Motor Vehicle Security and Recent Amendments to the *Personal Property Security Act*: Not (Quite) As Bad As You Thought

Until recently, a creditor having a security interest in a chattel, such as a motor vehicle, could exercise rights of seizure and sale, either pursuant to the provisions of the security agreement, or pursuant to the rights provided to secured creditors in the *Personal Property Security Act* ("PPSA"), without regard to the exemptions in the *Execution Act* that exclude certain kinds of property from seizures if made pursuant to a Writ of Seizure & Sale issued by the court to an unsecured creditor seeking to collect on a judgment debt.

The Bad News

However, amendments in August, 2008, to s. 62(2) of the PPSA provide that "property that would be exempt under the *Execution Act* from seizure under a writ issued out of a court other than a purchase money security interest…is exempt from the rights of the secured party [to seizure and sale] under subsection [62] (1)". Included in such exemptions under the *Execution Act* is: "A motor vehicle not exceeding the prescribed amount" (which is currently $5650).

Upon first reading, one might conclude that the practical value of taking a security interest in a motor vehicle has been seriously diminished.

However, a secured creditor may yet be able to avoid the application of that exemption:

The (Possibly) Good News

S. 62(2) purports to limit only the creditor's statutory rights of seizure and sale provided under s. 62(1). It does not refer to the distinct contractual rights of seizure and sale that are found in almost every Security Agreement. The latter, arguably, remain unaffected by the new exemption and, therefore, a creditor seizing and selling pursuant to its contractual rights—as distinct from its statutory rights—may not subject to the exemption. This interpretation is not beyond argument, and remains untested in the courts.

And If Not…

Even if the exemption were to apply, a creditor may still seize a vehicle worth more than $5640, but will be liable to pay to the debtor $5650 out of the proceeds of sale, and apply only the surplus in reduction of the outstanding debt.

(Although contrary views have been expressed on this last point, the following provisions appear determinative: Section 3(3) of the *Execution Act* provides: "Where exemption is claimed for a motor vehicle that has a sale value in excess [$5650] plus costs of sale, the motor vehicle is subject to seizure and sale under a writ of execution and the amount referred to in that paragraph shall be paid to the debtor out of the proceeds of sale." Section 4 provides: "The sum to which a debtor is entitled under subsection…3(3) is exempt from attachment or seizure at the instance of a creditor." Taken together, these

provisions are clearly intended to create an exemption of $5650 in value, to permit a debtor to retain or replace a vehicle of that value as a basic necessity of life.

Other (Modestly) Good News

Note that the exemption applies, if at all, only to one vehicle of the debtor to a value of $5650. A debtor who has multiple vehicles will still have only a single exemption. Thus, if the debtor had two vehicles, worth $6k and $15k respectively, a creditor could realize, without deduction, on the $15k vehicle, as the $5650 exemption would be satisfied by the $6k vehicle remaining in the debtor's possession.

Note as well that the exemption does not apply to a "purchase money security interest" ("PMSI"), which would include an interest taken to secure payment out of an existing PMSI.

What To Do?

If the creditor is disposed to realize on a security interest in a defaulting debtor's vehicle which is apparently worth more than $5650, it may proceed to do so pursuant to the right of seizure provided in the security agreement. If faced with demand from the debtor (or his trustee in bankruptcy) for return of the first $5650 of proceeds of sale, the creditor may respond by relying on the interpretation set out under "The (Possibly) Good News" above: The exemption does not apply to a secured creditor's contractual (vs. statutory) rights. One may doubt that many cases will proceed beyond that stage. If the debtor or trustee does take proceedings, there is a sound legal basis for the credit union's position, which, on balance, I think will be supported by the courts—although a contrary result is possible.

Greater caution is recommended in respect of vehicles not clearly worth more than $5650. One may doubt, in any event, whether seizure of such a vehicle is worth the time and expense; and this is all the more true if the possibility of a legal dispute is factored in. Moreover, in the event that creditor's position is successfully challenged in court, a creditor who is found to have wrongfully deprived a debtor of means of transportation, rather than merely withheld, pending adjudication, his share of the proceeds of sale of the collateral, will stand in a less sympathetic position on the issue of liability for the debtor's legal costs.

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