



Legal Note – Transfers in Contemplation of Bankruptcy

The U.S. Bankruptcy Code contains provisions similar to the various state fraudulent transfer acts. The bankruptcy court may disregard any property transfer made within two years of bankruptcy, if the transfer was made to defraud creditors. Generally, the bankruptcy code finds voidable fraudulent transfers made (i) with the intent to defraud, hinder and delay creditors, or (ii) for less than reasonably equivalent value, while the debtor was insolvent. Therefore, any transfer within the two year window made with the intent to avoid any present or future creditor may be reversed by the bankruptcy court.

The 2005 Bankruptcy Abuse, Prevention and Protection Act imposes an additional ten year look-back on transfers made for asset protection purposes. The ten year rule generally permits the bankruptcy trustee to void any transfer made within a decade of bankruptcy, if made (i) to a “self-settled trust” (for which the debtor is the grantor and beneficiary) and (ii) with the intent to avoid a present or future creditor. The rule therefore creates an almost indefinite period during which assets used to fund a trust (benefiting the grantor) may be pursued. Any U.S. grantor to an asset protection trust (foreign or domestic) must therefore make absolutely certain that funding a trust for his own benefit does not result in insolvency or bring into question the grantor’s ability to pay existing (and reasonably expected future) debts. The trust should, of course, be prepared by a seasoned attorney.