In the United States Bankruptcy Court

for the Northern District of Iowa

TIMOTHY D. RODEMEYER and PATRICIA RODEMEYER *Debtor(s).*	Bankruptcy No. X88-00069M Chapter 7
UNITED STATES OF AMERICA *Plaintiff(s)* vs. TIMOTHY D. RODEMEYER and PATRICIA RODEMEYER LARRY S. EIDE Trustee HAMPTON STATE BANK ARDALE SAVINGS BANK and AID ASSOCIATION FOR LUTHERANS *Defendant(s)*	Adversary No. X88-0226M

MEMORANDUM AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

The matters before the court are motions for summary judgment filed by defendant Hampton State Bank and defendants Timothy D. and Patricia Rodemeyer. The trustee, Larry Eide" joined in the motions. A hearing was held on May 9, 1989 in Mason City, Iowa.

The court now issues the following order which includes findings of fact and conclusions of law. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K).

FINDINGS OF FACT

On September 28, 1988, the United States of America, on behalf of the Farmers Home Administration (FmHA), filed a complaint to determine secured status. FmHA requests the court to enter an order declaring that FmHA has a valid, perfected security interest in a life insurance policy to the extent of $21,000.00. FmHA also requests the court to enter an order compelling a turnover of the funds.

Defendant Hampton State Bank (BANK) filed a motion for summary judgment on January 25, 1989. Bank stated in its motion that the court's findings in Eide v. Rodemeyer (In re Rodemeyer), 99 B.R. 416 (Bankr. N.D. Iowa 1989) preclude as a matter of law the relief sought by FmHA.

The parties to this adversary proceeding are essentially the same as those parties involved in In re Rodemeyer, Id. and the consolidated objections to the life insurance exemption. The findings of fact in that adversary/contested mattered proceeding are contained on pages 417-421 of the court's Memorandum of Decision.

The parties agree that as a result of those findings, there are no remaining genuine issues of material fact in dispute in the present case. The findings of fact as determined by the court in that case are incorporated herein by reference as fully as though set out.

DISCUSSION

I.

"Summary judgment is appropriate only when there is no genuine issue of material fact so that the dispute may be decided on purely legal grounds." AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987) citing Holloway v. Lockhart, 813 F.2d 874, 878 (8th Cir. 1987).

II.

FmHA contends that it has a perfected security interest in the Rodemeyers' life insurance policy or its cash surrender value because it had a perfected security interest in debtors' farm products, the proceeds of which were used to increase the cash value of the life insurance. FmHA argues that its security interest remains valid and enforceable since the proceeds are traceable to the life insurance.

No one disputes that FmHA had a valid perfected security interest in debtors' farm products. Debtors sold those farm products and deposited the proceeds in a savings account at Ardale State Bank. Cash in which FmHA had no interest was also deposited in the account. Shortly before the life insurance transaction, Rodemeyer removed the funds in that account and transferred them to his attorney who deposited them in the trust account of Hobson, Cady & Drew. Disbursements from the attorney trust account were used to fund the life insurance transaction and to make other payments on behalf of the debtors.

Defendants argue that because of the filing of bankruptcy, Iowa Code § 554.9306(4) applies in this case to cut off FmHA's interest in the policy or its cash value. That Iowa Code subsection states as follows:

> In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:
>
> a. in identifiable noncash proceeds and in separate deposit accounts containing only proceeds;
> b. in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;
> c. in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and
> d. in all cash and deposit accounts of the debtor, in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph "d" is
>
> I. subject to any right of setoff; and
>
> ii. limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured

> party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs "a" through "c" of this subsection.

Iowa Code § 554.9306(4).

Defendants argue that this court's earlier ruling determining that the cash proceeds of the farm products were commingled with other money prior to the bankruptcy precludes FmHA as a matter of law from obtaining the relief sought in the complaint because the policy increase was purchased from non-identifiable cash proceeds. Defendants also argue that in the event of insolvency, a creditor must have a perfected security interest in the proceeds in order to obtain the benefits of § 554.9306(4). Defendants contend that FmHA does not have a perfected security interest in the life insurance policy.

> Iowa law defines "proceeds" as follows:
>
> "I Proceeds' include whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds . . . money, checks, deposit accounts and the like are 'cash proceeds'. All other proceeds are 'noncash proceeds'."

Iowa § 554.9306(l). The court concludes that at the time of bankruptcy, the life insurance policy or part of its cash surrender value was a noncash proceed under Iowa Code § 554.9306(l). More particularly, the estate's interest in the policy, to the extent of the converted FmHA proceeds ($20,525.80), is an identifiable noncash proceed within the meaning of Iowa Code § 554.9306(4)(a). Identifiability is not defined by the Uniform Commercial Code. Generally the "identifiability" of proceeds has depended on the ability of the secured creditor to trace his collateral into the proceed. Moister v. National Bank of Georgia (Matter of Guaranteed Muffler Supply Co., Inc.), 1 B.R. 324, 328 (Bankr. N.D. Ga. 1979); Coachmen Industries, Inc. v. Security Trust & Savings Bank of Shenandoah, 329 N.W.2d 648, 650 (Iowa 1983); Michigan National Bank v. Flowers Mobile Home Sales, Inc., 26 N.C. App. 690, 217 S.E.2d 108, 17 U.C.C. Rep.Serv. 861 (1975).

This court has previously ruled that the collateral of FmHA is traceable to the life insurance policy. The court does not believe that the arguments of the defendants with regard to § 554.9306(4)(b)-(d) are applicable to the perfection issue. The asset in question was an identifiable non-cash proceed at the time of filing. It was not a deposit account, a check, or money. The fact that the life insurance purchase was made with commingled funds does not prevent it from being identifiable as a non-cash proceed on the date of the filing of the bankruptcy case. The restrictions on commingling as stated in Iowa Code § 554.9306(4)(b) apply to cash proceeds, not to identifiable non-cash proceeds. There does not appear to be any limitation on the ability to trace previously commingled funds into identifiable non-cash proceeds under section 554.9306(4)(a) of the Iowa Code.

It must be determined whether FmHA's interest is perfected. FmHA's security interest in farm products and in their proceeds was perfected. In order to have continuous perfection in the life insurance policy as a proceed, FmHA would have to meet one of the requirements of Iowa Code § 554.9306(3).

This section states:

> 3. The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected

> security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless
>
> a. a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or
> b. a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or
> c. a security interest in the proceeds is perfected before the expiration of the ten-day period.
>
> Except as provided in this section, security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this Article for original collateral of the same type.

At the time of the bankruptcy filing, the proceed in question was life insurance, not cash, and therefore subsection 3(b) of § 554.9306 would not apply to give FmHA perfected status in the policy or its cash value. Nor is subsection 3(a) of help to FmHA. For continuous perfection under that subsection, perfection in the proceed results only under circumstances where perfection as to the proceed as original collateral would normally be attained by filing in the same location where filing took place for the initial collateral. The provisions of Article 9 of the Uniform Commercial Code do not apply to "a transfer of an interest or claim in or under any policy of insurance. . . ." as original collateral. Iowa Code § 554.9104(g).(fn.l) Perfection of a security interest in the life insurance policy would be accomplished by the execution of a written assignment. Paragraph 12.3 of the life insurance policy (plaintiff's Exhibit 1 in Eide v. Rodemeyer, 99 B.R. 416 (Bankr. N.D. Iowa 1989)) states:

1 This subsection does make § 9306 applicable where proceeds are involved, hence this analysis.

> "You may assign this certificate as collateral. The assignment must be in writing. AAL is not responsible for the validity of the assignment or for any action taken on this certificate that is inconsistent with the assignment before it is received at the home office."

Generally, an assignment of a life insurance policy is effective if a written assignment is delivered to the assignee. Petty v. Mutual Benefit Life Ins. Co., 235 Iowa 455, 15 N.W.2d 613, 617 (1944). If an insurance policy is silent as to method of assignment, "then the act on the part of the assured that signifies an intention to assign the policy will be binding." Id. at 618.

The insurance policy specifically states that the assignment must be in writing. There is no evidence that the debtor ever assigned his interest in the life insurance policy to FmHA. Since perfection in an insurance policy as original collateral is not accomplished by the filing of a financing statement, § 554.9306(3)(a) (first clause) is not of help to FmHA. Furthermore, since the policy was "second tier" proceeds (proceeds purchased with cash proceeds), FmHA could only be aided, if at all, by 9-306(3)(a) if the collateral description in the original financing statement indicated the type of property constituting the proceed. Section 554.9306(3)(a). An examination of the financing statements in evidence shows that the original financing statement filed January 23, 1985 did not include a description of the life insurance policy as a contract right, a general intangible or any other "type" of collateral by which a life insurance policy might be reasonably described. However, an amendment to the financing statement filed January 27, 1987 did add "included accounts Ind contract rights."

Reference to the security agreements themselves show that this amendment was specifically limited to certain entitlements of the debtor in government farm programs.

Subsections 554.9306(3)(a) and (b) not being of help to FmHA in establishing continuous perfection in the policy, FmHA would have become unperfected in the insurance policy within ten days of its purchase unless FmHA took steps to perfect in the insurance, as original collateral under § 554.9306 (3)(c). This, as has been discussed, would have required some action involving the insurance company, and not the filing of a financing statement with the Secretary of State. There is no evidence that FmHA took any steps to perfect its security interest in the policy under § 554.9306(3)(c). The funds in Rodemeyers' account in the Ardale Bank were turned over to Cady on January 6, 1988. While the evidence is not clear as to when Cady paid AAL, it is logical that Cady paid the money to AAL sometime between January 6, 1988 and the day of the filing of bankruptcy on January 15, 1988. Depending on the actual transfer date of the funds to the insurance company, FmHA would have lost its perfected status in the insurance policy sometime between January 16 and January 25, 1988, inclusive.

The court concludes that by no later than January 25, 1988 FmHA's perfected security interest in the policy or its cash surrender value became unperfected. Iowa Code § 554.9306(3). See Security Sav. Bank of Marshalltown, Iowa v. United States, 440 F.Supp. 444, 446-447 (S.D. Iowa 1977). The court further concludes that § 554.9306(4)(a) did not relieve FmHA of its need to perfect under 554.9306(3) (c). FmHA lost its perfected status in the insurance ten days after the purchase of the insurance even if this ten-day period elapsed after the filing of bankruptcy. Bankruptcy would not have stayed FmHA from taking action to perfect its interest in the policy. 11 U.S.C. § 362(b)(3). Because there was no stay, 11 U.S.C. § 108(c) would not have arguably aided FmHA.

Pursuant to 11 U.S.C. § 544(a)(1), the trustee has the rights and powers of a hypothetical judicial lien creditor as of the date of the filing of the bankruptcy petition. Norwest Bank, St. Paul v. Bergquist (In re Rolain), 823 F.2d 198, 199 (8th Cir. 1987). In Iowa, an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected. Iowa Code § 554.9301. Unless FmHA's constructive trust theory saves it, the bankruptcy trustee's rights in the non-exempt portion of the cash value of the policy would be prior to the rights of FmHA in those same proceeds.

III.

FmHA argues that it is entitled to recover under the concept of a constructive trust even if it does not have a properly perfected security interest in the life insurance policy. The defendants argue that the court should not consider FmHA's argument regarding the constructive trusts since FmHA did not make any reference to the creation of a constructive trust in its complaint.

Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. Bankr. R. 7008. Rule 8(a) provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain
>
> 1. a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it,

2. a short and plain statement of the claim showing that the pleader is entitled to relief, and
3. a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Fed.R.Civ.P. 8(a).

FmHA filed a complaint alleging certain facts and requesting the court to determine that FmHA has a validly perfected security interest in the life insurance fund and to require the turnover of the life insurance fund to FmHA. The complaint does not specifically request the court to establish a constructive trust in favor of FmHA. However, the allegations contained in the complaint are sufficient to permit the court to consider such equitable relief. It is not necessary that FmHA specifically request the employment of a constructive trust or other equitable remedy in its complaint in order for the court to grant such relief. Rule 54(c) of the Federal Rules of Civil Procedure, which is incorporated by Bankr. R. 7054, states:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which a party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

"The function of an affirmative federal pleading, under Fed.R.Civ.P. 8(a)(2), is to give the opposing party fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved." Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 714 (8th Cir. 1979), citing 5 C. Wright and A. Miller, Federal Practice and Procedure § 1215 at 108-110 (1969). The requirement that the plaintiff must succeed on the theories that are pleaded or not at all has been abolished by the Federal Rules of Civil Procedure. See Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974). One commentator has stated:

> The federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits."

5 C. Wright and A. Miller, Federal Practice and Procedure, § 1219 at 145 (1969). See also Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 714 (8th Cir. 1979).

The court does not believe that any of the defendants are prejudiced by the court's considering the constructive trust argument of FmHA. The court brought to the parties' attention at the hearing on May 9, 1989 the possibility of imposing a constructive trust or of employing other equitable relief as a remedy in favor of FmHA based on the facts of the case. The parties were given an opportunity to respond to this. Additionally, the court granted the parties twenty days to file post-hearing briefs. The court specifically requested the parties to address the constructive trust issue. The plaintiff and defendant Hampton State Bank have both filed briefs as to the imposition of a constructive trust. The court will, therefore, consider the appropriateness of imposing a constructive trust or similar equitable remedy.

IV.

FmHA argues that the constructive trust should be imposed in this case based on this court's finding in Eide v. Rodemeyer (In re Rodemeyer), 99 B.R. 416 (Bankr. N.D. Iowa 1989) that the debtor willfully

converted the FmHA security interest. The court held in Rodemeyer that the debtor had willfully and maliciously converted the FmHA security interest to the extent of the proceeds in the farm products.

In order to determine if a constructive trust or equitable lien should be imposed on property, courts look to the law of the state where the property is located. In re Flight Transp. Corp. Securities Litigation, 730 F.2d 1128, 1136 (8th Cir. 1984), cert. denied 105 S.Ct. 1169 (1985).

This court believes that, if warranted, the imposition of an equitable lien would be a more correct remedy. The principles of a constructive trust and an equitable lien are quite similar. Therefore, courts often overlook the trust-lien distinction. Lacy, Constructive Trusts and Equitable Liens in Iowa, 40 Iowa L.Rev. 107, 153 (1954).

An equitable lien arises "where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched. . . ." RESTATEMENT OF RESTITUTION § 161 (1937). The equitable lien is "essentially a special, and limited, form of the constructive trust." D. Dobbs, Handbook on the Law of Remedies § 4.3 at 249 (1973). The difference between a constructive trust and equitable lien is that the constructive trust gives the plaintiff complete title while an equitable lien gives the plaintiff a security interest only in the property which then can be used to satisfy a money claim. Dobbs § 4.3 at 249. R. Hillman, Contract Remedies, Equity, and Restitution in Iowa § 3.3B, at 68 (1979).

An equitable lien is more appropriate when the property to which the equitable lien would attach belongs only partly to the plaintiff. Smith v. Village Enterprises, 208 N.W.2d 35, 40 (Iowa 1973). See also Bogel v. Goldsworthy, 202 Iowa 764, 211 N.W. 257, 260 (1926). The value of the debtor's life insurance policy was approximately $25,820.90. FmHA has an unperfected security interest to the extent of $20,525.80. Therefore, FmHA would not be entitled to the entire life insurance policy. Consequently, an equitable lien to the extent of $20,525.80 would be the most appropriate remedy in this case, if relief is to be accorded to FmHA.

An equitable lien is an appropriate restitutional remedy to prevent unjust enrichment. Matter of Receivership of Hollingsworth, 386 N.W.2d 93, 96 (Iowa 1986). D. Dobbs, Handbook on the Law of Remedies § 4.1 at 223-227 (1973). Several factors will be considered by the court in determining whether the unsecured creditors in Rodemeyer will be unjustly enriched if FmHA is denied an equitable lien on the cash value of the insurance. In making this determination, the court believes it relevant to consider that it is Rodemeyers' unsecured creditors, not Rodemeyers, that will benefit from a determination adverse to FmHA. Also, the court considers that it is the policy of the Code to permit unsecured creditors as a whole to benefit from the avoidance of transfers made to hinder, delay or defraud particular creditors. 11 U.S.C. § 548(a)(1). The court also considers that FmHA could have taken steps to insure that the proceeds of its collateral (until used to pay FLB) would be segregated in an account over which it had some protective control. This FmHA did not do; it merely suggested that Rodemeyers place the cash proceeds in a bank account pending resolution with FLB. FLB is a business lender, not a novice.

The critical issue is whether the unsecured creditors would be unjustly enriched by the court's failing to impose the equitable remedy requested. In order to reach this determination, the court believes it relevant to know whether in the absence of wrongdoing by Rodemeyers, and assuming that bankruptcy took place, FmHA would have had a perfected security interest in the policy. Clearly, had there been no conversion and no bankruptcy, FmHA would have retained its perfected status in the identifiable cash proceeds in the Ardale Bank. It is arguable that the court should examine the unjust enrichment issue as of when the debtor's wrongdoing occurred without considering subsequent events

such as bankruptcy. Therefore, the court might consider that on the date Rodemeyer converted the FmHA collateral proceeds to life insurance, FmHA had a perfected security interest in these cash proceeds. As a result of the conversion, FmHA lost its perfected interest. It is arguable that to permit the "strong arm" powers of the trustee to defeat FmHA's unsecured interest would result in unjust enrichment. "But for" the wrongdoing of the debtor, FmHA would have had a perfected security interest in the identifiable proceeds.

However, I believe that the determination of unjust enrichment might also be made through an examination of all occurrences including the debtors' bankruptcy filing. Had no wrongful conversion taken place and had the collateral proceeds remained at the Ardale Bank commingled and untampered with until the date of bankruptcy, FmHA may still have had an unperfected interest. This could be the effect of Iowa Code § 554.9306(4)(d). This Code section would have limited the perfected security interest of FmHA in the existing proceeds to those cash proceeds "received by the debtor within ten days before the institution of the insolvency proceeding . . . " 554.9306(4)(d).

This Code section limits the secured creditor with a perfected security interest in proceeds to a portion of a deposit account which does not exceed the amount of any cash proceeds of its collateral which were received by the debtor within ten days prior to the filing of bankruptcy. J. White & R. Summers, Uniform Commercial Code, 2nd edition, § 24-6, at 1016 (1980). This section would have limited FmHA to proceeds of its collateral received by the debtor on or after January 5, 1988. There is insufficient evidence before the court to determine whether the debtor received proceeds from the sale of collateral pledged to FmHA on or after that date.

Because the court believes the evidence is insufficient on this factual point, the court cannot grant defendants' motions for summary judgment. It will be necessary to determine, through trial, what proceeds of FmHA collateral, if any, came into the hands of the debtor within ten days of filing of the bankruptcy case. This may be a factual matter which may be agreed to among the parties after some discovery. Absent such agreement, it is necessary to set final trial on this matter. Because there is a material factual matter which may be in dispute which this court believes relevant to the issue of unjust enrichment, the motions for summary judgment must be denied.

V.

Although additional factual evidence must be adduced prior to the court's final ruling, a legal issue raised by Hampton State Bank may be resolved at this juncture.

The defendant Hampton State Bank argues that even if a constructive trust could apply in this case, it would be of no benefit since FmHA's interest would be avoided by the trustee under 11 U.S.C. § 544. Pursuant to 11 U.S.C. § 544(a)(1), the trustee has the rights and powers of a hypothetical judicial lien creditor as of the date of the filing of the bankruptcy petition.

The court must, however, also look at 11 U.S.C. § 541(d). That section provides:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by a debtor but as to which the debtor retains legal title to service or supervise the servicing of such a mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

The debtors had legal title to the life insurance policies. However, since an equitable lien could be imposed upon the insurance, the debtors may not have an equitable interest in such property. It may be that the life insurance policies are not property of the estate under 11 U.S.C. § 541. In re Flight Transp. Corp. Securities Litigation, 730 F.2d 1128, 1136 (8th Cir. 1984), cert. denied 105 S.Ct. 1169 (1985); In re N. S. Garrott & Sons, 772 F.2d 462, 467 (8th Cir. 1985).

The defendant Hampton State Bank argues that 11 U.S.C. § § 541(d) and 544(a) operate independently and therefore property not part of the estate under § 541(d) may come into the estate under § 544(a). The defendant cites a number of cases in support of that position. See In re Cascade Oil Co., Inc., 65 B.R. 35, 39 (Bankr. D. Kan. 1986); In re Great Plains Western Ranch Co., Inc., 38 B.R. 899, 902-05 (Bankr. C.D. Cal. 1984).

The court disagrees with the defendant's argument. The trustee may not avoid an interest under 11 U.S.C. § 544(a) if the property is not property of the estate pursuant to 11 U.S.C. § 541(d). The Eighth Circuit Court of Appeals has stated:

> Imposition of a constructive trust under state law upon a debtor's property generally confers on the true owner of the property an equitable interest in the property superior to the trustee's or debtors in possession. The estate succeeds to only such title in rights in the property as the debtor had at the time the petition was filed. Thus, where under state law the debtor's conduct gives rise to a constructive trust, so that the debtor holds only bare legal title to this property, subject to a duty to reconvey it to the rightful owner, the estate would generally hold the property subject to the same restrictions.

In re N. S. Garrott & Sons, 772 F.2d 462, 467 (8th Cir. 1985) (citations omitted).

The Second, Fifth and Eleventh Circuit Court of Appeals have agreed that the provisions defining property of the estate in § 541(d) prevail over a trustee's § 544 strong-arm powers. Sanyo Electric, Inc. v. Howard's Appliance Corp. (In re Howard's Ap- pliance Corp.), 874 F.2d 88, 93 (2nd Cir. 1989); Matter of Quality Holstein Leasing, 752 F.2d 1009, 1013 (5th Cir. 1985); In re General Coffee Corp., 828 F.2d 699, 704 (11th Cir. 1987), cert. denied 108 S.Ct. 1470 (1988).

This court agrees with those courts that have held that the provisions of § 541(d) prevail over the trustee's § 544 strong-arm powers. The court recognizes that the above-cited circuit court cases dealt with constructive trusts rather than equitable liens. An equitable lien and a constructive trust are substantially the same. D. Dobbs, Handbook on the Law of Remedies, § 4.3 at 249 (1973). Therefore, the court believes that an equitable lien in bankruptcy should be treated the same as a constructive trust.

However, even if property that is not part of the estate under § 541(d) could come into the estate under § 544(a), FmHA's equitable lien might be superior to the trustee's interest. Section 544(a)(1) of the Code provides the trustee with the rights and powers of a hypothetical judicial lien creditor as of the date of the filing of the bankruptcy petition. Norwest Bank, St. Paul **v.** Bergquist (In re Rolain), 823 F.2d 198, 199 (8th Cir. 1987). An equitable lien is superior to the rights of all persons except bona fide purchasers. RESTATEMENT OF RESTITUTION § 168 (1937). See City National Bank of Marshalltown v. Crohan, 135 Iowa 230, 112 N.W. 793, 796 (1907). (Equitable lien prevails over attaching creditor since creditor has no greater rights than debtor.) In this case, FmHA may have an

equitable lien on the life insurance policy. FmHA does not claim an equitable lien on real property. Therefore, the trustee would not be a bona fide purchaser for value. See 11 U.S.C. § 544(a)(3).

ORDER

The motions for summary judgment filed by the Rodemeyers and Hampton State Bank and joined in by the trustee, Larry Eide, are denied. The clerk shall set a telephonic scheduling conference during which the court will determine the final progression to trial of this adversary proceeding.

SO ORDERED THIS 25th DAY OF AUGUST, 1989.

William L. Edmonds
Chief Bankruptcy Judge

In the United States Bankruptcy Court

for the Northern District of Iowa

TIMOTHY D. RODEMEYER and PATRICIA RODEMEYER	Bankruptcy No. X88-00069M
Debtors.	Chapter 7
UNITED STATES OF AMERICA	Adversary No. X88-0226M
Plaintiff	
vs.	
TIMOTHY D. RODEMEYER and PATRICIA RODEMEYER LARRY S. EIDE Trustee HAMPTON STATE BANK and AID ASSOCIATION FOR LUTHERANS	
Defendants	

SUPPLEMENTAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The matter before the court is a complaint by United States of America on behalf of the Farmers Home Administration (FmHA) seeking a determination of its rights in a portion of the cash value of a certain life insurance policy. Based on motions for summary judgment, the court by order filed August 25, 1989, decided many factual and legal issues relating to this adversary proceeding.[1] There remains the issue of whether FmHA is entitled to the imposition of a constructive trust or equitable lien on the portion of the cash value of the life insurance policy held not to be exempt. On November 8, 1989, the parties filed a stipulation of facts; they have indicated by a pre-trial statement that the

court may decide the matter without further trial based on the stipulation and on its previous rulings in this case. All parties have waived oral argument.

1 Other factual findings necessary to a determination of this adversary proceeding were issued in Eide v. Rodemeyer (In re Rodemever), 99 B.R. 416 (Bankr. N.D. Iowa 1989).

The court now supplements its findings and conclusions as set out in its memorandum and order filed August 25, 1989.

SUPPLEMENTAL FINDINGS OF FACT

The following findings of fact are adopted from the stipulation of facts submitted by the parties to the court on November 8, 1989:

During the calendar year.1987, FmHA held a valid perfected security interest in the Debtors' farm products. Certain of those farm products were sold during the calendar year 1987 and with the consent of FmHA the proceeds were deposited in a bank account maintained by the Debtors solely in their names at Aredale State Bank. Cash in which FmHA had no security interest was also deposited in said account. On or about October 10, 1987, the balance in said bank account was in the amount of $27,000.00. Except for interest income earned on this balance, no additional deposits were made to said account either from the proceeds of FmHA collateral or from other sources. On or about January 5, 1988, debtors withdrew from said bank account the sum of $27,150.00 which was subsequently paid to Hobson, Cady & Drew Trust Account by check dated January 5, 1988, and paid by the drawing bank, Aredale State Bank, on January 6, 1988. No other monies of the debtors were deposited into the attorney trust account. Disbursements from the attorney trust account were used to fund the life insurance transaction and to make other payments on behalf of the Debtors prior to the filing of the Voluntary Petition herein on January 15, 1988. The Debtors did not receive or deposit in their bank account maintained at the Aredale State Bank or the attorney trust account any money from the sale of collateral pledged to FmHA during the time period commencing January 1, 1988, and ending January 15, 1988, inclusive.

The FmHA is making claim herein only to the $20,525.80, which funds were ruled not exempt by Order of the Court on January 3, 1989.

DISCUSSION

FmHA seeks imposition of a constructive trust on a portion of the cash value of a life insurance policy which was purchased by Timothy Rodemeyer with wrongfully converted proceeds of FmHA collateral. The court has previously determined that on the date of bankruptcy FmHA did not have a perfected security interest in the cash value even to the extent of the converted proceeds. Based upon the foregoing stipulated facts, the court concludes that had the proceeds not been converted, FmHA would not have had a perfected security interest in them on the date of the filing. Had there been no conversion as of the filing date, FmHA's perfected security interest in the proceeds would have been "limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings. . . ." Iowa Code § 554.9306(4)(d)(ii). The parties have stipulated that debtors did not receive any proceeds of FmHA's collateral within the ten days prior to the bankruptcy filing. Absent conversion, § 554.9306(4)(d)(ii) would have precluded FmHA from claiming a perfected interest in any proceeds in the bank account on the date of filing. To impose a constructive trust or equitable lien on the wrongfully converted proceeds, arguably, would

place FmHA in a better position than it would have enjoyed absent the conversion. This is only one consideration, however, in determining whether an equitable lien should be imposed. As previously discussed, an equitable lien is an appropriate remedy to prevent injustice and particularly unjust enrichment. Tubbs v. United Central Bank, N.A., Des Moines, Iowa, ___ N.W.2d ___, 1990 Westlaw WL 5297 at page 24 (Iowa, Jan. 24, 1990). Timothy Rodemeyer, contrary to his agreement with FmHA, converted FmHA cash proceeds into life insurance. Generally, the Eighth Circuit Court cases dealing with situations such as this deal with them in the context of the constructive trust. The constructive trust's effect upon property of the estate is discussed in In re Flight Transp. Corp. Securities Litigation, 730 F.2d 1128, 1136 (8th Cir. 1984), cert. denied sub nom, Reavis & McGrath v. Antinore, 469 U.S. 1207, 105 S.Ct. 1169, 84 L.Ed.2d 320 (1985). There it is said that "[w]here, under state law, the debtor's fraud or other wrongful conduct gives rise to a constructive trust, so that the debtor holds only bare legal title to the property, subject to a duty to reconvey it to the rightful owner, the estate will generally hold the property subject to the same restrictions," Id. at 1136.

The circuit has also said that "imposition of a constructive trust under state law upon a bankruptcy debtor's property generally confers on the true owner of the property an equitable interest in the property superior to the trustees." Vineyard v. McKenzie (Matter of Quality Holstein Leasing), 752 F.2d 1009, 1012 (5th Cir. 1985). The estate succeeds to only such title and rights in the property as the debtor had at the time the petition was filed." In re N.S. Garrott & Sons, 772 F.2d 462, 467 (8th Cir. 1985).

If under state law the trust attaches prior to the filing of the bankruptcy petition, the trust beneficiary would normally recover its equitable interest in the property in the bankruptcy proceedings. Matter of Quality Holstein Leasing, 752 F.2d 1009, 1014 (5th Cir. 1985). In its previous Memorandum filed August 25, 1989, the court indicated that several factors affected its decision in this case. These bear repeating. FmHA could have required segregation of its proceeds in a separate bank account and yet did not do so; this militates against the imposition of an equitable lien. Also, had there been no conversion, and had the money remained in the commingled account at the time of the filing of the bankruptcy, FmHA would have been unperfected as to all monies in the account. This latter factor, however, does not supply an answer to the problem. It merely illustrates the tension between Iowa Code § 554.9306(4) and the state law remedies of equitable liens or constructive trusts. The court has found no case law indicating that § 9306(4) displaces equitable principles involving constructive trusts or equitable liens. Iowa Code § 554.1103. General Motors Acceptance Corp. v. Jones (In re Czebotor), 5 B.R. 379, 381 (Bankr. E.D. Wash. 1980). Shelton v. Erwin, 472 F.2d 1118 (8th Cir. 1973) may hold otherwise but its holding deals only with equitable liens based on contract, not tort.

Several factors favor the imposition of an equitable remedy. First and foremost is the wrongdoing of the debtor. Second, as the court found in its previous decision, FmHA had demanded a return of the proceeds while they were still in the commingled account. The factual finding was as follows:

When it became apparent that no agreement with FLB would be reached, FmHA, by Dunn, requested a return of the funds to FmHA. Dunn advised Timothy Rodemeyer that (sic) on January 4, 1988 that FmHA would not release those funds for a payment to FLB while Rodemeyers' operating loan to FmHA was delinquent. Rodemeyer responded to Dunn that the money had already been released.

Eide v. Rodemever (In re Rodemeyer), 99 B.R. 416, 420 (Bankr. N.D. Iowa 1989). At the time of the demand, FmHA had a perfected security interest in the majority of the proceeds in the bank account. Furthermore, FmHA's remedy at law appears inadequate. If adequate, the equitable remedy would not lie. Berry Seed Co. v. Hutchings, 74 N.W.2d 233, 236, 247 Iowa 417 (1956). FmHA's obtaining a

portion of its claim through a trustee's distribution of the cash value to all creditors would not be an adequate remedy at law.

While this is a close case and the result is not free from doubt, based on the facts before the court and the legal issues under consideration, this court believes it would be equitable to impose a lien against the insurance policy's cash value to the extent of the cash proceeds converted from FmHA.

The court's decision is supported by a recent ruling of the Court of Appeals for the Second Circuit. Sanyo Electric, Inc. v. Howard's Appliance Corp. (In re Howard's Appliance Corp.), 874 F.2d 88 (2nd Cir. 1989). This court would be reluctant to follow that ruling in this case absent intentional wrongdoing by Rodemeyer. In Sanyo Electric, Inc. v. Howard's Appliance Corp., id., a constructive trust was imposed upon a chapter 11 debtor's inventory, absent wrongdoing by the debtor, because of the debtor's failure to disclose to a secured party the storage of inventory in a state not covered by the original security documents, which failure prevented the secured creditor from perfecting the creditor's security interest in the new location. Because of Rodemeyer's wrongdoing, the imposition of an equitable lien seems more appropriate. See In re Woodfield Furniture Clearance Center of Suffolk, Inc., 102 B.R. 327, 334 (Bankr. E.D. N.Y. 1989); Security State Bank of Tyndall, S.D. v. Cap (In re Van Winkle), 54 B.R. 466, 469 (Bankr. D. S.D. 1985).

FmHA's equitable lien would relate back to the date of debtor's wrongdoing. This would be no later than the date of the purchase of the life insurance which occurred between January 6, 1988 and January 15, 1988. It may also have been at the time the debtor distributed the FmHA proceeds to its attorney on January 6, 1988, and may have occurred as early as January 4, 1988, when Timothy Rodemeyer refused the FmHA demand to return the funds. Mumm v. Adametz (In re Adametz), 53 B.R. 299, 307 (Bankr. W.D. Wis. 1985).

In any event, the wrongdoing occurred prior to the filing of bankruptcy and it is at the time of the wrongdoing that the equitable lien should attach to the proceeds. The court adopts the date of the refusal to return the funds--January 4, 1988. Any interest of the bankruptcy estate in the life insurance policy, to the extent of converted proceeds, was one of legal title subject to the equitable interest in FmHA.

Furthermore, the court concludes that the FmHA interest in the insurance policy to the extent of the converted proceeds is superior to any interest of Rodemeyers or Hampton State Bank. Hampton State Bank subordinated its interest in the converted collateral to the FmHA, and its only arguments in the case have been that the trustee's interest is prior and superior to that of FmHA's.

CONCLUSIONS OF LAW

At the time of the filing of the bankruptcy case, FmHA had an equitable lien against debtors' AAL insurance policy to the extent of $20,525.80. This lien interest was prior and superior to any interest of the estate created by the filing of the petition in bankruptcy, and was superior to any interest in such proceeds claimed by Hampton State Bank or the Rodemeyers.

ORDER

IT IS ORDERED that judgment shall enter that the United States of America, on behalf of the Farmers Home Administration, had on the date of the creation of this bankruptcy estate, an equitable

lien on the estate's interest in the debtor's life insurance policy with Aid Association for Lutherans and that the equitable interest was superior to the interest of debtors and Hampton State Bank.

SO ORDERED ON THIS 9th DAY OF FEBRUARY 1990.

William L. Edmonds
Chief Bankruptcy Judge