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Insolvency Law

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FRASER MILNER CASGRAIN LLP

COURT ADJOURNS SANCTION HEARING IN ASSET BACKED PAPER CCAA PROCEEDINGS

In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008 CarswellOnt. 2820) the Ontario Court considered an application for the approval of a Plan of Arrangement pursuant to section 6 of the CCAA following a majority vote in support of the Plan. However, there was also opposition to the sanction of the Plan, primarily on the basis that certain releases contained within the Plan were beyond the jurisdiction of the Court to sanction, or were overly broad and therefore offensive to the “fair and reasonable” test, as the releases in question were broad enough to effect a release for fraudulent activities.

Ultimately, the Court concluded that it did not have sufficient information upon which it could either grant or dismiss the sanction application, stating at paragraph 10:

I am not satisfied that the release part of the Plan, which is broad enough to encompass release from fraud, is in the circumstances of this case at this time properly authorized by the CCAA, or is necessarily fair and reasonable. I simply do not have sufficient facts at this time on which to reach a conclusion one way or the other.

It should be noted that the Court was somewhat reluctant to adjourn the sanction hearing given the gravity of the situation and the importance to the debtor companies and its stakeholders of having the Plan approved, however, the Court was also cognizant that it simply could not sanction a Plan which did not withstand the scrutiny of the Court, or was not within the jurisdiction of the CCAA.

The Court describes its overriding concern commencing in paragraph 18:

Hence the Plan, which does not mention the word “fraud”, does not explicitly advise Noteholders that those claims will be released against all who are bound by the Plan, particularly the initiating parties and supporters. I also recognize that the extensive majority who voted in favour of the Plan may not have believed that they had claims against one or more of the releasees in fraud.

Those who believe they have claims in fraud were not consulted before the Plan was developed. Their voices may well be of a different kind and quality from the voices of other Noteholders who by their votes were willing to compromise claims of negligence in all its forms.

In my view, there must be a mechanism for the Court to determine in an expeditious fashion whether or not the Plan can be approved with a way to take into account legitimate, specific and particularized claims of fraud if there are any.

Additionally, the Court laid a pathway for the parties to address these shortcomings of the Plan:

In my view, the test of whether or not this Plan can succeed in its present form will in large part be dependent upon the ability of the parties to initiate and submit for approval a process for (a) articulation (who are the parties); (b) particularization (what precisely is the claim in fraud); and (c) what is the appropriate form (e.g., mediation/arbitration) for fraud claims.

The Court directed that the parties return by no later than May 30, 2008 to report on their proposals for resolving potential fraud claims, and the Court extended the stay of proceedings to that date. Stay tuned!

For further information please contact David Mann at 403 268-7097 or David LeGeyt at 403 268-3075, or visit our website www.fmc-law.com/insolvency.