnesota law should apply as to the five cars in which MAA claims an interest is therefore correct as to only two of them -- those titled in Minnesota.

The Court has examined the applicable U.C.C. provisions in the various jurisdictions and has found no relevant distinctions with the applicable U.C.C.

provisions under Wisconsin law. The Court need not concern itself with these essentially unfounded assertions of applicable law, however. Under any scenario examined by the Court, the Auto Auctions have shown no evidence to establish that any security interest they might have had in the vehicles would have been perfected.

Briefly stated, there are two methods for perfecting a security interest in motor vehicles which are potentially applicable here. The first involves filing the normal financing statement and is used where the debtor is a "motor vehicle dealer" (as defined under state law) and the subject vehicles are inventory. See WIS. STAT. ANN. § 409.302(3)(b) (West Supp. 1991).[(2)] The other method, applicable in almost all other transactions involving motor vehicles as security, is the notation by the relevant state authority of the security interest on the individual title(s) of the vehicle(s) involved. See WIS. STAT. ANN. § 342.19 (West 1991).[(3)] See generally Clark, The Law of Secured Transactions Under the Uniform Commercial Code para. 12.03 (2nd ed. 1988).

The Court need not concern itself with which one of these perfection methods is applicable here since the Auto Auctions have provided no evidence which would support a finding that any interest they might have had was perfected under either scenario. They have not shown that a financing statement was filed in the appropriate forum; nor have they shown that any security interest was noted on the title certificate for each vehicle.

Bank One, however, has shown that it filed a financing statement to perfect its security interest pursuant to § 409.302(3)(b) of the Wisconsin statutes. The Court finds that this was the proper method for Bank One to perfect its interest in the vehicles and on that basis holds that the Bank does have a valid perfected security interest in the vehicles at issue here.

One final argument needs to be briefly addressed. The Auto Auctions argue that their alleged interest was perfected by their taking possession of the vehicles shortly before the debtor filed bankruptcy. Since the Court has found no security interest in favor of the Auto Auctions, there was nothing to perfect by taking possession of the cars. Even if the Auto Auctions had had a security interest, Bank One would still have priority since its security interest in the subject vehicles was perfected prior to the time that the Auto Auctions took possession. See WIS. STAT. ANN. § 409.312(5)(a) (West Supp. 1991). This argument is therefore without merit.

Finally, counsel for MAA and FAA submitted a "Supplemental Memorandum of Law" to this Court on November 20, 1991. In this memorandum, counsel for the Auto Auctions asserts that certain provisions of the Wisconsin Administrative Code prohibited the debtor from selling vehicles for which it did not have actual title in its possession. Aside from the fact that this memorandum was neither requested by this Court nor timely filed, the arguments raised therein are without merit. As pointed out by counsel for Bank One in a response filed on November 20, 1991, the Wisconsin Administrative Code provision is inapplicable to the present case.[(4)]

In summary, the Court finds that the Auto Auctions do not have a valid security interest in the vehicles transferred by them to the debtor. The Auto Auctions thus have an unsecured claim against the debtor's bankruptcy estate. Accordingly, Bank One's motion for application of funds for payment of its secured claim is granted and Manheim's motion for turnover is denied. Manheim should submit an itemization of its fees and disbursements pursuant to its § 506(c) motion for Court approval. Any balance remaining after payment of Bank One's secured claim against the debtor and

payment of Manheim's approved fees and disbursements will pass to the trustee for distribution pursuant to the provisions of the Bankruptcy Code.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTES:

1. Other language on the document identifies MAA as the "broker" in the transaction.

2. The relevant Florida and Minnesota statutes are Fla. Stat. § 679.302(3)(b) (1990) and Minn. Stat. § 336.9-302(3)(b)(i)(1991), respectively.

3. The relevant Florida and Minnesota Statutes are Fla. Stat. § 319.27 (1990) and Minn. Stat. § 168A.17 (1991), respectively.

4. The Administrative Code provision cited by the Auto Auctions is a licensing provision which regulates the facilities, records, and licenses required of Wisconsin motor vehicle dealers. The debtor's president, moreover, indicated in his affidavit that the Auto Auctions provided him with facsimile copies of the titles to the vehicles purchased so as to ensure compliance with such Wisconsin administrative provisions.