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TD WELCOMES JOHN M. McDONNELL

TD is pleased to announce that **John M. McDonnell** has become a partner of the Firm.

Mr. McDonnell is a Chapter 7 Bankruptcy Panel Trustee and a former New Jersey State Trooper. He has represented Chapter 7 bankruptcy trustees, debtors, and creditors for eighteen years. Also, he is an LLM in Bankruptcy candidate at St. John's Law School, a member of the bar of the States of New Jersey and New York, and a graduate of Seton Hall University School of Law. He will concentrate his practice in the area of bankruptcy. **TD**



Third Circuit Imposes Limits On the Ability to Assume and Assign Executory Contracts

By Scott J. Koplik

The United States Court of Appeals for the Third Circuit recently held that a trustee or debtor-in-possession may not assign an executory contract if the proposed assignee is unable to perform a material non-economic term of the contract. *In re Fleming Cos., Inc.*, 499 F. 3d 300, 308 (3d Cir. 2007).

Section 365(a) of the Bankruptcy Code allows a trustee to assume or reject an executory contract of the debtor. Section 365(f), in turn, authorizes a trustee to assign an assumed executory contract, provided the assignee provides adequate protection of future performance. While the bankruptcy court may excise contract terms, the Third Circuit has cautioned that a bankruptcy court must be sensitive to the rights of the non-debtor contracting party to receive the full benefit of his or her bargain.

“A trustee or debtor-in-possession may not assign an executory contract if the proposed assignee is unable to perform a material non-economic term of the contract.”

In *Fleming*, the debtor, a wholesale supplier of grocery products, had executed pre-petition a long-term supply contract with Albertson's, Inc., a supermarket chain. The contract expressly required the debtor to supply Albertson's from a specific facility located in Tulsa, Oklahoma and formerly owned by Albertson's. The Tulsa facility not only contained many former Albertson's employees, but also the infrastructure created by Albertson's.

In its subsequent bankruptcy case, the debtor rejected its lease of the Tulsa facility. Thereafter, the debtor moved to assume and assign the supply contract. Albertson's objected to the motion on the basis that the proposed assignee's systems were not compatible with its own. In response, the debtor argued that the proposed assignee could simply supply groceries at the same price and on the same payment terms.

The Third Circuit ruled against the debtor. It found that resolution of the dispute did not depend on whether a term is “economically material,” but rather, on “whether the term is integral to the bargain struck between the parties (its materiality) and whether performance of that term gives a party the full benefit of his bargain (its economic significance).” Applying this standard, the Third Circuit held that although the issue of supply from the Tulsa facility did not have manifest material and economic significance, the parties considered supply

from that facility to be “material” because of Albertson's association with the facility and the resulting express condition in the contract. The court held, moreover, that given Albertson's reliance upon use of the Tulsa facility, failure to use the facility would burden Albertson's in an “economically significant” way. Accordingly, the court affirmed the decision to deny the debtor's motion to assume and assign the contract. **TD**

TD in the News

March 26, 2008

Richard D. Trenk served as a speaker in a national audio conference entitled “Taking & Defending Depositions: Keys to Winning Your Case” and hosted by The National Constitution Center, an independent, non-partisan, non-profit organization established by Congress to increase public understanding of and appreciation for the Constitution, its history, and its contemporary relevance.

March 19, 2008

Jennifer Carrillo-Perez was appointed to the Board of the New Jersey chapter of ASPIRA of New Jersey, a national non-profit organization dedicated to the education and leadership development of Puerto Rican and other Latino youth.



Jennifer Carrillo-Perez

Spring 2008

Henry M. Karwowski is teaching Business Associations, an upper level mandatory four credit course, at Seton Hall University School of Law. He has taught at Seton Hall since 2002.

March 16, 2008

Joseph J. DiPasquale, Elnardo J. Webster II, Newark Mayor Cory A. Booker, and former New York Giants Linebacker Carl Banks, among others, hosted a reception honoring United States Senator and Democratic Presidential Candidate Barack Obama in Ridgewood, NJ.



Elnardo J. Webster II

March 10, 2008

The Community Associations Institute named its Editorial Committee, of which **Gina R. Orosz** is a member, the “2007 Committee of the Year.”

March 2008

Anthony Sodono III represented pro bono a student in his appeal before the Woodbridge Board of Education to contest a school’s decision to suspend the student for a period of ten days and transfer the student to another school as a result of certain language contained in a school assignment. The Board of Education reversed the school’s decision and authorized the student to remain in the same school.

February 27, 2008

Shoshana Schiff co-hosted the Annual Essex County Bar Association Bar Goes Local Breakfast for Maplewood, South Orange, and Irvington at the South Orange Performing Arts Center.

John M. McDonnell presented a seminar on estate planning at the Former Troopers’ Association of New Jersey annual winter meeting in Orlando, FL.

January 30, 2008

Richard D. Trenk served as a panelist on a seminar entitled “The Bankruptcy Card and How to Play It: A Guide For Non-Bankruptcy Judges and Practitioners” at the New Jersey Law Center in New Brunswick, NJ. The Honorable Rosemary Gambardella of the United States Bankruptcy Court for the District of New Jersey, the Honorable Nancy Sivilli, J.S.C. of the Superior Court of New Jersey, Law Division, Criminal Part, Essex County, and Diane E. Vuocolo, Chair of the Bankruptcy Section of the New Jersey State Bar Association, also served on the panel.

Winter 2007-08

Anthony Sodono III, John M. McDonnell, and **Michele Dudas** extensively lectured for the Financial Literacy Project of the New Jersey Bankruptcy foundation at various high schools in the State of New Jersey. Also, on October 2, 2007, Mr. Sodono presented the FLIP Program to school superintendents and educators at a symposium held at Raritan Valley College. FLIP is an education outreach program dedicated to educating high school students on credit, credit cards, identify theft, and related issues.

January 25, 2008

After extensive discovery, significant motion practice, and a trial, the Superior Court of New Jersey ordered the County of Essex to award the medical services contract at the 2,200-inmate Essex County Jail not to the incumbent vendor, but rather, to CFG Health Systems, LLC, an unsuccessful bidder for the contract. The County had originally awarded the contract to the incumbent vendor even though the vendor had submitted a bid significantly higher than the bid submitted by CFG. While the incumbent submitted a \$37 million bid, CFG submitted a \$33 million bid. The court agreed with CFG’s argument that the bidding process had been flawed. **Richard D. Trenk**, with the assistance of **Henry M. Karwowski, Michele M. Dudas,** and **Mark Y. Moon**, represented CFG in the matter.

January 14, 2008

An article entitled “Bearing the Sins of the Father - in Bankruptcy,” written by **Henry M. Karwowski**, appeared in the *New Jersey Law Journal* 2008 Bankruptcy Law Supplement. It can be accessed at www.trenklawfirm.com/articles/html.

January 7, 2008

Joseph J. DiPasquale served as a panelist on a seminar on Chapter 7 Trustees at the New Jersey Bankruptcy Inn of Court at Seton Hall University School of Law. The Honorable Donald H. Steckroth of the United States Bankruptcy Court for the District of New Jersey, Assistant United States Trustee Martha Hildebrandt, and Chapter 7 Standing Trustee Karen Bezner also served on the panel.

January 2008

Scott J. Koplík was appointed to the Executive Committee for the Essex County Bar Association Young Lawyers Section.

Mark Y. Moon was appointed as the Director of Recruitment and Membership for the Essex County Bar Association Young Lawyers Section.

December 2007

John M. McDonnell was appointed the fiscal agent for the Jewish Center and Hebrew Day School of Lakewood. **Anthony Sodono III** represented Mr. McDonnell and prepared a comprehensive forensic report regarding the School’s operations. As a result of the report, substantial legal fees and protracted discovery litigation were avoided.

Shoshana Schiff

was appointed Seton Hall University School of Law Class of 1998 Reunion Chair.



Shoshana Schiff

Fall 2007

Joseph J. DiPasquale represented Maplewood Homebuilders, LLC and Century 21 Atlantic Realtors, Inc. in their purchase of over 3,000 active real estate listings sold by Chapter 11 debtor Foxtons North America Inc. On October 29, 2007, the United States Bankruptcy Court for the District of New Jersey entered an order approving the sale.

TD Attorneys Named Super Lawyers

In March 2008, **Richard D. Trenk**, **Joseph J. DiPasquale**, and **Sam Della Fera, Jr.** were named New Jersey Super Lawyers in the area of Bankruptcy & Creditor/Debtor Rights by *New Jersey Monthly Magazine*. **TD**



Sam Della Fera, Jr.



Committee Recommends Changes to the New Jersey Court Rules

By Mark Y. Moon

On February 22, 2008, the New Jersey Supreme Court Civil Practice Committee released its 2008 Report on New Jersey Court Rule amendments recommended for adoption. The Report addresses, in all, nineteen recommended amendments and twenty-two rejected proposals. Several amendments warrant particular mention.

For instance, a proposed amendment to Rule 2:8-1 would compel the Appellate Division to issue a short statement of reasons for its determination on a motion for emergent or injunctive relief. Currently, an appellate judge reviewing an application for emergent relief need only review the twenty-two answers on an appellant's fact sheet and issue an order bearing a "granted" or "denied" stamp. Incidentally, the Appellate Division Rules Committee opposed the recommendation on the basis that the amendment would tax the resources of an overly burdened court. The Appellate Division adjudicated over 570 motions for emergent relief in the 2006-2007 court year.

Second, under current Rule 4:23-5(a)(1), a party may obtain dismissal or suppression of a pleading without prejudice if its adversary fails to make discovery. A proposed amendment to Rule 4:23-5(a)(2) would allow a party to move for dismissal or suppression with prejudice only 60 days after entry of an order

without prejudice under subpart (a)(1). Rule 4:23-5(a)(2) currently requires a party to wait 90 days before it can move for such relief.

Third, proposed amendments to Rule 4:24-1 would clarify that the 60 day extension of discovery added after joinder of parties would start to run on the original end date of discovery rather than on the date of joinder.

Finally, in keeping with the newly recognized institution of civil unions in New Jersey, the committee proposes the insertion of the phrase "or statutory union" after every mention of marriage or marital relationship in the Rules.

The Committee considered but ultimately rejected two notable proposals. First, the Committee considered an amendment to expand the usage of unpublished opinions under Rule 1:36-3. Also, the Committee reconsidered a 1996 amendment which required judges to provide one day notice of the date on which the judge intended to place on the record his or her findings regarding an orally argued motion. Rejecting concerns about the cost and time for attorneys and judges, the Committee determined that the amendment should remain effective for now. A full copy of the 2008 Report of the Supreme Court Civil Practice Committee is available at www.judiciary.state.nj.us/reports2008/index.htm. The Supreme Court will evaluate the Committee's recommendations in June and any rule amendments will go into effect on September 1, 2008. **TD**

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Additional Information

Additional Information: This newsletter provides general information of interest to our clients and friends. It does not constitute legal advice. You should consult with legal counsel to determine how the law may apply to your specific situation.

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IMMIGRATION



Cold Winter for Tropical Debtor: Bankruptcy Court Scrutinizes Cayman Islands Entity's Chapter 15 Petition

By Adam D. Wolper

In re Basis Yield Alpha Fund (Master), 381 B.R. 37 (Bankr. S.D.N.Y. 2008), joint provisional liquidators for a company in a Cayman Islands liquidation proceeding sought, in a United States Bankruptcy Court, recognition of the company's liquidation as a "foreign main proceeding" under Chapter 15 of the Bankruptcy Code. The court clarified that recognition is not a "rubber stamp exercise." On the contrary, the court held, even the absence of objections to the petition for recognition and a statutory presumption in favor of the debtor do not prevent a court from considering all relevant facts and making its own determination on the issue of recognition.

Congress enacted Chapter 15 of the Bankruptcy Code in order to implement the Model Law on Cross-Border Insolvency, a law formulated to provide a mechanism for addressing cross-border insolvency cases. Chapter 15 allows a foreign representative to apply through the bankruptcy court for "recognition," approval of which accords the foreign representative the capacity to sue and be sued in United States courts. Under section 1517(a), the movant can establish a basis for recognition if it can show that the foreign proceeding is a "foreign main proceeding." Chapter 15 defines the term "foreign main proceeding" to mean

"a foreign proceeding pending in the country where the debtor has the center of its main interests," or "COMI," generally meaning "principal place of business." Section 1516(c) provides that in the absence of evidence to the contrary, the debtor's registered office is presumed to be the debtor's COMI.

In Basis Yield, the debtor was incorporated and it maintained its "registered office" in the Cayman Islands. The debtor filed a liquidation petition in the Cayman Islands and ultimately sought, in the United States, recognition of its liquidation as a "foreign main proceeding." Although the debtor failed in its petition to submit information regarding its principal place of business, no parties had filed any objections to its petition. Thus, the debtor moved for summary judgment on the issue of recognition on the basis that, under section 1516(c), its registered office was presumed to be its COMI.

The court rejected the debtor's argument. The court found that certain evidence, including the debtor's incorporation as an "exempted company" under Cayman Companies Law, raised suspicion as to whether the Cayman Islands qualified as the debtor's COMI. The court found, also, that the failures to object and the section 1516(c) presumption did not deprive the court of its own power to assess whether the debtor had satisfied the requirements of section 1517. Accordingly, the court denied the debtor's motion for summary judgment. **TD**

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Step forward.



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