

message from partner in charge

With summer upon us, we often find ourselves looking for diversions. We hope you'll take some time out of your day and divert your attention to our latest *Detroit Update*.

In this update, Vicki Harding writes about a closely watched U.S. Supreme Court ruling regarding the bankruptcy transfer tax exemption and how the ruling can affect debtors.

You also will find information about our recent Pepper and Eggs Webinar on Privacy & Security Compliance. Information security compliance is being demanded by the public and government alike. Pepper partners Michael Hordell and Peter Adler discussed these requirements and approaches that companies can take to comply.

As always, thank you for reading and please let us know if you have any comments or suggestions.

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Supreme Court Rules that Bankruptcy Transfer Tax Exemption Applies Only to Transfers Made After a Plan Is Confirmed

In a closely watched case, the U.S. Supreme Court held that the exemption from transfer taxes for property transferred under a Chapter 11 plan of reorganization applies only to transfers made after the plan is confirmed, not to sales made before plan confirmation.

Section 1146 of the Bankruptcy Code provides that the “issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.” Since transfer and other recording taxes can be a significant cost of a sale, this exemption can be a valuable benefit of confirming a plan of reorganization.

Until the Supreme Court's decision in *Florida Dept. of Revenue v. Piccadilly Cafeterias* (June 16, 2008), court decisions were split on applying this provision. The decisions turned on the meaning of transfers “under a plan” that is “confirmed”: can a transfer be “under” a plan that is subsequently confirmed, or must the plan be confirmed at the time of the transfer? Some courts (including the Third Circuit Court of Appeals and the Fourth Circuit Court of Appeals) held that the tax exemption was available only for transfers that occurred after confirmation of the plan. Other courts (including the Eleventh Circuit) held that the exemption could be available for preconfirmation transfers related to a plan that is subsequently confirmed.

It is increasingly common in Chapter 11 bankruptcies for debtors to sell assets under section 363 of the Code before approval of a plan of reorganization. The debtor will claim the section 1146 transfer tax exemption so long as

the plan ratifying the sale is eventually confirmed by the court. Proponents of exempting these transfers argued that the timing of the confirmation requirement under section 1146 is ambiguous, and construing this section to include preconfirmation transfers necessary for consummation of a plan furthers the purpose of maximizing value for the bankruptcy estate. It also better accounts for the practical realities of Chapter 11 reorganization cases.

However, the Supreme Court rejected these arguments in a majority opinion by Justice Thomas (with a dissent by Justice Breyer joined by Justice Stevens), concluding that the tax exemption applies “only to transfers made pursuant to a Chapter 11 plan that has been confirmed” and thus was not available in the *Piccadilly Cafeterias* case because the transfers occurred before the plan was confirmed.

Although this was already the state of the law in the Third and Fourth Circuits, in a number of other jurisdictions debtors have routinely claimed tax exemptions for transfers made in connection with sales conducted to facilitate a proposed plan. Now the tax exemption will be available only if the transfer is made after the plan is confirmed.

This decision could provide an incentive to debtors seeking to use the exemption to file and seek confirmation of a Chapter 11 plan as quickly as possible. This may be necessary where savings from the transfer tax exemption would be significant, but circumstances require that the assets be sold expeditiously.

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Pepper and Eggs Series Webinar Recording

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Information security compliance is being demanded by the public and government alike. The problem this presents is how to place all the disparate pieces into a unified approach. Information security officers, privacy officers, compliance officers and attorneys are being confronted with an increasing number of laws and regulations affecting their organizations. These include HIPAA, GLBA, FISMA, and the FTCA, numerous state laws on privacy and notice of breach laws and private contractual standards such as the Payment Card Industry Data Security Standard (PCIDSS).

After providing a brief overview of these requirements, attendees at the most recent webinar learned about a unified approach to security compliance that leads to simultaneous compliance with multiple laws and regulations.

Listen to the webinar by visiting http://www.pepperlaw.com/pepper/webinars_update.cfm?rid=12.0.

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Upcoming Events

National Association of Seed and Venture Funds

September 10-12, 2008
Detroit Marriott Renaissance Center
Detroit, Michigan

Pepper is proud to sponsor the 15th Annual NASVF conference. Several Pepper partners will be presenting on a variety of topics.

For more information, visit
<http://nasvf.org/nasvf/web.nsf/pages/achome.html>.

The Capital Roundtable: P.E. & V.C. Fundraising

Workshop: September 24, 2008
Featuring Pepper partner **Michael B. Staebler**

Masterclass: September 25, 2008
Featuring Pepper partners **Julia D. Corelli** and **Todd W. Betke**

Visit www.capitalroundtable.com for more information about these events and to register.



Peppercast: Uniform Environmental Covenants Act

Kenneth Joseph, a real estate lawyer in Pepper's Pittsburgh office, and **Todd C. Fracassi**, an environmental lawyer in Pepper's Detroit office, discuss Pennsylvania's enactment of the Uniform Environmental Covenants Act.

In addition to discussing the issues related to the enforceability of environmental covenants and Pennsylvania's decision to adopt a uniform law regarding covenants, this podcast identifies and discusses significant features of the Act, including the need to convert previous filed instruments to comply with the Act within five years of its effective date.

Listen today by visiting the Environmental Law or Real Estate sections of www.pepperpodcasts.com.

Pepper Hamilton Is Again Included in Annual AmLaw 100 List; Better Its Position from Last Year by Seven Spots

Pepper Hamilton LLP is once again included in the AmLaw 100, *The American Lawyer's* list of top 100 law firms. The firm is ranked 88th nationally, having bettered its position from last year by seven spots.

The American Lawyer magazine published its annual AmLaw 100 list, which ranks law firms by gross revenue, as well as by a number of other criteria, in its May 2008 issue. Pepper Hamilton is one of just a few firms in the Detroit market included in the AmLaw 100 this year.

“Pepper’s size – more than 500 lawyers firm-wide, including 32 in Detroit – and stature attract sophisticated clients,” said Barbara Rom, the partner in charge of Pepper Hamilton’s Detroit office. “Our clients face enormous challenges and demand experienced legal counsel, regionally and nationally. Our office here in Detroit offers them all of the resources of a large, multi-office firm with a national and international practice.”

Pepper Hamilton has been practicing in downtown Detroit since 1979, and was one of the first national law firms to enter the Detroit market. In the intervening 29 years, the office’s practice has grown from an original emphasis on labor relations law, including the related fields of occupational safety and health and employment discrimination counseling and litigation, to include corporate restructuring and bankruptcy, corporate and securities (including venture capital and SBIC), environmental (litigation and regulatory), employment, litigation, public finance, real estate and tax matters.

Pepper Hamilton LLP

Attorneys at Law

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