



SECURED CREDITORS NEED TO CONSIDER INSURANCE

Getting a debtor to sign a security agreement and register a financing statement under Ontario's *Personal Property Security Act* ("PPSA") are steps which a secured creditor must take in Ontario to protect its priority to the debtor's assets vis-à-vis over other creditors.

Although it is typical for security agreements to extend the secured creditor's security interest to the "proceeds" of the collateralized assets (including insurance proceeds) and to obligate the debtor to sufficiently insure the assets and arrange for the secured creditor to be named as "loss payee" under the debtor's applicable insurance policies, secured creditors often fail to "follow up" in this area.

As a recent Ontario case illustrates, failure to be named as "loss payee" under the debtor's insurance policies may be fatal to secured creditors.

In *Chrysler Credit Canada v. Fehr*, (55 O.R. (3d) 630) (Ont. Superior Court of Justice), following default by a car owner to pay his car loan to Chrysler Credit, the car owner was involved in an accident and received all of the insurance proceeds from his insurer, AXA Insurance Company ("AXA"). Although Chrysler Credit did file the typical PPSA registration, AXA did not search for secured creditors and relied on the car owner's false proof of claim that there were "no lienholders" on the vehicle in making payment in full to the car owner. Chrysler Credit was not named as "loss payee" on the vehicle insurance policy and did not arrange for its own separate insurance. Chrysler Credit was unable to claim the insurance proceeds from the car owner who made a voluntary assignment in bankruptcy following the accident. Accordingly, Chrysler Credit sought the Court's assistance in attempting to recover the value of its loan directly from AXA.

The Court in *Chrysler Credit Canada v. Fehr* ruled that, as Chrysler Credit did not have a claim under the insurance contract, it could not recover any monies from AXA and ruled further that AXA owed no "fiduciary duty" to Chrysler Credit to do any PPSA search before making payment in full to the car owner. According to the court, Chrysler Credit was not vulnerable or dependent upon AXA and could have protected itself by refusing to advance the loan to the car owner until it received the insurance certificate naming Chrysler Credit as "loss payee". The burden of this fraud could not be shifted by the court from the secured creditor to the lender.

The lesson to be learned in *Chrysler Credit Canada v. Fehr* is that secured creditors should take all steps necessary to become a "loss payee" under the debtor's insurance policies. Although the execution of a security agreement and PPSA registration will assist with priority issues among

the debtor's creditors, failure to be named as "loss payee" may leave a secured creditor vulnerable if the collateralized assets become damaged or destroyed.

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