



Impact of Insolvency Law Amendments on Distressed Automotive Parts Supplier Cases

Presentation to
Automotive Parts Manufacturers' Association

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Presentation Overview

- “The Drill” – Approach taken by Suppliers with customers
- Insolvency law amendments – codification with modifications
- Will amendments change approach of Suppliers?
- Suggested areas to implement best practices
- Questions?

“The Drill” - From a Customer’s Perspective

- No or minimal consultation by Supplier prior to its filing
- Threat is an immediate shutdown in supply of parts if Supplier “asks” are not met
- Posture is that little time available to negotiate terms due to severe liquidity constraints (pressure from Bank)
- Other customers’ interests may not be known or aligned (those that can exit quickly vs. those that need time)
- Less willingness/interest in forming customer groups

Common List of Supplier (or Bank) “Asks”

- Price increase or cost contribution
- Accelerated payment terms for A/P
- Limitation on set-offs
- Commit to buy raw, WIP and finished inventory
- Commit not to resource production for set term
- Commit to sale process
- Exit protocol (removal of tooling, dedicated equipment purchase and indemnity for damage/injury)
- Unionized employees may leverage situation

Amendments – Codification with Modifications

- Thumbnail sketch of CCAA and BIA
- Amendments effective September 18, 2009
- Areas of Interest:
 - DIP Loans
 - Termination of contracts
 - Sale of contracts
 - Critical suppliers
 - Receivers

New Regime - General

- Extraordinary powers now expressly mandated by statute, rather than extraordinary exercise of Court's implied jurisdiction
- Under \$5MM debtors filing under BIA will have access to CCAA type extraordinary powers

“The Drill” – Possible Changes

THREAT

- Customer must agree to list of “asks” or shipment of parts stop

Change (BIA s.65.11, CCAA s.32)

- Executory contract repudiation/termination regime
- At least 15 days prior notice
- Opportunity to require hearing
- Generally, 30 days before contract termination can be effective

“The Drill” – Possible Changes

THREAT

- Bank will stop funding unless terms met

Change (BIA s.50.6, CCAA s. 11.2)

- Easier for customers or third parties to provide funding to Supplier on a super-priority basis
- List of factors to be considered in granting priority does not include prejudice to secured creditor specifically
- Overall shift of power away from secured creditors to debtor

“The Drill” – Possible Changes

THREAT

- Critical raw material suppliers will no longer ship unless Customer funds hostage payments

Change (BIA s. , CCAA s. 11.4)

- Critical supplier regime
- A supplier found to be critical can be forced to ship
- But granted super-priority charge over assets to secure payment of future shipments
- (Note: Might not address tooling supplier with repairer lien)
- Practice re pre-filing payable owed to “critical” supplier

“The Drill” – Possible Changes

THREAT

- Incur substantial professionals fees

Change (BIA s.64.2(1)(c), CCAA s.11.52(c))

- Court may order super-priority charge over assets to secure the fees and expenses of “interested persons” – would a customer or group of customers qualify?
- Does threat of an application by a customer(s) in and of itself create leverage?

“The Drill” – Possible Changes

THREAT

- Management self-dealing

Change (BIA ss.96, 65.13 & 63, CCAA s.36.1 & 36)

- Easier to pursue fraudulent self-dealing transactions
- More restrictions on sales to principals and other related parties
- Court can remove and replace directors but difficult test to meet (**BIA s. 64, CCAA s. 11.5**)

“The Drill” – Possible Changes

THREAT

- Monitor close to management such that not discharging duties appropriately or Monitor is conflicted

Change (several different sections of CCAA)

- Checks and balances on Monitor including:
 - Ability to apply to have the Monitor removed
 - Complaints procedure with Office of Superintendent in Bankruptcy
 - Extra reporting requirements on Monitor
 - Duty to examine and pursue related party transactions

New Regime - Risks

- May be legally easier to assign contracts/P.O.s without consent – threaten forced sale
- Receiverships may become more common
- There is added protection from employee successor liabilities for receivers
- Protective rules around termination of contracts and other rules discussed above do not apply to receivers

Areas for Best Practices

- Review all standard contract terms
- Process for monitoring supply base and customers' financial viability – watch for and collect info concerning “Red Flags”
- Process for gathering, maintaining and organizing proper and complete records of all purchaser orders, agreements, tooling bailer waivers, applicable standard terms etc.
- Avoiding battle of the forms
- Avoid risks of alleged verbal contracts and course of dealings waiving or amending written contractual terms/rights
- Be Prepared!

Questions?





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