

522(f)(2)
ORS 23.160(1)(c) ✓
ORS 23.160(1)(d)

In re Ficke
685-07184(a)

PSW 2/13/1986

To decide whether a debtor may have the benefits of lien avoidance under 522(f)(2) the court must make a dual determination. First, the court must determine whether the debtor has a valid exemption. Second, if the debtor has a valid exemption under state law, the court must determine if the debtor may under 522(f)(2) avoid a lien which impairs this valid exemption.

A truck equipped with a refrigerator unit and originally used for dairy delivery does not constitute a "tool of the trade" within the meaning of ORS 23.160(1)(c) where debtor does not wish to continue dairy delivery but use the truck for yard work. Such a vehicle may be claimed as exempt under ORS 23.160(1)(d) as a vehicle.

The availability of lien avoidance is governed by federal law. Vehicles are not listed in 522(f)(2). So the debtor can avoid the lien only if the vehicle is a tool of the trade under federal law. A truck with a refrigerator unit does not qualify as a tool of the trade under federal law since possession will not enable the debtor to continue the practice of his trade or profession. Therefore, the motion to invalidate the creditor's lien is denied.

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S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

FEB 13 1986

TERENCE H. DUNN, CLERK
BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)	
)	
DAVE DON FICKE and)	Case No. 685-07184(a)
SHARON FICKE, fdba Dave Ficke)	
Distributors,)	
)	FINDINGS OF FACT AND
_____ Debtors.)	CONCLUSIONS OF LAW

This matter is before the court upon the motion of David D. Ficke and Sharon Ficke (Debtors) to invalidate a lien held by Echo Spring Dairy (Creditor) on a 1971 Chevrolet dairy truck pursuant to the provisions of 11 USC 522(f)(2). Having heard testimony and reviewed the file, the court makes the following findings of fact:

1. Debtor David D. Ficke used the truck in his former business as a distributor of Echo Spring dairy products.
2. The truck bears Dairy Product Association logos on its sides and back, and is refrigerated.
3. On September 13, 1983 Debtors gave Creditor a non-purchase money security interest in the delivery truck to secure monies owed by the Debtors for Creditor's dairy products delivered by Debtor David D. Ficke. Creditor validly perfected

1 its security interest in the truck by notation on the certificate
2 of title.

3 4. David Ficke continued in business for three years and
4 stopped deliveries on January 31, 1985. He then notified the
5 Creditor of his intent to cease his business as an Echo Spring
6 Dairy distributor.

7 5. Debtors filed a chapter 7 petition on February 12, 1985.

8 6. Debtor David Ficke is presently unemployed. At trial he
9 testified that he wishes to use the truck in starting his own
10 yard maintenance business. He has been doing yard work for his
11 mother-in-law for one and one-half years and has received
12 requests from the neighbors to work for them. He has not as yet
13 engaged in such work commercially. At trial Debtor submitted a
14 copy of a leaflet advertising his yard maintenance service. He
15 testified that he had prepared the leaflets two to three months
16 prior to the hearing but had not yet distributed them.

17 7. By agreement of the parties, creditor took possession of
18 the truck on November 6, 1985 and continues in possession of the
19 truck. The truck has not been used since repossession.

20 8. Debtor has claimed the truck as exempt under ORS
21 23.160(1)(c) and (d).

22 The court makes the following conclusions of law:

23 1. Section 522(f) provides:

24 . . . the debtor may avoid the fixing of a lien on an
25 interest of the debtor in property to the extent that
26 such lien impairs an exemption to which the debtor
27 would have been entitled under subsection (b) of this
28 section, if such lien is . . . (2) a nonpossessory,
nonpurchase-money security interest in any . . . (B)
implements, professional books, or tools of the trade
of the debtor (emphasis added)

1 The issues presented are two. First, may the Debtors avoid
2 a lien under §522(f)(2) placed on a vehicle which has been
3 declared exempt pursuant to the provisions of ORS 23.160(1)(d)?
4 Second, may the Debtors avoid a lien under §522(f)(2) placed on a
5 vehicle which has been declared exempt pursuant to the provisions
6 of ORS 23.160(1)(c)?

7 2. In order to decide whether a debtor may have the
8 benefits of lien avoidance under §522(f)(2), the court must make
9 a dual determination. First, the court must determine if the
10 debtor has a valid exemption. Second, if the debtor has a valid
11 exemption under state law, the court must determine if the debtor
12 may, under §522(f)(2) avoid a lien which impairs this valid
13 exemption.

14 3. The status of the exemption must be determined as of the
15 date of the filing of the petition. Garcia v. Lincoln Bank (In
16 re Garcia) No. 380-02961, unpublished op. (Bankr. D.or. April 27,
17 1981).

18 4. Oregon has chosen to "opt out" of the federal exemptions
19 statute. Thus the Oregon exemption provisions apply pursuant to
20 11 USC 522(b)(2). ORS 23.160(1)(c) permits a debtor to claim as
21 exempt "[T]he tools, implements, apparatus . . . necessary to
22 enable the . . . debtor to carry on the trade, occupation or
23 profession by which the . . . debtor habitually earns a living,
24 to the value of \$750." ORS 23.160(1)(d) permits the debtor to
25 claim as exempt "[A] vehicle to the value of \$1,200. . . .
26 'vehicle' includes an automobile, truck, trailer, truck and
27 trailer or other motor vehicle."

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1 5. The United States Bankruptcy Court for the District of
2 Oregon has held that a vehicle constitutes a tool of the trade
3 under ORS 23.160(1)(c) only if it is "uniquely suited for and
4 principally used in connection with a principal business
5 activity." Lindsay v. U.S. Bank (In re Lindsay) 29 Bankr. 25, 26
6 (Bankr. D.Or. 1983), cited with approval in In re Moss, 34 Bankr.
7 395 (Bankr. D.Or. 1983). "In order for an item to be considered
8 a 'tool of the trade' of the debtor the item must be necessary
9 for the present employment of the debtor rather than for some
10 theoretical future employment. TransAmerica Financial Services
11 v. Rigert (In re Rigert) No. 381-02404, unpublished op. (Bankr.
12 D.Or. Jan. 7, 1982).

13 6. In the case at hand the Debtor David D. Ficke ceased
14 making deliveries on January 31, 1985. He filed bankruptcy on
15 February 12, 1985. He has no intention of continuing to work in
16 dairy product delivery. Thus he was no longer using the truck to
17 make a living when he filed his petition. Garcia, supra.

18 7. The truck is not "uniquely suited" for yard work; its
19 refrigeration unit is unnecessary for yard work. Yardwork does
20 not constitute Debtor's principal business activity; he has never
21 done yardwork commercially.

22 8. Debtors may not classify the truck as a "tool of trade"
23 based on "some theoretical future employment." Rigert, supra.
24 Therefore, Debtors cannot exempt the truck as a "tool of the
25 trade" under ORS 23.160(1)(c).

26 9. Debtors may however claim the truck as exempt as a
27 vehicle under ORS 23.160(1)(d).

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1 10. Federal law determines the availability of lien
2 avoidance. In re Thompson, 750 F.2d. 628, 630 (8th Cir. 1984).
3 11 USC 522(f)(2) allows avoidance of nonpossessory nonpurchase
4 money security interests in only those items specifically listed
5 in subsection (A), (B) and (C). Vehicles are not listed. Thus
6 the Debtors may avoid the creditor's lien under §522(f)(2) only
7 if this court finds the vehicle is a "tool of the trade" within
8 the meaning of that subsection.

9 11. A vehicle may qualify as a "tool of the trade" under
10 §522(f)(2)(B) if it is "necessary to and used by the debtor to
11 carry on his trade." In re Meyers, supra, 2 Bankr. at 605. A
12 "tool of the trade" is one which allows a "working debtor to
13 continue the practice of his trade or profession." In re LaFond,
14 45 Bankr. 195, 199 (Bankr. D.Minn. 1984). The debtor must prove
15 that he is "legitimately engaged in a trade which currently and
16 regularly uses the specific implements or tools exempted."
17 Yoder v. U.S. (In re Yoder) 32 Bankr. 777 (Bankr. W.D. Pa. 1983)
18 quoted with approval in LaFond, supra, 45 Bankr. at 200.

19 12. A truck with a refrigeration unit is not "necessary to"
20 carrying on the business of yardwork. Meyers, supra, 2 Bankr. at
21 605. Debtor David Ficke has never used the truck for yardwork.
22 Id. Thus possession of the truck will not enable Debtor David
23 Ficke to "continue the practice of his trade or profession."
24 LaFond, supra, 45 Bankr. at 199. Yardworkers do not "currently
25 and regularly" use delivery trucks outfitted with refrigeration
26 units. Therefore, the delivery truck is not a "tool of the
27 trade" within the meaning of §522(f)(2)(B). The Debtors' motion
28 to invalidate the Creditor's lien should be denied.

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An order consistent herewith shall be entered.

DATED at Eugene, Oregon this 13th day of February, 1986.



POLLY S. WILHARDT
Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
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IN RE)
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DAVE DON FICKE and) Case No. 685-07184(a)
SHARON FICKE, fdba Dave Ficke)
Distributors,)
)
) ORDER
_____ Debtors.)

The court, having entered its Findings of Fact and
Conclusions of Law in the above proceedings, and based thereon,
IT IS HEREBY ORDERED that the motion of Debtors David D.
Ficke and Sharon Ficke to invalidate the lien held by Creditor
Echo Spring Dairy on the 1971 Chevrolet dairy truck is denied.
DATED at Eugene, Oregon this 13th day of February, 1986.


POLLY S. WILHARDT
Bankruptcy Judge