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# Financing the Purchase of Vehicles? Beware Some Very Fine Points

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If you lend money to someone to buy a truck or other motor vehicle, make sure not only that the vehicle is insured, but that the insurer is obliged to pay *you* the proceeds of any claim. If you don't, you may never see your money if the vehicle is totalled or stolen.

That is the lesson of a decision earlier this year in an Ontario Superior Court of Justice case in which a lender, *GE Canada Equipment Finance G.P.* was neither listed as the "loss payee" in policies covering two highway tractors it had financed nor the holder of an "assignment of insurance" recorded with the insurer, *ING Insurance Company of Canada.*

Here is the background. GE financed two highway tractors for Brampton Leasing and Rental Inc. by conditional sales contract, properly registering its interest in the tractors under Ontario's Personal Property Security Act (PPSA) and reserving title to them until they were fully paid for.

Brampton leased the vehicles to a third party, or sublessee. The sublease presumably was issued with the consent of GE but the court decision is silent on this point. In any event, the sublessee obtained insurance from ING, naming itself as lessee and Brampton as lessor. The decision states "the evidence demonstrates that ING did not know of GE's interest in the vehicles."

The vehicles were stolen. A claim was made to ING and ING made payment to cover the total loss. Then the vehicles were recovered and ING took possession of them. One was sold and the other remained in the possession of ING.

GE claimed that its security agreement with Brampton as registered with the province under the PPSA entitled it to the vehicles or to the proceeds of their sale. (While not explicitly stated in the case, it is implied that Brampton did not remit the proceeds to GE and subsequently became a bankrupt.)

ING argued that GE's claim was nullified by Ontario's Insurance Act. The regulations under that Act require every motor vehicle insurance policy to incorporate Statutory Condition 6(7), which stipulates that if the insurer "replace(s) the automobile or pays the actual cash value of the automobile, the salvage, if any" becomes the property of the insurer.

In arriving at its decision, the court examined two sections of the PPSA – section 4(1)(c), which provides that the Act does *not* apply to a transfer of an interest in an insurance policy, and section 9, which states that a security agreement is effective against third parties "except as otherwise provided by this *or any other Act*."

The court also considered an earlier Ontario Supreme Court case, *Chrysler Credit Canada v Fehr*, which examined the entitlement of a financier to insurance proceeds and found that subsection 258(3) of the Insurance Act prevents anyone, regardless of their interest, who is not a named insured or loss

payee, from claiming entitlement to the insurance proceeds.

### Lessons Learned

Often, finance companies will allow a borrower or lessee to lease or sublease leased or financed equipment. The results above indicate that the insurer is not obliged to conduct a PPSA search prior to paying out a claim, and further, if the finance company is not named as loss payee, it has no entitlement to claim the insurance proceeds from the insurer.

While finance companies will want to see evidence that the financed equipment is insured, not all will take steps to ensure that they are listed on the insurance policy or that an assignment of insurance is recorded with the insurer.

However, the listing of two loss payees on an automobile policy is not permissible under Ontario law, so the only way to protect the lead financier is for there to be a direct covenant between a sublessee and the finance company and for the finance company to be the only loss payee under the policy. ■