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§ 547(c)(3)(B)  
FRBP 9006(a)

Roost v. GMAC (In re Boyer)

Adv.# 96-6223-aer  
Main Case # 696-60987-aer7

9/18/97

AER

published

The court held that FRBP 9006(a) applied to extend the 20 day perfection period of §547(c)(3)(B) to the next business day, if the 20th day lands on a Saturday, Sunday or legal holiday. The Court reasoned that perfection was an affirmative act (and thereby procedural) which is necessary to preserve the defense, analogizing the grace period to a statute of limitations.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	696-60987-aer7
SCOTT LAWRENCE BOYER and	)	
CHRISTEN MARIE BOYER,	)	
	)	
Debtors.	)	
<hr/>		
ERIC R.T. ROOST, Trustee,	)	Adversary Proceeding
	)	No. 96-6223-aer
Plaintiff,	)	
	)	
v.	)	
	)	
GENERAL MOTORS ACCEPTANCE CORP.,	)	MEMORANDUM OPINION
	)	
Defendant.	)	

This matter comes before the court for trial upon stipulated facts.

BACKGROUND

The plaintiff-trustee brought this adversary proceeding to avoid defendant's security interest in a vehicle as a preferential transfer pursuant to 11 U.S.C. § 547. On March 11, 1997, the "Pre-trial Order and Stipulated Facts" was filed herein. The parties have agreed to submit this matter for decision upon the facts

1 contained in the Pre-trial Order and Stipulated Facts and a  
2 Supplement to Pre-trial Order and Stipulated Facts which was  
3 received by this court on May 21, 1997. This opinion incorporates  
4 the stipulated facts presented by the parties as the court's  
5 findings of fact; they will not be set forth at length.

6 Suffice it to say the pertinent facts are that on December  
7 11, 1995, one of the debtors purchased a 1994 GMC Jimmy vehicle (the  
8 vehicle) from a dealer. The debtor received possession of the  
9 vehicle on that same date. In addition, on that same date, a  
10 security interest was granted in the form of a retail installment  
11 contract signed by the debtor. The dealer's interest in the vehicle  
12 has been assigned to the defendant. The application for title and  
13 registration was filed with the Oregon Motor Vehicles Department  
14 (DMV) on January 2, 1996. Twenty days from December 11, 1995, was  
15 Sunday, December 31, 1995. Monday, January 1, 1996, was a federal  
16 and state holiday. DMV was closed on both December 31, 1995 and  
17 January 1, 1996. The debtors filed their Chapter 7 petition,  
18 herein, on March 13, 1996.

19 The parties have agreed that the plaintiff has carried his  
20 burden of proof to establish a prima facie case for avoidance of a  
21 preferential transfer pursuant to 11 U.S.C. § 547(b). The  
22 defendant, however, maintains that an affirmative defense to  
23 preference avoidance set forth in 11 U.S.C. § 547(c)(3) applies,  
24 hence, the transfer of the security interest in the vehicle may not  
25 be avoided by plaintiff. The court has heard the oral argument of  
26 the parties and has reviewed their written submissions.

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ISSUE

The parties have agreed that if Bankruptcy Rule 9006(a) applies, defendant has perfected its security interest within the 20 days allowed by 11 U.S.C. § 547(c) (3) and prevails. If Bankruptcy Rule 9006(a) is inapplicable, as argued by plaintiff, then perfection occurred outside the 20 day grace period and plaintiff prevails. Thus, the sole issue to be decided by this court is whether or not Bankruptcy Rule 9006(a) operates to extend the 20 days allowed for perfection contained in 11 U.S.C. § 547(c) (3) when the last day to achieve perfection falls on a Saturday, Sunday or Legal Holiday.

DISCUSSION

All statutory references are to the Bankruptcy Code, Title 11 United States Code unless otherwise indicated.

Section 547(c) provides in pertinent part:

The trustee may not avoid under this section a transfer -

(3) that creates a security interest in property acquired by the debtor-

(A) to the extent such security interest secures new value that was-

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

1 Here, the parties have agreed that all of the elements of  
2 § 547(c)(3) are present with the exception of § 547(c)(3)(B) which  
3 allows 20 days for the defendant to perfect its security interest in  
4 the vehicle.

5 We must turn. . .to the applicable state law to  
6 determine the method for perfecting a security  
7 interest. . .

8 In Oregon, a creditor perfects its interest in a  
9 motor vehicle by applying for notation of the security  
10 interest on the certificate of title. O.R.S. §  
803.097(1). If the application contains all the  
11 necessary information, and is accompanied by all the  
12 required documentation, 'the security interest is  
13 perfected as of the date marked by the division on the  
14 application.' O.R.S. §803.097(3).

15 In re Loken, 175 B.R. 56 at 60, 61 (9th Cir. BAP 1994).

16 Here, it is clear that defendant perfected its security  
17 interest in the vehicle on January 2, 1996 as agreed by the parties.  
18 Bankruptcy Rule 9006(a) provides in pertinent part:

19 In computing any period of time prescribed or allowed  
20 by these Rules or by the Federal Rules of Civil  
21 Procedure made applicable to these Rules, by the local  
22 rules, by order of court, or by any applicable  
23 statute, the date of the act, event, or default from  
24 which the designated period of time begins to run  
25 shall not be included. The last day of the period so  
26 computed shall be included unless it is a Saturday, a  
Sunday, or a legal holiday, . . .in which event the  
period runs until the end of the next day which is not  
one of the aforementioned days. (Emphasis added).

27 On its face, Bankruptcy Rule 9006(a) clearly applies,  
28 compelling a conclusion that the defendant has perfected its  
29 security interest in the vehicle within the time allowed. The  
30 plaintiff contends, however, that Bankruptcy Rule 9006(a) is  
31 inapplicable to the affirmative defenses asserted under § 547(c).

1 In brief, the plaintiff's argument is that the Bankruptcy  
2 Rules are procedural, not substantive. These procedural rules may  
3 not either enlarge or abridge substantive rights, See 28 U.S.C.  
4 § 2075<sup>1</sup>. Here, the grace period provided in § 547(c)(3)(B) is a  
5 substantive element of defendant's affirmative defense.  
6 Accordingly, Bankruptcy Rule 9006(a) may not be applied to extend  
7 that period of time.

8 Plaintiff relies heavily upon In re Ross, 193 B.R. 902  
9 (Bankr. W.D. Mo. 1996). There, the court discussed the difference  
10 between substantive and procedural statutes noting that statutes  
11 which are substantive define and regulate rights; they are  
12 procedural if they neither impair nor enlarge such rights but merely  
13 prescribe a method for enforcing them or obtaining a redress for a  
14 grievance. Based upon that analysis, the Ross court concluded that:

15 Section 547(c)(3)(B) clearly defines and regulates the  
16 substantive rights of a secured party. It provides  
17 that if a secured party perfects its security interest  
18 on or before 20 days after the debtor receives  
19 possession, then it acquires the right of an  
20 affirmative defense against the trustee's preference  
power. This provision deals with the establishment of  
the right of a secured party to defend against a  
trustee's preference action, and is not related to the  
procedural considerations regarding the actual  
assertion of the defense.

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22 <sup>1</sup>28 U.S.C. §2075 provides, in pertinent part:

23 The Supreme Court shall have the power to prescribe by  
24 general rules, the forms of process, writs, pleadings, and  
25 motions, and the practice and procedure in cases under Title  
11.

26 Such Rules shall not abridge, enlarge, or modify any  
substantive right.

1 193 B.R. at 905, 906.

2 In addition, plaintiff relies upon the recent Bankruptcy Appellate  
3 Panel case of In re Bergel, 185 B.R. 338 (9th Cir. BAP 1995).

4 A number of cases decided prior to the Ross decision have,  
5 however, held that Bankruptcy Rule 9006(a) does apply to the grace  
6 period provided by § 547(c)(3)(B) or the related grace period  
7 specified in § 547(e)(2)(A)<sup>2</sup>. See In re Lamons, 121 B.R. 748  
8 (Bankr. S.D. Ohio 1990); In re Saffron, 134 B.R. 62 (Bankr. M.D. Ga.  
9 1991); and In re Plante, 38 B.R. 239 (Bankr. D. Me. 1984). Indeed,  
10 in an unpublished letter opinion, Judge Higdon, has considered this  
11 issue. She concluded that the application of fairness in the legal  
12 process clearly requires that Bankruptcy Rule 9006(a) be applied.<sup>3</sup>

13 There appears to be little law in this circuit dealing with  
14 the issue at hand. In In re Loken, 175 B.R. 56 (9th Cir. BAP 1994)  
15 the court held that a security interest which was perfected outside  
16 the 10 day grace period<sup>4</sup> (in that case the 12th day) did not qualify  
17 for the enabling loan defense provided under § 547(c)(3). In Loken,  
18 however, the 10th and 11th days were not weekend days or holidays.

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20 <sup>2</sup>Section 547(e)(2)(A) provides in part:

21 (2) For the purposes of this section.. .a transfer is made-  
22 (A) at the time such transfer takes effect between the  
23 transferor and the transferee, if such transfer is  
perfected at, or within 10 days after, such time, except  
as provided in subsection (c)(3)(B);

24 <sup>3</sup>Long et. al. v. Selco Credit Union, (In re Wisner), Case No. 92-  
25 6043-H (Bankr. D. Or. Feb. 3, 1993) (letter op.) (Higdon, J.).

26 <sup>4</sup>Section 547(c)(3)(B) was amended in 1994 to increase the 10 day grace  
period to 20 days.

1 Both parties cite the Bergel, opinion to support their respective  
2 positions.

3 In Bergel, the trustee sought to avoid a judgment lien as a  
4 preference. The trustee argued that Bankruptcy Rule 9006(a) could  
5 be applied to extend the 90 day preference period of § 547(b)(4)(A)<sup>5</sup>  
6 when the 90th day falls on a Saturday, Sunday, or legal holiday.  
7 The court rejected the trustee's argument. Noting the difference  
8 between substantive and procedural statutes the court concluded:

9 It is clear that the power to avoid any preferential  
10 transfer within 90 days before the date the petition  
11 was filed is a substantive element of a cause of  
12 action under § 547(b). Section 547(b) does not  
13 require any affirmative act by the trustee. Rather,  
14 it creates a statutory period in which certain  
15 transfers are avoidable by the trustee.

16 We therefore hold that the use of Rule 9006(a) to  
17 extend the preference period beyond the limitations  
18 set forth in § 547(b)(4)(a) is an impermissible  
19 enlargement of the trustee's substantive right to  
20 avoid transfers. (Emphasis added).  
21 185 B.R. at 341.

22 It is noteworthy that the Bergel court did not address the  
23 issue presented here, the 20 day grace period provided in  
24 § 547(c)(3)(B). Plaintiff argues that the same result applies by  
25 analogy.

26 The court, in Bergel, however, noted that the 90 day  
preference period, which is part of the trustee's cause of action,

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<sup>5</sup>Section 547(b) provides in part:

[T]he trustee may avoid any transfer of an interest of the  
debtor in property -

(4) made-

(A) on or within 90 days before the date of  
the filing of the petition;

1 does not require any affirmative act on the part of the trustee. In  
2 short, the trustee need not take any action during the 90 day period  
3 in order to preserve his avoidance powers. Indeed, such action  
4 would be impossible since the 90 day reach back applies pre-  
5 petition.

6 The same result does not apply to the grace period provided  
7 for perfection in § 547(c)(3)(B). The defendant must perfect its  
8 security interest, as allowed by state law, within the 20 day grace  
9 period in order preserve its right to the affirmative defense.  
10 Thus, the grace period is analogous to a statute of limitations.

11 Courts have consistently held that Bankruptcy Rule 9006(a)  
12 applies in computing whether or not an adversary proceeding has been  
13 timely commenced under § 546<sup>6</sup>. See In re Oro Import Company, Inc.,  
14 69 B.R. 6 (Bankr. S.D. Fla 1986); In re Kaelin Associates Electrical  
15 Construction, Inc., 70 B.R. 412 (Bankr. E.D. Penn. 1987); and In re  
16 Hanna, 72 F.3d 114 (9th Cir. 1995).

17 Further, "[t]his circuit has stated that a party challenging  
18 a bankruptcy rule has a 'heavy burden' of showing that the rule

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19 <sup>6</sup> § 546(a) An action or proceeding under section 544, 545, 547,  
20 548, or 553 of this title may not be commenced after the  
21 earlier of-

22 (1) the later of-

23 (A) 2 years after the entry of the order for  
24 relief; or

25 (B) 1 year after the appointment or election  
26 of the first trustee under section 702, 1104,  
1163, 1202, or 1302 of this title if such  
appointment or such election occurs before the  
expiration of the period specified in  
subparagraph (A); or

(2) the time the case is closed or dismissed.

1 deals with a matter of substance rather than procedure." In re  
2 Hill, 811 F.2d 484, 487 (9th Cir. 1987). This court notes that the  
3 application of the position advocated by the plaintiff could  
4 substantially reduce the amount of time available for a secured  
5 creditor to perfect a purchase money security interest or enabling  
6 loan. In some instances, the period of time could be as short as 17  
7 days, clearly abridging rights provided by Congress in enacting  
8 § 547(c) (3).

#### 9 CONCLUSION

10 Here, perfection of the defendant's security interest  
11 required that an affirmative act be done by the defendant, namely,  
12 the application for notation of its security interest on the  
13 certificate of title with the DMV. The DMV marked defendant's  
14 application on January 2, 1996, the first business day following the  
15 20th day in this case. Accordingly, under the rationale set forth  
16 in Bergel, and Hill, Bankruptcy Rule 9006(a) applies, extending the  
17 20 day grace period to and including January 2, 1996. This court  
18 declines to follow the result reached by the court in Ross.

19 The defendant has carried its burden of proof to establish  
20 the affirmative defense to the plaintiff's preference avoidance  
21 powers as set forth in § 547(c) (3) and is entitled to a judgment in  
22 its favor.

23 This opinion constitutes the court's findings of fact and  
24 conclusions of law pursuant to Bankruptcy Rule 7052; they shall not  
25 be separately stated.  
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ALBERT E. RADCLIFFE  
Bankruptcy Judge

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