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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Commercial Litigation Update

This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our commercial litigation clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Commercial Litigation group, Lou Brzezinski at 416.593.2952 or lbrzezinski@blaney.com

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"The credit crisis that has affected Canada, the United States, and the rest of the world in recent months has its roots in an esoteric financial market known as asset-backed commercial paper (ABCP)."

CANADIAN APPROACH SAVES $32 BILLION ABCP MARKET

Lou Brzezinski

The credit crisis that has affected Canada, the United States, and the rest of the world in recent months has its roots in an esoteric financial market known as asset-backed commercial paper (ABCP).

The collapse of this market effectively removed hundreds of billions of dollars of assets from financial institutions in North America. The loss of these assets essentially prevented financial institutions from borrowing money at the same interest rate, or in the same quantity, as they did before. In addition, U.S. banks that had chosen to inject an inordinate portion of their investment capital into these assets found themselves unable to meet their own debt obligations to other financial institutions, and soon either sought protection from their creditors under the U.S. Bankruptcy Code Chapter 7 and Chapter 11, or were gobbled up by their creditors, or were rescued by large cash injections by the U.S. government.

The Canadian approach to this crisis was far different. Through a negotiated consensus, the stakeholders in Canada reached a standstill agreement which ultimately was incorporated into a court order. As a result, the fallout in Canada from this market failure was relatively inconsequential.

In order to understand the nature of the ABCP market, one must go back several years to a booming American economy, particularly the booming housing market. From 2004 onwards, "teaser mortgages" were being offered to first-time buyers at interest rates below prime. In addition, many of these teaser mortgages had removed the obligation of the new mortgagor from paying any principal in the first year and required interest only. These were commonly known as sub-prime mortgages.

Many of these first-time mortgagors/borrowers were often under-qualified, or completely unqualified, to receive mortgage funding. These individuals were often referred to as "Ninjas," literally meaning "No Income, No Jobs, and No Assets".

Many of these sub-prime mortgages were either issued by, or guaranteed by, two U.S. reserve agencies, Freddie Mac and Fannie Mae.

The banks would bundle up in portfolios certain income-producing assets, such as the sub-prime mortgages, Visa card debts, car leases, accounts receivable by way of securitization, and other

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"In Canada, as of August, 2007, investors had placed over $116 billion in Canadian ABCP. In the U.S.A., it was closer to $1 trillion."

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collateralized debt obligations, and would sell these portfolios to special-purpose third parties known as "conduits".

The conduits would receive cash for an ABCP note which represented a short-term investment, usually by a financial institution. With the money that the conduits received from the notes, they sought to purchase portfolios which stood as security for the repayment of the notes. As Mr. Justice Robert Blair of the Ontario Court of Appeal explained in the court's judgement on the issue: "Financial institutions that sold or provided the conduits with the assets that secured the ABCP were known as 'asset providers'. To help ensure that investors would be able to redeem their notes, 'liquidity providers' agreed to provide funds that could be drawn upon to meet the demands of the maturing ABCP notes in certain circumstances. Most asset providers were also liquidity providers and many of the financial institutions were also holders of ABCP notes."

The final piece of the puzzle was provided by the rating agencies which classified these notes as investment grade.

In addition, investors often bought insurance to hedge against any failure by the assets or the liquidity providers.

The premiums paid to the insurer, and the insurance back, were collectively known as credit default swaps. Soon this insurance instrument itself became part of the ABCP market. In Canada, as of August, 2007, investors had placed over $116 billion in Canadian ABCP. In the U.S.A., it was closer to $1 trillion.

The Canadian market was divided into bank-sponsored ABCP and non-bank-sponsored ABCP. The value of the non bank sponsored ABCP market was $32 Billion and it was this market that triggered the ultimate demise in the overall Canadian ABCP market in or about August, 2007. Provided that investors were willing to roll their ABCP notes over, or buy new ABCP notes, to replace maturing notes, the ABCP market was stable. However, beginning in the first half of 2007, the economy in the United States was shaken by what is referred to as the sub-prime lending crisis.

As long as housing prices continued to rise, the security behind the sub-prime mortgage made it a relatively safe investment. However when the housing boom cratered at the beginning of 2007, these sub-prime mortgages went into default and foreclosures failed to yield sufficient funds to pay back the mortgage loan. In fact, more often than not, the foreclosure sales yielded no results at all.

The U.S. sub-prime lending crisis had an impact in Canada because Canadian ABCP investors became concerned that the assets underlying the ABCP notes had either included U.S. sub-prime mortgages or overvalued assets like U.S. sub-prime mortgages. Even though the ABCP market in Canada had little or no sub-prime mortgages in it, the lack of transparency in these financial instruments made it difficult for investors to know its constituent elements.

The crisis was exacerbated as many of the assets backing the ABCP notes were generally long-term, such as residential mortgages and auto loans. In essence, because of their long-term

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"The destruction and chaos in the United States was averted completely in Canada, mostly as a result of the nature of the Canadian financial market, which is much more concentrated than in the United States and has a much smaller number of institutions and other stakeholders."

nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP notes. As Mr. Justice Blair explained: "When uncertainty began to spread through the ABCP market, investors stopped buying the ABCP notes and existing note holders stopped rolling over their maturing notes. There was no cash to redeem these notes. Although calls were made on the liquidity providers for payment, most of the liquidity providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence, the liquidity crisis in the ABCP market."

In the U.S.A., the ABCP market investor did nothing in the early stages to try to address the inherent problems and the impending crisis. Instead, right until this market completely collapsed, investment banks such as Lehman Brothers were buying ABCP on margins equivalent to 30-1. Notwithstanding the warnings of some of America's most successful investors, such as Warren Buffet who referred to these investments as "weapons of financial mass destruction", the U.S. financial institutions watched as the market collapsed and also watched their own demise. AIG, one of the world's largest insurance companies, was a major player that provided the credit default swaps and invested heavily into this market. By the middle of September of 2008, they were on the verge of bankruptcy. Under 80% of the common shares of AIG are now owned by the U.S. government, which paid $85 billion as a rescue plan for AIG. Fannie Mae and Freddie Mac, who have trillions of dollars worth of sub-mortgages, were similarly bailed out by the U.S. government. Investment banks such as Lehman Brothers and Bear Stearns no longer exist, as they either went bankrupt or were gobbled up by their competitors. Large and substantial savings banks such as Washington Mutual and Wachovia had their existence terminated and/or were gobbled up by their competitors.

The destruction and chaos in the United States was averted completely in Canada, mostly as a result of the nature of the Canadian financial market, which is much more concentrated than in the United States and has a much smaller number of institutions and other stakeholders.

When in August of 2007 the market was on the verge of collapse, Canadian financial institutions did not sit back and do nothing. In fact, they proactively sought measures to resolve the crisis. This culminated in the now-historic Montreal Protocol, which is essentially a standstill arrangement orchestrated by numerous participants in the ABCP market, including asset providers, liquidity providers, note holders and other financial industry representatives. Under the standstill agreement, the parties are committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and the notes.

A committee known as the Pan-Canadian Investor's Committee was struck. It was made up of 17 financial and investment institutions. Mr. Purdy Crawford was named as the committee's chair.

In order to ensure that the Montreal Protocol was both binding and enforceable, the committee devised a creative approach, implementing

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the restructuring statute known as the *Companies Creditors' Arrangement Act*, a statute ironically born shortly after the great depression in Canada. This statute, although skeletal in its provisions, was used by both counsel and the Ontario courts to craft a plan that saved the market and probably saved several large financial institutions from sharing the same demise as their American neighbours.

The plan that was devised by the Pan-Canadian Investor's Committee had two important elements to it:

1. Those parties holding ABCP notes would have these notes deferred for payment until the underlying asset matured. In other words, the plan stipulated a match between the due date of the note and the due date of the asset underlying the note. This compromise also eliminated a substantial portion of interest, and in some cases, a reduction of the amount of principal. None of these notes could be called immediately, or were due immediately.

2. The other salient point of the plan involved the releases of officers, directors and financial institutions involved in the ABCP market. These releases were for the benefit of participants in the ABCP market, but who were not directly involved in the actual application to the court.

Much has been written about these third party releases and the fraud carve-out that ultimately emerged, but what is essential to note is the creativity and the prescience of the courts in dealing with complex financial restructuring and, of course, the cooperation demonstrated by all stakeholders in the ABCP market, many of them competitors.

The meeting to approve the plan was held on April 25, 2008 and the vote overwhelmingly supported it, with 96% of the note holders voting in favour. Following the successful vote, the applicant sought court approval for the plan.

On June 5, 2008, Mr. Justice Colin L. Campbell of the Ontario Superior Court of Justice, who heard the application, issued his reasons for approving and sanctioning the plan on both the jurisdiction and the third party releases. His decision was appealed and the appeal was heard on June 25 and 26, 2008. The Court of Appeal supported the decision of the lower court and issued its reasons August 18, 2008.

In coming to the decision to dismiss the appeal, Mr. Justice Blair stated, with respect to the jurisdiction under the *CCAA*:

"An interpretation of the *CCAA* that recognizes its broader socio-economic purposes is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself."

In coming to the conclusion that the plan was fair and reasonable and that the application judge's sanction of the plan was proper, Mr. Justice Blair stated:

"Here the debtor corporations being restructured represent the issues of more than $32 billion in non-bank sponsored ABCP notes. The proposed compromise and arrangement affects the entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution

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"Like the aftermath of 2001 and the bursting of the "tech bubble", the most recent across-the-board volatility of the equity markets will inevitably increase the exposure to litigation of financial advisors whose clients have seen their portfolios decline."

Andrew J. Heal is a litigation partner at Blaney McMurtry. His wide-ranging practice embraces architectural/construction/engineering matters, commercial litigation, municipal, planning and expropriation matters, and insurance defence litigation, which includes defending professionals against dereliction of their professional duties both in regulatory and civil proceedings.

Andrew is an expert in dispute resolution related to construction and municipal matters. He acts regularly for a variety of contractors, subcontractors, owners, developers, insurers and lenders in construction-related matters. He serves as counsel in arbitrations and mediations and has extensive experience in negotiating resolutions of disputes, particularly for construction projects in trouble.

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of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada."

Subsequently, leave to appeal to the Supreme Court of Canada was denied.

No one can say with certainty that the deferred long-term notes will, in fact, be honoured by the assets backing them, nor can one say with certainty that there will be no fall-out in the Canadian financial system as a result of the ABCP market.

However, one can credit the Canadian stakeholders for the manner in which they came together to seek compromise and consensus and to use the courts in a constructive, creative fashion to resolve issues and to save the ABCP market without asking for, or receiving, a single dime from the Canadian government or from the Canadian population. ■

FINANCIAL ADVISORS FACE CLIENT LAW SUITS DURING VOLATILE MARKETS

Andrew J. Heal

Like the aftermath of 2001 and the bursting of the "tech bubble", the most recent across-the-board volatility of the equity markets will inevitably increase the exposure to litigation of financial advisors whose clients have seen their portfolios decline.

I use the term "financial advisor" here to refer to a person who gives advice on financial matters. This includes several categories of financial advisor: those, for example, who provide advice to the public in relation to the investment or trading in stocks, bonds, mutual funds, investment trusts, or personal pension schemes. Such advice may be given in conjunction with investment services (such as buying and selling stocks) and may be given in exchange for a fee. While having the appearance of a business relationship, there may also be a relationship based on trust, giving rise to elevated duties of care.

The law recognizes a number of ways that a professional financial advisor may become liable to their client. These include breach of duty, negligence, breach of contract, conversion, and breach of trust. Some financial advisors may act as simple order takers. Provided all the rules are followed, discharging one's duties can be fairly straight forward. There may only be a breach of the relationship where the financial advisor fails to execute the instructions provided.

However, a secondary function may include providing investment advice. Here, a financial advisor may assume a much larger role in suggesting investments and offering an investment strategy. In this situation, a fiduciary relationship with its attended elevated duties may or may not come into existence. A "fiduciary relationship" is a relationship of the utmost trust and good faith that a fiduciary owes. A "fiduciary duty" is a legal term that basically means you are required to bring a level of care to the other person's affairs that you would to your own, in addition to your own training and expertise. An analysis of whether this elevated duty arises is primarily fact driven, and depends on the reliance and vulnerability of the client to the investment advisor.

"The client who suffers a loss because a portfolio decreases in value does not, by that fact alone, have a claim against a broker if the stocks and bonds were suitable investments..."

In the case of financial advisors, whether or not the financial advisor is a fiduciary will depend, for example, on the residual discretion of the client to control his/her own investment portfolio and the level of trust placed on the advisor.

The key rule, however, for all financial advisors is the "know your client" rule. For example, investment dealers are licensed by the Investment Dealers Association ("IDA"). Financial advisors who are investment dealers are not permitted to trade in securities that expose their clients to undue risk of financial disaster. This means that financial advisors must be aware of all pertinent client details, including income and capital worth. Usually the forms that the client fills out at the time an investment account is opened provide this information to the financial advisor. This information should be updated regularly in order to properly serve a client and his/her changing investment needs or objectives.

In addition to the general code of conduct governing security industry professionals, there are several specific practices that are prohibited by security industry regulators. In the case of the "asset backed commercial paper" problems of last year (written about separately in this update) the resolution included a release of claims, other than fraud, arising against advisors and the banks in respect of that investment product.

The recent Canadian equity market downturn and shedding of 30% of value since the early part of 2008 will inevitably cause some to scrutinize whether their portfolios contained unsuitable investments. It is in the nature of markets that values fluctuate. The causes of the tumble in equity stocks are not yet well understood or articulated, and have been a subject of much commentary and criticism. Successful claims against a financial advisor will depend on independent expert evidence to satisfy a court that a duty arose, and was breached and that damages resulted.

Here, one might imagine in light of the speed of the market's decline, there may be exposure for failure to promptly execute sell orders. Defending claims of professional negligence requires the advisor to keep up to date on the client's circumstances and informed of any significant changes in the suitability of the investments. Not every error in judgment will result in compensable damages to a client. The client who suffers a loss because a portfolio decreases in value does not, by that fact alone, have a claim against a broker if the stocks and bonds were suitable investments for the particular client and the broker acted consistent with industry practice. Financial advisors, like any professionals, do not guarantee the results of their advice. The only guarantee is that they will take reasonable care in providing the advice consistent with industry rules and practice.

It is clear, however, that the turmoil of the past September and October in the Canadian equity markets will likely lead to increased exposure and bring financial advisor conduct under closer scrutiny. ■

COMMERCIAL LITIGATION UPDATE

"One of the most important practical considerations that must be taken into account before commencing a law suit is whether the defendant will have sufficient assets at the end of a trial to pay any judgment that may be obtained."

John Polyzogopoulos provides counsel in a variety of matters including breach of contract, tort claims, shareholder disputes, product liability, professional negligence, debt and security enforcement claims, and insolvency. John is a current member of The Advocates' Society, the Ontario Bar Association and the Toronto Lawyers' Association and is a past president of the Hellenic Canadian Lawyers' Association

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RARE COURT ORDERS CAN HELP COMPANIES TAKE LEGAL ACTION

John Polyzogopoulos

This is the third of three articles on unusually forceful, difficult-to-obtain court orders that can enable companies that fear they are the victims of such illegal activities as fraud, intellectual-property theft, and trade secret theft to (a) capture evidence before it might be destroyed or (b) freeze assets that could be used to pay claims they might win.

The first article in this series, published in the January, 2008 issue of *Commercial Litigation Update* , focused on Norwich orders, which allow a person to obtain information from a third party, in particular a proposed defendant's bank, before moving forward with the claim against the defendant himself.

The second article, published in the June, 2008 issue of *Commercial Litigation Update* focused on Anton Piller orders, which allow a plaintiff to seize documents and other evidence from defendants when there is a risk that the defendant will destroy the evidence if given prior notice of a claim.

This article focuses on Mareva injunctions, in which the court freezes a defendant's assets at the outset of an action to assure that there will be money to pay any claim that it might grant.

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One of the most important practical considerations that must be taken into account before commencing a law suit is whether the defendant will have sufficient assets at the end of a trial to pay any judgment that may be obtained. The last thing a litigant wants to do is spend tens of thousands of dollars only to receive a paper judgment that cannot be paid.

Normally, the most the plaintiff can do is conduct investigations into the creditworthiness of the defendant and decide whether to proceed based upon an educated guess as to whether the defendant will have assets at the end of the day. A plaintiff is not normally entitled to secure assets in advance to ensure that they will be available to satisfy a judgment that may not come for years. A defendant is normally entitled to carry on its ordinary course of business, and if business takes a turn for the worse and there is no money left by the time a judgment is granted, that is too bad for the plaintiff.

However, in situations where the defendant has acted fraudulently in the past or may act fraudulently in the future, a plaintiff may be able to apply to the court for what is called a *Mareva* injunction (named after the famous English decision in which one of the first such orders was made). A *Mareva* injunction freezes the defendant's assets pending trial. Because they run contrary to the general rule against execution before judgment, *Mareva* injunctions are very hard to obtain. If available, however, a successful application for a *Mareva* injunction can end the litigation at the very outset or, at the very least, guarantee payment following a trial. Accordingly, it is a very powerful tool for litigants and their counsel at the outset in appropriate cases.

Because Mareva injunctions are hard to obtain,

"...in situations where the defendant has acted fraudulently in the past or may act fraudulently in the future, a plaintiff may be able to apply to the court for what is called a Mareva injunction."

litigants and their counsel need to proceed cautiously with their application to the court. Knowledgeable counsel should be retained, as this will minimize the possibility of running into the many pitfalls that can arise.

In order to obtain a *Mareva* injunction, the plaintiff must establish that:

1. The plaintiff's case for damages against the defendant is strong;

2. There is evidence that the defendant is removing, or there is a real risk that the defendant is about to remove, his or her assets from the jurisdiction to avoid the possibility of a judgment; OR

3. The defendant is otherwise dissipating or disposing of his or her assets in a manner clearly distinct from his or her usual or ordinary course of business or living so as to render the possibility of future tracing of the assets remote, if not impossible; AND

4. The plaintiff is prepared to pay the defendant damages in the event that the court later determines that the *Mareva* injunction should never have been issued and the defendant suffers damage as a result of the injunction.

The first branch of the test is the most straightforward. It is usually fairly clear to counsel and the court whether the plaintiff's claim is strong. The most common types of "strong" claims are contractual claims (such as loan agreements or promissory notes), where it is often fairly clear that there has been a breach (non-payment of a loan, for example) and money is due and owing. The more difficult cases to fit within this branch of the test are tort or equitable claims (e.g. claims in defamation, negligence, breach of fiduciary duty), where there is no contract to support the claim. In such cases, often neither the defendant's liability nor the amount of damages is clear. Where a case is 50-50, the court may not be persuaded that it is strong enough for a *Mareva* injunction to be granted. An added difficulty in proving a strong case for a *Mareva* injunction is that, by their nature, these applications to the court are brought at the very outset of the litigation, at the time the plaintiff's statement of claim is issued, well before the plaintiff has had an opportunity to build their case through the documentary and oral discovery of the defendant.

The second and third branches of the test, which are essentially alternatives to each other, are usually the most difficult hurdle to overcome in *Mareva* injunction cases. There is often no clear or irrefutable evidence that a defendant is, or is likely to be, dissipating or removing assets from the jurisdiction. Often, the best that a plaintiff can do is point to previous fraudulent or other bad conduct which would lead a reasonable person to conclude by inference that there is a real risk that the defendant will dissipate or remove assets. There is therefore often a leap of faith that must be made by the judge hearing the application. Predicting whether a judge will make that leap of faith is very difficult.

The evidence to support the inference that the defendant is, or will dissipate or dispose of assets, must be carefully gathered by counsel and his or her client, often with the help of private investigators and other experts. In addition

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to coordinating the fact-gathering exercise, counsel must ensure that the information included in the affidavits sworn in support of the application to the court constitute full and frank disclosure of all relevant and material facts, even those that might tend to help the defendant and diminish the plaintiff's case. This is because *Mareva* injunctions are brought without notice to the defendant (to give prior notice would risk the assets being dissipated or removed before the court can hear the matter), and therefore the court makes an initial order having only heard only one side of the story. To a great extent, therefore, the court is relying on the candour and integrity of the plaintiff and his or her counsel and must assume, when granting such orders, that it has not been misled. If the court later determines that an important fact was not brought to its attention, it can set aside the *Mareva* injunction and order the plaintiff to pay damages and costs.

Finally, as with any other injunction application, the plaintiff must be prepared to give an undertaking in damages, which is an undertaking to the court that if it is later determined that the *Mareva* injunction should not have been granted and the defendant suffers damages as a result of the freezing of his or her assets, the plaintiff will pay the defendant the damages. The requirement to given an undertaking in damages causes the plaintiff to carefully consider the relative strength and importance of his or her case. It helps to weed out speculative or tactical applications and provides the court with added assurance that the plaintiff is serious and confident in the justness of his or her cause.

After the initial granting of the *Mareva* injunction, the plaintiff's counsel serves the order on the defendant and any third parties, such as banks, which may be holding the plaintiff's assets. These third parties are bound to comply with the order and not release the assets to the defendant pending further court order. The defendant then has the opportunity to retain counsel and go back to court to challenge the validity of the order. Often times, rogue defendants either settle quickly or simply vanish or do not contest the matter and the plaintiff is able to fairly quickly obtain default judgment and thereby access the seized assets on a timely basis.

As summarized in this three-part series of articles, clients should be aware that there are a number of powerful pre-trial remedies available to litigants at the outset of a case that can greatly help ensure a successful outcome. *Norwich* orders allow a plaintiff who suspects he or she has been defrauded to obtain information about a defendant from third parties, usually banks, without the defendant's knowledge. Such information can often be the whereabouts of the plaintiff's assets, which can then be used in support of an application for a *Mareva* injunction to freeze those assets pending trial. *Anton Piller* orders can be obtained to seize documents and other evidence from defendants when there is a risk that the defendant will destroy the evidence if given prior notice of a claim. ■

COMMERCIAL LITIGATION UPDATE

"It has been historically true that construction bankruptcies are highly sensitive to the performance of the economy as a whole."

PROTECTING YOUR CONSTRUCTION BUSINESS IN UNCERTAIN ECONOMIC TIMES

Andrew J. Heal

There are worrisome signs in the Canadian economy - job cuts, rising inventory levels, declining profits, the decline in oil prices, and the falling Canadian dollar. There are offsetting effects, too, such as declining wage pressure and the lower cost of Canadian goods abroad that a declining dollar produces.

Statistics published October 7 indicated that as a result of declines in both the residential and non-residential development sectors, the value of building permits fell 13.5% to $5.6 billion in August, a level similar to the one observed last March. On a year-to-date basis, permits were down 0.7% from the same period last year. GDP growth in the construction sector from July 2007 to July 2008 was relatively flat. Some sort of recession of uncertain duration seems likely.

The real economy has been slowing down for some time now with the difficulties in the U.S. economy hurting demand for Canadian exports, and in particular construction exports, and declining consumer confidence will likely reduce current aggregate demand. Construction insolvencies are expected to rise.

Further, the September and October declines in the U.S. and Canadian equity markets have led to a substantial increase in uncertainty. It has been historically true that construction bankruptcies are highly sensitive to the performance of the economy as a whole. The construction industry has the highest number of bankruptcies per dollar of output when compared to other sectors of the economy.

Members of Blaney McMurtry's architectural/construction/engineering services (ACES) group are often asked to identify strategies that owners, contractors, sub-contractors and material suppliers may wish to employ when faced with an insolvency situation.

The first thing that one should think about in how to protect your assets and how to get paid is to think outside the box. While I would expect that most readers ought to know, or be reasonably familiar with, the remedies under the *Construction Lien Act*, there are important provisions of the *Act* dealing with trust claims where officers, directors or persons having effective control of the company may become personally liable for breach of trust in certain circumstances, where they have left corporate debts or obligations unpaid in preference to the payment of certain other obligations.

Notwithstanding these other remedies, it is always worth pursuing claims on performance, bonds and labour and material payment bonds where issued on construction projects.

Particular creditor and debtor strategies that you may wish to discuss with your legal professional on a go forward basis include the following:

- use construction contract for mandatory disclosure and include financial searches (creditor strategy)
- obtain broad comprehensive guarantee from principal with assets (creditor strategy)

dividend out, keep capitalization thin (debtor strategy)

- limit personal guarantees and indemnities by limiting the amount, limit term and cap liability (debtor strategy)
- use multiple corporate entities with different bank accounts for each project (debtor strategy)
- wind down the old business and open a new one (debtor strategy)
- first pay corporate debts that carry personal exposure (debtor strategy)
- pay attention to *Construction Lien Act* trust provisions (debtor and creditor strategy)
- consider pre-emptive restructuring under the *Bankruptcy and Insolvency Act*, or the *Companies Creditors Arrangement Act*. (debtor and creditor strategy)

To supplement these strategies Blaney McMurtry has developed a Construction Lien Checklist and Written Notice of Lien form. Any member of the ACES team would be happy to discuss what strategy may be worth pursuing in any particular situation. ■

Commercial Litigation Update is a publication of the Commercial Litigation Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

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We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416.593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

UPCOMING SPEAKING ENGAGEMENTS

October 21, 2008

Geza Banfai will be participating in a panel discussion on "Construction Project Delivery Risks and Mitigation Strategies" at the 2008 Canadian Forum on Public Procurement in Montreal, Quebec.

October 22, 2008

Deborah Grieve will be speaking on the Personal Property Security Act for credit managers at the Credit And Collections Management Fall Workshop Series, hosted by Lumbermen's Credit Services in Toronto.

November 3, 2008

Geza Banfai will be speaking on "Tender Legalities", at the Understanding Pitfalls and Practices of Tendering in the Construction Marketplace course sponsored by The Construction Institute, in Toronto.

November 24 and 25, 2008

Geza Banfai will once again co-chair the 18th Annual Construction Superconference sponsored by the Canadian Institute, in Toronto. On November 24th, he will be speaking on "Managing Risk in Construction Contracts" at this conference.

December 1, 2008

Deborah Grieve will be speaking on Priority Funding in Insolvency Reform Law at the Ontario Bar Association's Professional Development Program "Ready, Set, Go!: New Insolvency Reforms to the BIA and CCAA" in Toronto.

EXPECT THE BEST

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