• BANKRUPTCY LAW UPDATE: 30 DAY GOOD RIGHTS STRENGTHENED •

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Significant insolvency law amendments were declared in force as of September 18, 2009 (the "Amendments"). The Amendments were contained in Bill C-55 which received Royal Assent on November 25, 2005 and in Bill C-12 which received Royal assent on December 14, 2007, but the Amendments were not proclaimed into force until September 18, 2009.

One of the Amendments which is now in force strengthens suppliers' rights to repossess goods under s. 81.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]. These supplier rights are commonly referred to as "30 Day Good" rights. This article provides an update on the 30 Day Good rights previously reported in the November, 2008 edition of the *Red Flag*.

The 30 Day Good right under s. 81.1 of the *BIA* is a super-priority claim which allows an unpaid supplier to repossess goods that were delivered to a purchaser, who subsequently becomes bankrupt or is placed under receivership, within 30 days of the bankruptcy or receivership. The super-priority aspect of the 30 Day Good rights means that it ranks above all other claims or rights against the purchaser in respect of the goods delivered by the supplier that fall within the 30 Day Good right requirements. Prior to the Amendments, suppliers viewed the 30 Day Good rights as overly restrictive and it was often difficult for suppliers to effectively exercise their 30 Day Good rights. The Amendments should help to alleviate some of the technical defects and restrictions to assist suppliers in exercising this important unpaid supplier right.

A supplier can now claim the right to repossess goods delivered within 30 days <u>before</u> the purchaser became bankrupt or became a person who is subject to a receivership. Under the old provision, suppliers could only demand to recover goods delivered within the 30 days of the date of presenting its 30 Day Good notice. (In other words, if the purchaser went bankrupt on Day 28 after the goods were delivered, the supplier had to make its demand within two days of the bankruptcy or the 30 Day Good rights expired). The new provision still requires suppliers to act swiftly, but it takes into account the reality that there is often some delay between a bankruptcy and when suppliers learn of a bankruptcy.

To exercise the right, following requirements must be satisfied:

- The supplier presents a written demand for repossession to the purchaser, trustee or receiver, in the prescribed form and containing the details of the transaction, **<u>within a period of 15 days</u>** after the day on which the purchaser became bankrupt or became a person who is subject to a receivership. If no notice is presented within the 15-day period then the 30 Day Good rights expire. The prescribed form is available at <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01944.html>.
- **The supplier will be able to claim goods delivered within 30 days of bankruptcy or receivership (as opposed to 30 days before notice).**
- **The purchaser must be bankrupt or subject to a receivership.** The Amendments expand the application of the right to a receivership where "any property is under the possession or control of a receiver". The old provision was more limited and only applied to a receivership over all or substantially all of the inventory, A/R or other property.

- The goods must be in possession of the purchaser, receiver or trustee. Amendments expand the right to include situation where goods are in possession of purchaser's agent (for example, stored in a warehouse).
- The goods must be identifiable and in the "same state as they were on delivery".
- The goods must not have been resold or be subject to an arm's length agreement for sale.
- After a valid 30 Day Good Notice is delivered, the purchaser, trustee or receiver must either pay the supplier the balance owing or permit the supplier to repossess the goods.

In order to maximize 30 Day Good rights:

- **Suppliers should keep current on purchaser's situation** so that it can learn as quickly as possible if there is a receivership or bankruptcy.
- The trustee in bankruptcy has five days and a receiver has ten days to notify creditors of the proceeding. **Suppliers should act quickly** upon receiving such a notice or otherwise learning that a purchaser is bankrupt or in receivership and send a 30 Day Good notice.
- Where possible, suppliers should have invoicing that tracks serial numbers, batch numbers or other identifying features of goods supplied.
- Avoid terms which extend credit beyond 30 days.

[*Editor's note*: Craig Mills and Margaret Sims are partners in the Financial Services and Insolvency Group of Miller Thomson LLP, and they each represent Court appointed monitors and trustees, debtors, lenders, and other creditors in the insolvency context.

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