

TD THE STANDARD

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TD ATTORNEYS NAMED SUPER LAWYERS

In March 2009, **Richard D. Trenk**, **Joseph J. DiPasquale**, and **Sam Della Fera, Jr.** were named Super Lawyers in the area of Bankruptcy & Creditor/Debtor Rights by *New Jersey Monthly Magazine*. **TD**

Pictured from Left to Right: Richard D. Trenk, Joseph J. DiPasquale, and Sam Della Fera, Jr.



A BANKRUPTCY TRUSTEE'S FAILURE TO TIMELY OBJECT TO THE EXEMPTION OF A DEBTOR'S ENTIRE INTEREST IN PROPERTY BARS THE TRUSTEE FROM SELLING THE PROPERTY

By Michele M. Dudas

In *In re Reilly*, 534 F.3d 173 (3d Cir.), petition for cert. filed, 77 USLW 3267 (Oct. 20, 2008), the United States Court of Appeals for the Third Circuit addressed the issue of whether a chapter 7 trustee who fails to object to the exemption of a debtor's entire interest in certain property may nevertheless move to sell the property if he later learns that the property value exceeds the amount of the claimed exemption.

In *Reilly*, the debtor, a cook who operated a one-person catering business, listed as personal property an ownership interest in "business equipment," consisting of catering utensils and instruments possessing a value of \$10,718. She claimed an exemption for the entire value of the property. The trustee failed to object to the exemption within the 30 day period prescribed by Bankruptcy Rule 4003(b). Later, the trustee obtained an appraisal indicating that the equipment possessed a value of approximately \$17,200. The trustee then moved to sell the equipment in order to recoup the value in excess of the amount of the exemption claimed by the debtor. The debtor objected on the basis that the property had

become fully exempt after the Rule 4003 deadline had expired. The bankruptcy court, and later the district court on appeal, agreed with the debtor's argument.

The Third Circuit affirmed. It held that the debtor, in valuing the equipment at \$10,718 and claiming an exemption in the same amount, put the trustee on notice that the debtor intended to fully exempt the property. If the trustee doubted the debtor's valuation of the equipment, the court found, the trustee should have timely sought an appraisal, objected to the exemption, or requested an extension of the deadline. The court noted that its holding accorded with bankruptcy's promise of a fresh start, and that all parties would know, following the lapse of the period for filing objections, what property belonged to the bankruptcy estate and what property remained with the debtor. Also, the court observed that other laws would deter crafty debtors who may seek to undervalue their property with the hope of having it bypass the bankruptcy estate. Finally, the court found that there was no reason to suspect, on the facts in *Reilly*, bad behavior on the part of the debtor. On the contrary, the court found, the equipment apparently had significant sentimental value for the debtor. Accordingly, the debtor was entitled to retain the property. **TD**

TD in the News

February 2009

Joseph J. DiPasquale was recognized by *The Italian Tribune* as “Best of New Jersey – Among Our Most Distinguished Americans of Italian Descent” and conferred the Stivale D’Italia Award of Excellence.

An article entitled “A Review of Federal Tax Lien Case Law in 2008”, written by **Adam D. Wolper**, appeared in the February 2009 issue of the *American Bankruptcy Institute Journal*.

February 5, 2009

Shoshana Schiff co-hosted the Annual Essex County Bar Association Bar Goes Local Breakfast for Maplewood, South Orange, and Irvington at St. James Gate in Maplewood, NJ.

Winter 2009

Joao F. Magalhaes served as coach for the James Caldwell High School mock trial team.



Joao F. Magalhaes and students at the Annual Vincent J. Apruzzese Mock Trial Competition on January 27, 2009.

Joseph J. DiPasquale represents seven hotels, located in Michigan, Mississippi, North Carolina, and Wyoming, in their chapter 11 bankruptcy cases. Mr. DiPasquale was quoted in an article about the Wyoming hotel bankruptcy in the *New York Times* on February 9, 2009. It can be accessed at <http://www.nytimes.com/2009/02/10/us/10cheyenne.html?emc=eta1>.

January 29, 2009

The United States Bankruptcy Court for the District of New Jersey confirmed a Chapter 11 Plan of Reorganization filed by debtor-in-possession New Jersey Mobile Dental Practice, P.A. **Thomas M. Walsh** represented the debtor-in-possession.



Thomas M. Walsh

January 12, 2009

An article entitled “Informal Proofs of Claim – A Brief Summary,” written by **Henry M. Karwowski**, appeared in the *New Jersey Law Journal* 2009 Bankruptcy Law Supplement.

December 2008

An article entitled “Law Day 2008,” written by **Shoshana Schiff**, appeared in the Winter 2008 issue of the *Essex County Bar Association Chronicle*.

December 1, 2008

TD welcomed new associate **Kelley J. Lake**, former Assistant Corporation Counsel for the City of Newark Law Department; former law clerk for the Honorable John F. Malone, Superior Court of New Jersey, Chancery Division, General Equity Part, Union County; and a 2006 graduate of Rutgers University School of Law at Newark.

November 22, 2008

The following trivia question appeared in *The Star Ledger*: “Who was the last Rutgers linebacker drafted by an NFL team?” Answer: **Elnardo J. Webster II**.

November 12, 2008

Jennifer Carrillo-Perez was appointed Chairperson of 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.

Fall 2008

Anthony Sodono III represented Capalbo’s Gift Baskets in a successful financial workout.

Shoshana Schiff became a board member of the New Jersey chapter of the International Women’s Insolvency and Restructuring Confederation, an international professional association dedicated to enhancing the professional status and reputation of women in the insolvency practice and to providing opportunities for networking, professional development, leadership, and mentoring at the local, national, and international levels.



Shoshana Schiff

October 21, 2008

Richard D. Trenk, representing the Township of West Orange in an eminent domain case, argued before the Supreme Court of New Jersey. The argument can be viewed at <http://www.trenklawfirm.com/news.html>.

October 19, 2008

TD, led by **Michele M. Dudas** and **Richard D. Trenk**, served as a sponsor of and participated in the annual Making Strides Against Breast Cancer Walk in Parsippany, NJ.

October 5, 2008

TD, led by **Michele M. Dudas**, **Richard D. Trenk**, **Mark Y. Moon**, and **Adam D. Wolper**, served as a sponsor of and participated in the Eighth Annual Miracle Walk, benefiting the Saint Barnabas Medical Center Neonatal Intensive Care Unit, at Verona Park in Verona, NJ.

September 2008

Michele M. Dudas was named Volunteer Lawyers For Justice Pro Bono Attorney of the Month.

September 24 and 25, 2008

Richard D. Trenk and the Honorable Michael B. Kaplan of the United States Bankruptcy Court for the District of New Jersey presented a seminar entitled “Litigation Strategies and Tactics in the 21st Century” for the Social Security Administration in Baltimore, Maryland.

September 22, 2008

TD and Bederson & Company LLP co-sponsored a blood drive for Community Blood Services.

September 15, 2008

Scott J. Koplik served as a co-organizer of the Essex County Bar Foundation Young Lawyers Section “Survival in the Courts” Program and Annual Judicial Reception at the Newark Club in Newark, NJ. The Program featured several Superior Court of New Jersey judges as moderators and speakers.



Scott J. Koplik

September 12, 2008

The United States Bankruptcy Court for the District of New Jersey confirmed a Chapter 11 Plan of Reorganization filed by debtor-in-possession Littleton Equity Commons, LLC. **Richard D. Trenk**, with the assistance of **Thomas M. Walsh**, represented the debtor-in-possession.

September 2, 2008

TD welcomed new associate **Markis M. Abraham**, a May 2008 graduate of Rutgers University School of Law at Newark; a graduate of Wharton School of the University of Pennsylvania, at which he earned a B.S. in Economics with a concentration in Information Systems; and the former CEO of WomenRising, Inc. in Jersey City, NJ.

TD Volunteers at St. Anne's Soup Kitchen

On December 24, 2008, **Richard D. Trenk**, **Sam Della Fera, Jr.**, **Anthony Sodono III**, and **Mark Y. Moon** joined New Jersey Bankruptcy Court Clerk James J. Waldron and members of the Bankruptcy Court Clerk's Office to volunteer and feed the homeless at St. Anne's Soup Kitchen in Newark, NJ. **TD**



By Markis M. Abraham

A BANKRUPTCY TRUSTEE'S FAILURE TO RAISE A PREFERENCE OBJECTION DURING THE CLAIMS ALLOWANCE PROCESS DOES NOT RESULT IN WAIVER OF A PREFERENCE CLAIM

In In re Popular Club Plan, Inc., 395 B.R. 587 (Bankr. D.N.J. 2008), Judge Michael B. Kaplan of the United States Bankruptcy Court for the District of New Jersey recently had cause to address an issue on which courts across the country have split: whether the failure of a debtor-in-possession or trustee to raise a preference objection to a creditor's claim during the claims allowance process results in waiver of the debtor's or trustee's right to subsequently bring a preference action against that creditor.

In Popular Club, a chapter 11 debtor objected to a landlord's proof of claim. After negotiations, the debtor and the landlord agreed to the modification and reduction of the claim to a certain amount. Subsequently, following confirmation of the debtor's chapter 11 plan, the trustee for the bankruptcy estate's post-confirmation trust initiated against the landlord an action in which the trustee sought to recover alleged preferential transfers made by the debtor to the landlord during the 90 day period preceding the bankruptcy

filing. The landlord moved to dismiss the complaint; it argued that the trustee, having agreed to allow the creditor's claim, had waived the right to bring the action.

The court ruled in favor of the trustee on the basis of several reasons. First, although Bankruptcy Code section 502(d) provides the means by which a debtor-in-possession or trustee may disallow the claim of any recipient of a preferential transfer, such Code section does not provide or even suggest a corollary right of a creditor to dispute an avoidance action on the basis of a previously settled claim. Second, the Bankruptcy Code does not require a trustee to raise a preference objection during the claims allowance process. Third, engrafting a preference waiver onto section 502(d) would result in a windfall for the creditor-transferee. Fourth, in a chapter 11 case, the debtor or trustee may need to resolve claims long before a preference analysis is undertaken. Next, in most chapter 11 cases, the debtor or trustee must maintain an ongoing working relationship with creditors during the confirmation process; thus, compelling the debtor or trustee to bring preference actions at that time might thwart the reorganization. Finally, the parties had not litigated in any state court proceedings; thus, the entire controversy doctrine did not prevent the action. **TD**

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.

Design

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



NEW LAW AUTHORIZES PUBLIC ENTITIES TO IMPLEMENT ENERGY SAVINGS IMPROVEMENT PROGRAMS

By Jodi M. Luciani

On January 21, 2009, Governor Corzine signed into law A-1185/S-1537, authorizing public entities to implement Energy Savings Improvement Programs (ESIP) for the purpose of reducing energy consumption and protecting the environment. The new law offers public entities and contracting units which lack the necessary funding to finance energy saving projects a new way to make their buildings more energy efficient without increasing their costs.

Under an ESIP, a public entity would enter into a lease-purchase agreement with an energy services company to implement energy conservation measures. During the first phase of the program, the company would conduct an energy audit to identify energy inefficiencies and recommend possible energy saving projects. The company would finance the program and the public entity would repay the debt through

energy savings. Thus, the value of the energy savings would pay for the energy savings improvements. Also, the program would eliminate the need for capital expenditures by a public entity.

The law further provides that the energy services company must offer the public entity the option to purchase an energy savings guarantee, at no additional cost, to ensure that the savings resulting from the program will be sufficient to cover the costs associated with the lease-purchase agreement. If the savings are insufficient, the company must reimburse the public entity for any additional costs.

Accordingly, the new law, to take effect in March, will alleviate the need to increase taxes when a public entity makes the decision to go green. At the same time, by acquiring new energy saving improvements, such as efficient heating and solar panel installation, the programs protect the environment. **TD**

“A new law offers public entities and contracting units a novel way to make their buildings more energy efficient without increasing their costs.”

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Step forward.



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