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Determining Priority between Writs and Purchase Money Security Interests in the Province of Manitoba

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PRIORITY OF A PURCHASE MONEY SECURITY INTEREST

The definition of "purchase money security interest" is contained in *The Personal Property Security Act* (Manitoba) (the "PPSA"):

"purchase money security interest" means

- (a) a security interest taken or reserved in collateral to the extent that it secures all or part of its purchase price,
- (b) a security interest taken or reserved in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights,
- (c) the interest of a lessor of goods under a lease for a term of more than one year, and
- (d) the interest of a consignor who delivers goods to a consignee under a commercial consignment,

but does not include a transaction of sale and the lease back to the seller; and for the purpose of this definition, "purchase price" and "value" include credit charges or interest payable in respect of the purchase or a loan given to enable the debtor to acquire rights in the collateral;

To a lender, a “purchase money security interest” is a powerful interest. Indeed, in many circles, it is considered the “holy grail” of security interests. Provided perfection of the purchase money security interest is effected in the manner prescribed by the PPSA, a lender generally has “super-priority” over all other security interests in the same property. However, in the Province of Manitoba, lenders should be wary, even if advancing funds on a “purchase money” basis. If a writ of execution has been entered against the debtor, a purchase money security interest will not take priority.

PRIORITY OF A WRIT

Section 5 of *The Executions Act* (Manitoba) is reproduced below:

Except as hereinafter mentioned or as otherwise provided by another Act of the legislature, every writ of execution against goods and chattels, at and from the time of delivery to the sheriff binds all the goods and chattels, or any interest in all the goods and chattels, of the judgment debtor within the province and takes priority over any security agreement, as defined in The Personal Property Security Act, bill of sale, or assignment for the benefit of all or any of the creditors of the judgment debtor, made by the judgment debtor after the receipt by the sheriff of the writ of execution or which, by virtue of The Personal Property Security Act, has not taken effect prior to that receipt as against the creditor interested under the execution; but it does not take priority over a bona fide sale by the judgment debtor, followed by an actual and continued change of possession, of any of his or her goods and chattels, without actual notice to the purchaser that the writ is in the hands of the sheriff.

To paraphrase, this lengthy provision states that every writ of execution against goods and chattels binds all of the judgment debtor’s personal property at the time of delivery of the writ to the Sheriff. The writ will take priority over any security interest which arises after the receipt of the writ by the Sheriff. The writ does not take priority to a *bona fide* purchaser so long as the purchaser actually takes possession of the good and the purchaser has no actual notice of the writ. Unlike other provinces, a writ of execution cannot be registered in the Personal Property Registry in Manitoba. Rather, a writ of execution can be discovered by visiting www.jus.gov.mb.ca or obtaining a credit bureau report from Equifax. Equifax is provided with weekly “litigation” updates from every court across Canada respecting all consumers and commercial enterprises. However, an Equifax report may not contain an accurate record of all writs registered in Manitoba and lenders should be cautious when relying on such reports.

PRACTICAL ADVICE TO LENDERS

Lenders should note that section 5 gives the writ priority over **any security agreement** entered into after receipt of the writ by the Sheriff. This priority scheme appears to provide the writ with priority over a “purchase money security interest”. Therefore, in order to retain priority to collateral, lenders should either conduct a Court search or obtain an Equifax report before advancing funds on a “purchase money” basis. This, of course, is in addition to conducting a personal property registry search.

CONCLUSION

For more information on this topic, please contact Layh & Associates at (306)743-5520 or visit our website at www.layhlaw.com.