



Case Alert: In re: Washington Mutual, Inc., et al.

In *Washington Mutual*, Judge Walrath was called upon to determine whether the debtor or certain former employees were entitled to approximately \$69 million held in trusts created in connection with deferred employee compensation plans established by entities previously acquired by the debtor. The debtor filed a motion seeking authority to terminate the plan and “exercise ownership rights in the trust assets.” The plan participants objected, arguing that the Bankruptcy Court should impose a constructive trust on the trust assets due to the debtor’s wrongful conduct, namely the debtor’s refusal to give the participants their funds prior to the bankruptcy filing despite their absolute right to withdraw them. Although the Court concluded that the debtor’s conduct in failing to distribute the funds pre-bankruptcy when demanded was, in fact, wrongful and gave rise to a claim under ERISA for which imposition of a constructive trust was an available remedy, the Court denied imposition of a constructive trust. In so doing, the Court found that the deferred employee compensation plan was a “top hat plan” and “because the essential requirement that the top hat plans be unfunded, there is no nexus or property identifiably belonging to the [participants] on which a constructive trust can be placed ...”. The Court allowed the participants’ claims as general unsecured claims and permitted the debtors to retain and utilize the assets of the trust to satisfy claims in the case in accordance with the priority scheme established by the Bankruptcy Code.

If you have any questions or would like to discuss the decision further, please contact any of the Bankruptcy and Corporate Restructuring partners at Young Conaway. The Firm is also available for complimentary Delaware Update CLE programs to address any aspects of Delaware law that are of interest to our friends and colleagues around the country.

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Opinion

In re: Washington Mutual, Inc., et al., Case No. 08-12229 (MFW) (Bankr. D. Del. June 1, 2011)

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