

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

January 16, 1997

John S. Lovald, Esq.
Plaintiff-Chapter 7 Trustee
Post Office Box 66
Pierre, South Dakota 57501

Scott M. Perrenoud, Esq.
Counsel for Defendant
Post Office Box 1205
Sioux Falls, South Dakota 57101

Subject: **Trustee v. First Premier Bank (In re Gregory S.
and Patricia L. Bassler)**, Adversary No. 96-4031;
Chapter 7; Bankr. No. 96-40328

Dear Trustee and Counsel:

The matter before the Court is the Trustee's complaint for a determination that Defendant First Premier Bank does not have a lien on a vehicle because the lien was not perfected prepetition. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that whether the Bank has a perfected lien on the subject vehicle, which is titled in Illinois, is a question of Illinois law and that under Illinois law, the lien was not perfected prepetition.

STIPULATED FACTS. On January 13, 1995, Gregory S. and Patricia L. Bassler owned a 1993 GMC Safari SLX van, the subject vehicle, which was titled in South Dakota. GMAC held a first lien on the vehicle. On November 21, 1995, First Premier Bank (the Bank) advanced the Bassler's sufficient funds to refinance the van and obtained a security agreement covering the van. In the security agreement, the Basslers and the Bank established South Dakota for the jurisdiction and governing law for any related lawsuits. GMAC received the payment from the Basslers on November 27, 1995, released its lien that day, and mailed the title to the Bank. When the Bank received the title from GMAC, it first learned that the vehicle was no longer titled in South Dakota but was titled in

Re: Gregory and Patricia Bassler
January 16, 1997
Page 2

Illinois. The Bank contacted the Basslers on various occasions and asked them to get the vehicle reregistered in South Dakota and to have the Bank's lien noted on the title. The Basslers failed to do so.

On May 6, 1996, the Basslers (Debtors) filed a bankruptcy petition. On the date of filing, Debtors had possession of the vehicle and the Bank had possession of the Illinois certificate of title.

On June 28, 1996, the case trustee filed a complaint against the Bank seeking to have the Bank's security interest voided. The Bank answered the complaint and argued that Debtors deceived the Bank as to the state of registration and that its possession of the Illinois certificate of title constituted perfection. The Bank also argued that it should be subrogated to GMAC's secured interest, if the Bank's lien is found to be unperfected.

The parties submitted the matter on stipulated facts, briefs, and reply briefs. In his briefs, the Trustee argued that Debtors' failure to obtain a South Dakota title did not constitute an exception to South Dakota's perfection statutes and that the Bank failed to take the necessary steps to protect its interest. The Trustee noted that South Dakota's laws on perfection of secured interests in vehicle are very narrow.

In its briefs, the Bank relied on *In re Littlejohn*, 519 F.2d 356 (10th Cir. 1975)¹, for its proposition that the Trustee should not be allowed to avoid the Bank's unperfected lien because the Bank had done all it could prepetition to protect its secured interest.

DISCUSSION. While Debtors and the Bank agreed that South Dakota law would control any disputes regarding the creation and nature of the security agreement, these parties could not declare what law governs the perfection of the Bank's security interest since the purpose of perfection is to provide notice to other parties. Instead, state law must govern the perfection of liens on vehicles registered in that state. See *Fousek v. NEPCO Federal Credit Union (In re Peek)*, 31 B.R. 30, 32 (Bankr. D.S.D. 1983). The status of

¹ The Tenth Circuit has abandoned *Littlejohn* due to a statutory change in applicable Kansas law on vehicle lien perfection. *Lentz v. Bank of Independence (In re Kerr)*, 598 F.2d 1206 (10th Cir. 1979).

Re: Gregory and Patricia Bassler
January 16, 1997
Page 3

perfection must be determined based on the certificate of title in existence on the petition date. *Id.* Further, a trustee's avoidance powers must be determined based on the substantive law of the jurisdiction governing the property in question. *Direct Air, Inc. v. Fairchild Aircraft, Inc. (In re Direct Air, Inc.)*, 189 B.R. 444, 450 (Bankr. N.D. Ill. 1995) (citing 4 *Collier on Bankruptcy* ¶544.02). The vehicle in question here was registered in Illinois.

Neither party discussed whether the Bank's security interest was perfected under Illinois law on the petition date. A review of Illinois statutes and case law, however, indicates that lien perfection on a vehicle registered in Illinois is similar to perfection of a lien on a South Dakota vehicle. 625 ILL.COMP.STAT.ANN. 5/3-202(b). As in South Dakota, a lien must be noted on the vehicle's title in Illinois. The major difference is that in Illinois perfection relates back to the date the security interest was created if the old title and a new application that denotes the lien are delivered to the Illinois Secretary of State within 21 days after creation of the security interest. *Id.* If delivery of the old title and application is made more than 21 days after the creation of the security interest, perfection occurs when the delivery is made. *Id.* As in South Dakota, perfection by notation of the lien on the title is the exclusive method of perfecting a security interest on a vehicle in Illinois. 624 ILL.COMP.STAT.ANN. 5/3-207. Also as in South Dakota, a bankruptcy trustee takes priority over an unperfected security interest. 810 ILL.COMP.STAT.ANN. 5/9-301.

At the time of Debtors' petition, the Bank did not have a perfected security interest in the vehicle because its lien was not noted on the existing Illinois certificate of title. The Bank only had possession of the title. Possession of the title does not constitute perfection under Illinois law. Accordingly, the Trustee's interest is superior under § 544(a)(1) and 810 ILL.COMP.STAT.ANN. 5/9-301; *Mottaz v. Keidel (In re Keidel)*, 613 F.2d 172, 173-75 (7th Cir. 1980). The Bank is left unsecured and its lien is preserved for the benefit of the estate's creditors. The delay in perfection of the lien can only be attributed to the Bank and its misplaced reliance on Debtors to protect the Bank's interest. See *McRoberts v. Transouth Financial (In re Bell)*, 194 B.R. 192, 195 (Bankr. S.D. Ill. 1996)

As discussed in *Trustee v. Home Federal Savings Bank (In re Mark J. and Susan X. Steinfurth)*, Adversary No. 96-4032, slip op. at 3, (Bankr. D.S.D. December 23, 1996), appeal filed, (citing *In re*

Case: 96-04031 Form id: 122 Ntc Date: 01/16/97 Off: 4 Page : 1
Total notices mailed: 6

Debtor Bassler, Gregory Scott, Sr. 450 Oak Hill Drive, Sweetwater, TN 37874

Debtor Bassler, Patricia Lynnette 450 Oak Hill Drive, Sweetwater, TN 37874

Defendant First Premier Bank, PO Box 5147, Sioux Falls, SD 57101-1102

Plaintiff Lovald, John S. Box 66, Pierre, SD 57501

Aty Yarnall, Rick A. PO Box J, Sioux Falls, SD 57101-1925

Aty Perrenoud, Scott M. PO Box 1205, Sioux Falls, SD 57101