

**United States Bankruptcy Court  
Western District of Wisconsin**

Cite as: [Unpublished]

**Michael E. Kepler, Trustee, Plaintiff v. American Family Insurance Company, Defendant**  
(In re David C. Larson and Valerie A. Larson, Debtors)  
Bankruptcy Case No. 96-32800-7, Adv. Case No. 96-3200-7

United States Bankruptcy Court  
W.D. Wisconsin, Madison Division

March 5, 1997

Michael E. Kepler, Kepler & Peyton, Madison, WI, for the plaintiff.

Teresa A. Mueller and Barrett J. Corneille, Bell, Metzner, Gierhart & Moore, S.C., Madison, WI, for the defendant.

Robert D. Martin, United States Bankruptcy Judge

**MEMORANDUM DECISION**

The parties stipulated to the following facts: Paul Burkhardt was the owner of a 1987 Buick Grand National, as noted on the certificate of title. On June 21, 1995, Mr. Burkhardt entered into an agreement with David Larson, a used motor vehicle dealer, placing the Buick for sale on consignment at Capitol Corvette. Mr. Burkhardt did not give Mr. Larson a copy of the title certificate nor leave one at Capitol Corvette. If the vehicle was not sold, it was to be returned to Mr. Burkhardt. Mr. Larson did not sell the car as of July 11, 1996 when the involuntary bankruptcy was filed. On July 5, 1996, the Fitchburg Police Department released the car to Mr. Burkhardt after he showed the police his certificate of title and a copy of the consignment agreement. Mr. Burkhardt never filed a financing statement with the Secretary of State with respect to the consignment of his car at Capitol Corvette. The trustee made demand upon Mr. Burkhardt for return of the Buick, but Mr. Burkhardt refused. On September 18, 1996, the trustee filed an adversary proceeding against Mr. Burkhardt to recover the

Buick pursuant to §547. Thereafter, Mr. Burkhardt filed a claim with his automobile insurer, American Family Insurance Company, which paid Mr. Burkhardt \$19,000 for his car in return for an assignment of Mr. Burkhardt's rights, claims, actions, causes of action, title and interest in the Buick. American Family now holds the certificate of title. The transfer of the car back to Mr. Burkhardt was made while the debtor was insolent and within 90 days of the date of the petition. The parties also stipulated that "[i]f none of the other defenses apply then the fifth element of a preference under §547(b)(5) has been met." (Stipulation of Facts at ¶14). However, we read ¶14 as not precluding American Family from asserting the §402.326(3)(b) defense.<sup>1</sup> No other facts have been proved. The matter is before the court on cross motions for summary judgment.

American Family's motion for summary judgment is denied. Rule 56 provides that a motion for summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Becker v. Tenenbaum-Hill Associates, Inc., 914 F.2d 107, 110 (7<sup>th</sup> Cir. 1990). Essentially American Family makes two arguments: First, it claims only Mr. Burkhardt has an ownership interest in the Buick. Consequently, there was no transfer of the debtor's interest in property under §547. Alternatively, American Family argues the court should except consumers from the notice and filing requirements of the consignment statute, Wis. Stat. §402.326.

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<sup>1</sup>§547(a)(5) provides:

[The trustee may avoid any transfer] that enables such creditor to receive more than such creditor would receive if —

- (A) the cases 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.

The §402.326(3)(b) defense, if proved, would give Mr. Burkhardt an interest in his car superior to those of the trustee and Mr. Larson's secured creditors. Accordingly, under §547(a)(5), Mr. Burkhardt would have received no more by keeping his car than he would have had he left his car at Capitol Corvette and later filed a claim in Mr. Larson's bankruptcy.

Although these arguments present no genuine issue of material fact, judgment as a matter of law cannot be entered in favor of American Family. As a consignor, Mr. Burkhardt did not properly retain an interest in the Buick, and Wisconsin does not have a consumer exception to the consignment statute.

#### **A. Burkhardt's Interest in the Buick**

American Family claims it is entitled to summary judgment because Mr. Burkhardt retained and perfected a security interest in the Buick under §342.19, while Mr. Larson's inventory creditors did not. Thus, American Family argues, only Mr. Burkhardt has an interest in the Buick, and the trustee cannot recover the car under §547.

Section. §342.19 indeed governs security interests in vehicles:

(1) Unless excepted by s. 342.02, a security interest in a vehicle . . . is not valid against creditors of the owner or subsequent transferees or secured parties of the vehicle unless perfected as provided in this chapter.

(2)[A] security interest is perfected by the delivery to the department of the existing certificate of title, if any, an application for a certificate of title containing the name and address of the secured party, and the required fee. It is perfected as of the time its creation if such delivery is completed within 10 days thereafter, . . . otherwise, as of the time of such delivery.

Wis. Stat. §342.19. American Family cites Milwaukee Mack Sales, Inc. v. First Wisconsin Nat'l

Bank of Milwaukee, 93 Wis.2d 589 (1980), a case in which title was the proper method to perfect a security interest in a vehicle. However, the debtor in Milwaukee Mack was not a licensed car dealer as is Mr. Larson. Security interests created by licensed car dealers are excluded from perfection by title as provided in Wis. Stat. §342.02

This chapter does not apply to or affect:

(3) A security interest in a vehicle created by a . . . dealer who holds the vehicle for sale, which shall be governed by the applicable provisions of ch. 409.

and Wis. Stat. §409.302(3):

(3) The filing provisions of this chapter are not necessary or effective to perfect a security interest in property subject to:

(b) The following vehicle title statutes: s. 342.19 . . . *but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of ss. 409.401 to 409.408 apply to a security interest in that collateral created by that person as debtor;*

Wis. Stat. §409.302 (emphasis added). In short, Article 9 governs security interests created by dealers. Milwaukee Mack does not apply, and Mr. Larson’s inventory creditors have perfected security interests in the Buick irrespective of title.

Mr. Burkhardt does not have a secured interest in the Buick. Even if he could in all other instances retain title, once he put the car on consignment, he had to comply with Wis.Stat. §409.114.

See Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code, ¶1.06[1]

at 1-56 (rev. ed. 1993). Under §409.114, in addition to filing and perfecting by the appropriate method, Mr. Burkhardt was required to give written notice to Mr. Larson’s inventory creditors that he had retained an interest:

(1) A person who delivers goods under a consignment which is not a security interest<sup>2</sup> and who would be required to file under this chapter by s. 402.326(3)(c) has priority

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<sup>2</sup>American Family argues Mr. Burkhardt retained a “security interest” in the Buick even though Mr. Burkhardt put his car on consignment at a fixed price. A “true” or “price-fixing” consignment creates a sales agency in which goods are delivered to a dealer for resale. Armor All Products v. Amoco Oil Co., 194 Wis.2d 35, 51 (1995). That is the consignment arrangement in the present case. By contrast, a “false” or “security” consignment involves delivery of goods to a merchant who accepts them because the consignor agrees to take them back in lieu of payment if they are not resold. Columbia Int. Corp. v. Kempfer, 46 Wis.2d 550 (1970). Akin to “pmsi” lenders, the “security” consignor intends to retain a security interest in the consigned goods. For example, if Capitol Corvette had purchased the Buick from Mr. Burkhardt on credit, and Mr. Burkhardt had intended to retain a secured interest until payment in full, Mr. Burkhardt would have been a “security” consignor. While both types of consignments are governed by §402.326, only a “true” consignment is subject to §409.114 — as stated in subsection (1)( “under a consignment which is *not* a security interest . . . .”) However, even if Mr. Burkhardt were a “security” consignor and not a “price-fixer,” the result is the same because he did not comply with the notice requirements of §409.312(3), which governs priorities among conflicting inventory and purchase money security interests in the same collateral.

over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were property of the consignee . . . if:

(a) The consignor complies with the filing provision on sales with respect to consignments (s. 402.326(3)(c)) before the consignee receives possession of the goods; and

(b) The consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and

(c) The holder of the security interest receives the notification before the consignee receives possession of the goods; and

(d) The notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.

(2) In the case of a consignment which is not a security interest and in which the requirements of sub. (1) have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor.

Wis. Stat. §409.114 (emphasis added).

Regarding the first notice requirement in §409.114(1)(a), American Family claims Mr. Burkhardt perfected by title under chapter 342. In support of this, American Family writes “sec. 342.19 is the exclusive means of perfecting” and “[t]hat was done by Paul Burkhardt.” (Defendant’s Brief at p.8). A copy of the title certificate shows Mr. Burkhardt as registered owner but not secured party. (Defendant’s Ex. 1). However, we need not reach the issue of whether title alone perfected Mr. Burkhardt’s interest in the car because under §409.114(1)(b) - (d), Mr. Burkhardt had to give written notification of his retained interest in the Buick to Capitol Corvette’s secured creditors. Mr. Burkhardt did not give such notice before putting the car on consignment. Consequently, under §409.114(2), Mr. Larson’s secured creditors, and by virtue of 11 U.S.C. §544, the trustee have an interest that primes that of Mr. Burkhardt. Unless Mr. Burkhardt can prove an exception to §402.326(3), Mr. Larson had

an interest in the Buick such that Mr. Burkhardt's recovery of his car was a transfer of the debtor's interest in property. That transfer was to Mr. Burkhardt, a creditor, on behalf of the antecedent debt that arose from the consignment, and Mr. Burkhardt received more than he would have in Chapter 7 had the transfer not been made. But for an exception to §402.326(3), all of the elements of §547 have been met, and American Family's motion for summary judgment must be denied.

## **B. The Consumer Exception**

The consumer exception to §402.326(3) which American Family argues in the alternative is also not grounds for summary judgment. American Family says such an exception is warranted because Mr. Burkhardt did not attempt to retain a secret interest in the Buick to defraud Capitol Corvette's other creditors, and as a consumer, Mr. Burkhardt thought retaining title was enough to ostensibly retain ownership:

To require more from an individual owner-consignor than required by the Motor Vehicle statutes would have the effect of giving a favored position to commercial lenders . . . over unsophisticated consumers, frustrating the purposes of Chapter 342 and the Uniform Commercial Code.

(Defendant's Brief at p.16). A consumer exception may be in the works for the revised Uniform Commercial Code, but Wisconsin has not yet amended §402.326 as other have states.<sup>3</sup> Until the Wisconsin Legislature changes the UCC in Wisconsin, we are bound by the current version of

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<sup>3</sup>Section 2326 of the California Uniform Commercial Code provides in relevant part:

(5) If a person delivers or consigns for sale goods which the person used or bought for use for personal, family, or household purposes, these goods do not become the property of the deliverer or consignee unless the deliverer or consignee purchases and fully pays for the goods. Nothing in this subdivision shall prevent the deliverer or consignee from acting as the deliverer's agent to transfer title to these goods to a buyer who pays the full purchase price. Any payment received by the deliverer or consignee from a buyer of these goods, less any amount deducted from the payment for commissions, fees, or expenses, is the property of the deliverer and shall not be subject to the claims of the deliverer's or consignee's creditors.

§402.326. Summary judgment based on a consumer exception argument must be denied.

## **II. Cross Motion for Summary Judgment**

The trustee cross-moves for summary judgment claiming that as a matter of law the trustee has proven all of the elements of §547. The trustee's cross motion is granted as to all but the fifth element of §547 — whether the transfer enabled Mr. Burkhardt to receive more than he would receive in Chapter 7 had the transfer not been made. Because the car was on consignment, Wis. Stat. §402.326(3) governs whether Mr. Burkhardt's interest in the car primes that of Mr. Larson and his secured creditors. Mr. Burkhardt did not "comply with the filing provisions of Article 9" — which means §409.411 for "true" consignments — in satisfaction of the subsection (c) exception to §402.326(3). However, whether American Family can prove the subsection (b) exception — that Mr. Larson is generally known by his creditors to be substantially engaged in selling the goods of others — is a triable issue. Since American Family has joined the Motion to Consolidate the §402.326(3)(b) defense, the court will reserve ruling until that defense is tried.

For the foregoing reasons, it is ordered that the motion of American Family for summary judgment be denied and the motion of the trustee be granted in part, consistent with this opinion. Judgment may be so entered by the Clerk.