Financial Services Flash

AIRD & BERLIS LLP
Barristers and Solicitors

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Transfers Under Value

Included among the recent amendments to the *Bankruptcy and Insolvency Act* (the "**BIA**") and the *Companies' Creditors Arrangement Act* (the "**CCAA**") are several provisions which provide new avenues to review transactions characterized as "transfers under value." If a debtor received no consideration for a transfer, or if the value of the consideration received is conspicuously less than the fair market value of the consideration given by the debtor, a trustee or CCAA monitor can now ask the court to declare the transaction void, or to order any party to the transfer, or any other person who was "privy" to the transfer, to pay the debtor's estate the difference between the value received and the value given by the debtor. A person is privy to a transfer if that person is not dealing at arm's length, and directly or indirectly receives a benefit from the transaction or causes a benefit to be received by another person. The "value" of the consideration given and received is established by the trustee or monitor. Where a trustee or monitor refuses or fails to bring such a motion before the court, a creditor can ask the court for permission to bring the motion instead.

In order to successfully attack a "transfer under value" made to an arm's length party, the transfer must have taken place within the year prior to the date of the initial bankruptcy event or commencement of the CCAA proceedings (the "**Initial Event**"); the debtor must have been insolvent on the date of the transfer or have been rendered insolvent by it; and the debtor must have intended to defraud, defeat or delay a creditor. Unlike other classes of reviewable transactions or preferences, there is no presumption of intention here. Thus, since both insolvency and intention are requisite, it may be difficult to successfully challenge an arm's length "transfer under value."

In order to successfully attack a transfer to a non-arm's length party, the transfer needs only to have occurred within the year prior to the date of the Initial Event or, if it occurred within two to five years prior to the Initial Event, the debtor needs to have been insolvent on the date of the transfer or to have been rendered insolvent by it, or the debtor needs to have intended to defraud, defeat or delay a creditor. Note the disjunction: either insolvency or intent must be established if the transfer took place two to five years prior to the questioned transaction, but not both. This makes the evidential burden much lower than it is for arm's length transfers.

The Financial Services Group at Aird & Berlis LLP has a great deal of experience in insolvency proceedings and reviewable transactions. For more information, please contact any member of the Financial Services Group. Details can be found on our **Financial Services, Insolvency and Restructuring web page**, by clicking on **members**.

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