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In This Issue:

Anthony Sodono Receives Equal Justice Medal 2

Supreme Court: Bankruptcy Code Stamp-Tax
Exemption Applies Only to Transfers Made
Under a Confirmed Chapter 11 Plan 2

TD in the News 3

TD Volunteers For Habitat For Humanity 4

Changes Made to Affordable
Housing Law in New Jersey 4

An IRA May Be Exempt From a
Bankruptcy Estate Even Though the Debtor
Has No Present Right to Receive Payment 5

ANTHONY SODONO RECEIVES EQUAL JUSTICE MEDAL

On May 28, 2008, **Anthony Sodono III** received the Equal Justice Medal from Legal Services of New Jersey and the New Jersey State Bar Association in recognition of his “very considerable pro bono efforts on behalf of low income clients of Essex-Newark Legal Services in numerous bankruptcy cases.” **TD**

James H. Coleman, Jr., former Associate Justice of the Supreme Court of New Jersey, and Anthony Sodono III



SUPREME COURT: BANKRUPTCY CODE STAMP-TAX EXEMPTION APPLIES ONLY TO TRANSFERS MADE UNDER A CONFIRMED CHAPTER 11 PLAN

By Joao F. Magalhaes

Bankruptcy Code section 1146(a) allows for the exemption of stamp taxes for any asset transfer “under a plan confirmed under section 1129.” In the recent case of Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., a chapter 11 debtor sought, in connection with the sale of substantially all of its assets, an exemption under this section from the imposition of stamp taxes in the amount of \$39,200 assessed by the Florida Department of Revenue. The United States Supreme Court, resolving a split among circuit courts, adopted the approach of the United States Court of Appeals for the Third Circuit in Baltimore County v. Hechinger Liquidation Trust (In re Hechinger Inv. Co. of Delaware, Inc.), 335 F.3d 243 (3d Cir. 2003) and ruled that the section 1146(a) exemption applies only to transfers made pursuant to a chapter 11 plan that has already been confirmed. 128 S.Ct. 2326 (2008). In Piccadilly, the sale occurred prior to confirmation of the debtor’s chapter 11 plan. Thus, the Court ruled, the sale was not exempt from stamp taxes.

The Court cited a number of grounds in support of its decision. For instance, it held that in the context of section 1146(a), the transfer of an asset cannot be “under a plan confirmed” until the court confirms the plan in question. Only at that point, the Court found, does the transfer become eligible for stamp-tax exemption. Also,

the Court found it informative that Congress placed section 1146(a) in a subchapter entitled “POSTCONFIRMATION MATTERS.”

Next, the Court observed that a federalism canon – obliging courts to proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed – requires a narrow construction of section 1146(a)’s language. Employing this construction, the Court noted that Congress has not clearly expressed an exemption for pre-confirmation transfers.

Finally, the Court rejected the debtor’s argument that section 1146(a) should be construed liberally to serve its ostensibly remedial purpose. The Court noted that Congress, in enacting chapter 11, did not have a “single purpose.” Rather, chapter 11 strikes a balance between a debtor’s interest in reorganizing and restructuring its debts and the creditors’ interest in maximizing the value of the bankruptcy estate. Also, by generally leaving the determination of property rights in the assets of a bankrupt’s estate to state law, the Code accommodates the interests of states in regulating property transfers. Because these interests do not coincide, the Court declined to construe the section 1146(a) exemption to the detriment of the State of Florida. **TD**

TD in the News

August 7, 2008

Shoshana Schiff hosted the Northern New Jersey Lehigh University Alumni Association Freshman Sendoff at Mayfair Farms in West Orange.

July 2008

Henry M. Karwowski and **Joshua H. Raymond** were named New Jersey Rising Stars in the area of Bankruptcy & Creditor/Debtor Rights by *New Jersey Monthly Magazine*.

June 16, 2008

Shoshana Schiff served as a table captain and TD served as a sponsor for the Women's Fund of New Jersey Sixth Annual Fundraising Breakfast.

June 5, 2008

John M. McDonnell presented an estate planning seminar to approximately 100 members of the Former Troopers' Association of New Jersey in Flanders, NJ.

June 2008

Elnardo J. Webster II was ranked #17, ahead of Donald Trump among others, on the www.PoliticsNJ.com 2008 Power List. Mr. Webster was ranked #21 in 2007.



Elnardo J. Webster II

May 3, 2008

Mark Y. Moon, Adam D. Wolper, and **Joao F. Magalhaes** participated in the Tenth Annual Jersey Cares Day. Over 1200 volunteers painted classroom walls, planted gardens outside schools, picked up debris in public parks, and performed other volunteer services in Newark, NJ. TD in particular helped to renovate the teachers' lounge and paint murals in the cafeteria at Madison Elementary School in Newark. For more information on Jersey Cares, visit www.jerseycares.org.

Mark Y. Moon



May 2, 2008

Shoshana Schiff served as Chair of the Annual Essex County Bar Association Law Day Program, dedicated to introducing the legal profession to secondary school students in Essex County.

May 2008

John M. McDonnell was accepted as a member of Officer Down, Inc., a statewide not-for-profit organization dedicated to helping law enforcement officers and their families in time of need.

TD welcomed summer associates **Aziz O. Nekoukar**, a third year law student at University of Miami School of Law, **Katherine E. Riopel**, a third year law student at Seton Hall University School of Law, and **Erica L. Shapiro**, a third year law student at Seton Hall University School of Law.

April 30, 2008

Richard D. Trenk presented a seminar entitled "Depositions That Crush Your Opposition" for the Social Security Administration in Baltimore, Maryland.



Richard D. Trenk

April 29, 2008

Shoshana Schiff served as an Honorary Dinner Chairperson for the "Partners For Women and Justice" Fundraising Gala honoring Seton Hall University School of Law Professor Paula A. Franzese at the Valley Regency in Clifton, NJ.

April 27, 2008

TD served as a sponsor for the annual March of Dimes WalkAmerica event held in Brookdale Park, NJ.

April 13, 2008

TD, led by **Jodi M. Luciani**, participated in the National Multiple Sclerosis Walk in Roseland, NJ.



Jodi M. Luciani

April 2008

TD ranked #19, ahead of many of the largest firms in the State, on the PoliticsNJ.com 2008 List of New Jersey's Most Powerful Law Firms.

Anthony Sodono III and **John M. McDonnell** lectured for the Financial Literacy Project of the New Jersey Bankruptcy foundation ("FLIP"). On April 23, 2008, Mr. Sodono presented the FLIP Program to college students at Centenary College. On April 8, 2008, Mr. McDonnell presented the FLIP Program to college students at The College of New Jersey. FLIP is an education outreach program dedicated to educating high school students on credit, credit cards, identify theft, and related issues.

March 2008

TD welcomed new associate **Joao F. Magalhaes**, a graduate of Seton Hall University School of Law.

Henry M. Karwowski was nominated for the annual Adjunct Professor of the Year Award at Seton Hall University School of Law. Only 5 of approximately 185 professors were nominated. Mr. Karwowski was previously nominated for this award in 2006 and 2007. He has taught at Seton Hall since 2002.

An article entitled "What Is the Bar Date For Rejection Damage Claims?", written by **Henry M. Karwowski**, appeared in the March 2008 issue of the *American Bankruptcy Institute Journal*. It can be accessed at <http://www.trenklawfirm.com/articles/html>.

TD opened a new office located at 115 Maple Avenue, Suite 201, in Red Bank, New Jersey.

TD Volunteers For Habitat For Humanity

On May 29, 2008, **Mark Y. Moon, Scott J. Koplik, Adam D. Wolper, Joao F. Magalhaes, Aziz O. Nekoukar, Katherine E. Riopel, and Erica L. Shapiro** joined the Honorable Noalyn L. Winfield and New Jersey Bankruptcy Court Clerk James J. Waldron, among others, to volunteer at a Habitat For Humanity International event in Newark, NJ. Habitat for Humanity International is a nonprofit, ecumenical Christian housing ministry dedicated to eliminating poverty housing and homelessness. **TD**

Pictured from Left to Right: Mark Y. Moon, Scott J. Koplik, Erica L. Shapiro, and Katherine E. Riopel



CHANGES MADE TO AFFORDABLE HOUSING LAW IN NEW JERSEY

By Joni Noble McDonnell

On July 17, 2008, Governor Corzine signed into law the Affordable Housing Reform Statute, P.L. 2008, c. 46 (the "Reform Statute"). The Reform Statute makes significant changes to the law regarding affordable housing in New Jersey, including the Fair Housing Act, N.J.S.A. 52:27D-301, *et seq.*

For example, the Reform Statute establishes a Statewide Non-Residential Development Fee Act requiring that non-residential developments be assessed a fee equal to two and a half percent (2.5%) of the equalized assessed value of the land and improvements to an unimproved lot or two and one half percent (2½) of the increase in equalized assessed value of any additions to existing non residential structures. Certain properties are exempt from this fee including (i) properties that received a certificate of occupancy prior to the enactment of the statute; (ii) structures that upon completion will provide an

amenity to the public; and (iii) developments located within eligible urban transit hubs.

Further, the Reform Statute prohibits municipalities from entering into regional contribution agreements. These types of agreements allowed municipalities to transfer their fair share of affordable housing obligations to another municipality within their housing region.

Finally, the Reform Statute requires that at least thirteen percent (13%) of affordable housing within a municipality be reserved for very low income housing, which is defined as housing for a household with a gross income equal to thirty percent (30%) or less of the average gross income of households of the same size within the same housing region.

It is anticipated that this statute will have far reaching implications on residential and commercial development within municipalities throughout the State. **TD**

"The Affordable Housing Reform Statute makes significant changes to the law regarding affordable housing in New Jersey."

THE STANDARD

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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TD PRACTICES IN THE
FOLLOWING AREAS:
BANKRUPTCY
CORPORATE RESTRUCTURING
DEBTOR/CREDITOR RIGHTS
COMMERCIAL LITIGATION
BUSINESS LAW
FAMILY LAW
GOVERNMENT AFFAIRS
REAL ESTATE AND LEASING
IMMIGRATION



AN IRA MAY BE EXEMPT FROM A BANKRUPTCY ESTATE EVEN THOUGH THE DEBTOR HAS NO PRESENT RIGHT TO RECEIVE PAYMENT

By Gina R. Orosz

In order to exempt an individual retirement account (“IRA”) from his or her bankruptcy estate under Bankruptcy Code section 522(d)(10)(E), a debtor must satisfy the following three requirements: (1) the right to receive payment must be under a stock bonus, pension, profitsharing, annuity, or similar plan or contract; (2) the right must be on account of illness, disability, death, age, or length of service; and (3) the right may be exempted only to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

Previously, the United States Court of Appeals for the Third Circuit interpreted the third requirement to allow exemption of only present payments, and not future payments, from an IRA-type fund. *In re Clark* (*Clark v. O’Neill*), 711 F.2d 21 (3d Cir. 1983). The Third Circuit reasoned that although the exemption of present payments, to the extent they are necessary for the support of the debtor, is consistent with the historical purpose of exemption, the exemption of future payments “demonstrates a concern for the debtor’s long-term security which is absent from the statute.” Thus, in *Clark*, the court held that the chapter 7 debtor, a 43 year old man, could not claim an exemption for the amount in his Keogh retirement plan. The court noted that his right to receive payment without penalty would not accrue until he reached the age of 59½, died, or became disabled.

Years later, in 2005, the Supreme Court held that that the right to receive IRA payments can be exempted from the

bankruptcy estate pursuant to section 522(d)(10)(E). The Court addressed only the first two requirements of section 522(d)(10)(E); thus, the Court did not consider the fact that, as of the date of their bankruptcy petition filing, the debtors had not yet reached the age of 59½, and hence, they were not yet receiving payments. *Rousey v. Jacoway*, 544 U.S. 320 (2005).

Earlier this year, the Third Circuit had the opportunity to revisit its decision in *Clark*. In *In re Krebs*, 527 F.3d 82 (3d Cir. 2008), the debtor sought to exempt her IRA even though, at the time of her bankruptcy filing, she was only 58 years old, and hence, not yet receiving payment without penalty from her IRA. The Third Circuit determined that the intervening decision in *Rousey* impliedly overruled its decision in *Clark*. The court noted that the Supreme Court did not treat as dispositive whether the applicable plan or contract provides for immediate or deferred payments. Accordingly, the court held that the debtor’s right to receive payment from her IRA could be exempt under section 522(d)(10)(E) notwithstanding the debtor’s age and remanded the case for consideration of whether and to what extent the debtor’s right to receive payment under the IRA was reasonably necessary to support the debtor and her dependants. Finally, because the debtor filed her bankruptcy petition in September 2005, prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act, the court did not have cause to apply new Code section 522(d)(12), which unambiguously exempts qualifying IRA funds from a bankruptcy estate. **TD**

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Step forward.



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