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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SANTIAGO-MONTEVERDE,

MARY VERONICA SANTIAGO-MONTEVERDE,

Appellant,

-against-

No. 180

JOHN S. PEREIRA, CHAPTER 7 TRUSTEE,

Respondent.

20 Eagle Street
Albany, New York 12207
October 14, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Number 180, Mary
2 Veronica Santiago-Monteverde.

3 Counselor, you want any rebuttal time?

4 MR. MANN: I would like to save four
5 minutes for rebuttal.

6 CHIEF JUDGE LIPPMAN: Four minutes for
7 rebuttal. Go ahead.

8 MR. MANN: Thank you, Mr. Chief Judge. And
9 may it please the court, my name is Ronald Mann. I'm
10 counsel for the debtor-appellant, Ms. Santiago-
11 Monteverde.

12 The issue in this case is whether the
13 protections afforded a tenant in a rent-stabilized
14 lease are exempted from her bankruptcy estate because
15 they are a local public assistance benefit for
16 purposes of - - -

17 CHIEF JUDGE LIPPMAN: Tell us - - - tell us
18 what a public assistance benefit is.

19 MR. MANN: Well - - -

20 CHIEF JUDGE LIPPMAN: And how it fits into
21 your argument.

22 MR. MANN: - - - we think that the simplest
23 way to decide that question is to look at the
24 language of the statute which extends to local public
25 assistance benefits. The benefit here is plainly

1 local. It depends on specific determinations of the
2 cit - - - New York City.

3 JUDGE GRAFFEO: Why is it a benefit and not
4 just a status, that the tenant has a particular
5 status?

6 MR. MANN: Well, because the purpose of the
7 statute is to provide assistance and a benefit to the
8 - - -

9 CHIEF JUDGE LIPPMAN: But you're not
10 getting direct assistance, right? You're not getting
11 money each month. Does that matter?

12 MR. MANN: Well, there are many forms of
13 local public assistance benefits or, for that matter,
14 of public assistance that don't come - - -

15 JUDGE GRAFFEO: So what's - - - what's your
16 definition of benefit? Maybe that would help us
17 here.

18 MR. MANN: Well, as we suggest in our
19 brief, an ordinary dictionary definition of benefit
20 is it's something that provides aid or, more or less,
21 assistance to somebody. I think what's most
22 important here - - -

23 JUDGE SMITH: Doesn't - - - doesn't every
24 regulatory scheme benefit somebody or they're
25 intended to benefit somebody?

1 MR. MANN: Many regulatory schemes,
2 especially those that, you know, protect consumers do
3 provide benefits to them.

4 JUDGE SMITH: In fact, they're - - -
5 they're almost all intended to benefit the public.

6 MR. MANN: They're all intended to - - -

7 JUDGE SMITH: That's the nature of
8 regulation.

9 MR. MANN: - - - benefit the public. It's
10 not always clear there's specific people that they're
11 intended to benefit. But the fact that you - - -

12 CHIEF JUDGE LIPPMAN: But - - - but can you
13 tell if there's no hard-and-fast rule? If you don't
14 have to get X dollars to make it a benefit, how do
15 you know? And I think that's what Judge Smith is
16 driving at. How do you, you know, draw the line
17 between all these different kinds of quote "benefits"
18 that people can get? What's a - - - what's a real
19 public assistance benefit rather than something that
20 just benefits everybody? So, it's a good thing.
21 Let's say it's a good thing.

22 MR. MANN: All right, so I guess I could
23 answer that in - - - in three ways. The first is I
24 think it's important that the statute here uses the
25 word "benefit" as opposed to the word "payment",

1 which appears in various other closely related - - -

2 CHIEF JUDGE LIPPMAN: So that way you don't
3 have to get money?

4 MR. MANN: Therefore, it suggests - - -

5 CHIEF JUDGE LIPPMAN: A specific amount of
6 money?

7 MR. MANN: - - - that's it's something
8 broader than a simple cash payment.

9 CHIEF JUDGE LIPPMAN: How much broader?

10 MR. MANN: Well, I think that if you look
11 at the development - - - we talked about this in our
12 brief some - - - of public assistance programs over
13 the last twenty to fifty years, you'll see that they
14 go much more broadly than providing monetary benefits
15 in areas that are undisputedly brought within the
16 statutes such as - - -

17 CHIEF JUDGE LIPPMAN: It's the same as,
18 let's say, veterans' benefits?

19 MR. MANN: Well, veterans' benefits is the
20 next clause of the statute parallel to the one that
21 we're relying on. And, obviously, a lot of veterans'
22 benefits is not provided in the - - -

23 JUDGE SMITH: But can you think of one that
24 - - - that regulates the contractual obligation
25 between the - - - the - - - the person benefitted and

1 a third party?

2 MR. MANN: Well, it all depends on what you
3 think about it. I would characterize Medicare
4 program, which presumably is a public assistance
5 benefit, as regulating the contractual terms that are
6 offered between healthcare providers and patients,
7 between healthcare providers and - - -

8 JUDGE SMITH: No, but - - - no - - - but
9 yeah, those are cases in which the government pays
10 the bill.

11 MR. MANN: Not always. There are portions
12 of the medical costs that are paid by the consumers
13 and those costs are regulated to some degree by the
14 statute, which limits the amount that the providers
15 can charge.

16 JUDGE PIGOTT: You don't have to be in
17 poverty to - - - to have a rent-stabilized lease. Is
18 that right?

19 MR. MANN: Well, it's true you don't have
20 to be in poverty. I don't think that it's fair to
21 characterize the people that are covered by the
22 statute as particularly wealthy. Respondent suggests
23 that it has to be limited to the needy. And I think
24 what I would say about that is the legislature has
25 used public assistance, even that phrase, public

1 assistance benefits, in lots of contexts that don't
2 apply, strictly speaking, to programs that are
3 limited to the poor. So we have programs for the
4 elderly, programs for the disabled, programs for
5 veterans. Those are available to those people
6 whether or not they happen to be poor - - -

7 CHIEF JUDGE LIPPMAN: Why isn't this just -
8 - - it freezes your rent. Isn't that the concept of
9 - - - of rent stabilization, a certain point that it
10 freezes the rent? Is that different than this
11 concept of a - - - of a benefit?

12 MR. MANN: I don't think so. I think that
13 does provide a benefit to her. Obviously, strictly
14 speaking, the program doesn't just freeze the rent.
15 The rents for many of the apartments under procedures
16 in the statute go up from time to time. But to just
17 look at the language of the statute you would ask
18 yourself is this something that the local governments
19 have done, publicly not privately, designed to - - -
20 and, in fact, providing assistance and benefit to
21 her.

22 CHIEF JUDGE LIPPMAN: Well, it's to stop
23 evictions in - - - in - - - in effect, isn't it?

24 MR. MANN: Yes, that's one of the things it
25 does. It also provides mandatory renewal of leases.

1 It limits the scope of rent increases.

2 JUDGE RIVERA: So - - - so you're saying
3 the benefit is not just that it - - - whether it
4 freezes or ensures that you're paying below-market
5 rent. It's that there are these other benefits that
6 somehow inure to this tenant and I - - - I thought
7 you were also suggesting to the successors, potential
8 successors - - -

9 MR. MANN: Yeah, I - - - I would say - - -

10 JUDGE RIVERA: - - - that - - - that it's
11 not just that I'm only paying X amount monthly. It's
12 something else?

13 MR. MANN: I would say that, generally
14 speaking, the program has four components that
15 provide benefits to her. It gives protection against
16 rent increases, which are strictly limited to a
17 complex procedure. Mandatory renewal, she gets to
18 stay. She can keep renewing the lease. It's very
19 hard to evict her. She - - - it's not that easy to
20 evict anybody under New York law, but for people in
21 these leases it's much harder to evict than it is for
22 normal. There's a special eviction process. And
23 then they have rights of succession, so if there's
24 somebody - - -

25 JUDGE SMITH: Un - - - under your theory,

1 would - - - would any system of price controls be a
2 public assistance benefit?

3 MR. MANN: I don't know that any system of
4 price controls would be. I think if you had
5 something like the price controls that were in effect
6 during the Nixon Administration when I was younger, I
7 don't think those target a particular group of
8 people. They didn't identify a group of people who
9 had a particularized need where a local government
10 said these particular people are facing - - -

11 JUDGE SMITH: Before - - - before you - - -

12 MR. MANN: - - - an emergency.

13 JUDGE SMITH: Before you run out of time,
14 let me switch you to - - - to a slightly different
15 subject. What is your position on whether the - - -
16 the - - - the - - - on whether it's exempt or not on
17 whether these benefits, or whatever you call them,
18 this property interest, can be monetized? I mean,
19 are you - - - did - - - did - - - is your - - - would
20 - - - I would assume your client would be perfectly
21 happy to sell these to the landlord for 150,000
22 dollars.

23 MR. MANN: Well, I - - - I don't believe
24 that my client - - - I - - - I guess that the - - -
25 the question of whether they can be monetized, I'm

1 not sure I, strictly speaking, understand. But I
2 don't think that she would be happy to sell her
3 benefits for a small amount of money, because she
4 would ultimately be homeless.

5 JUDGE SMITH: How about a large amount of
6 money?

7 MR. MANN: Well, there's - - - enough money
8 for her to be able to be sure she could find a place
9 to live in New York City would be quite a large
10 amount of money, because she doesn't have any income.
11 So they might give her as much as, let's say - - -

12 JUDGE SMITH: Well, as - - - as I
13 understood it, they were - - - the - - - the deal
14 that you turned down was 10,000 dollars and stay
15 there for life.

16 MR. MANN: Well, it said stay there for
17 life, but the person offering that deal is not
18 somebody who's in a position to guarantee she can
19 stay there for life. All she wants to do is know she
20 can stay in her apartment.

21 JUDGE SMITH: But if you - - - but you - -
22 -

23 MR. MANN: The people who - - -

24 JUDGE SMITH: I would thin - - - you know,
25 if - - - if - - - if she got the 150 that - - - or

1 MR. MANN: - - - than continue - - -

2 JUDGE RIVERA: But - - - but what's - - -

3 MR. MANN: - - - to live there.

4 JUDGE RIVERA: What's the property that
5 she's able to sell?

6 MR. MANN: I don't believe there - - -

7 JUDGE RIVERA: I thought - - - I thought
8 the only property that she's able - - - in - - - in
9 that you're sort of talking about this would be her
10 life tenancy.

11 MR. MANN: Well, it - - - it's our position
12 - - -

13 JUDGE RIVERA: What else is there? She
14 can't sell successor rights.

15 MR. MANN: It's our position that there's
16 no property that she has any ability to sell. Now
17 she can decide - - -

18 JUDGE SMITH: So you're saying - - - you -
19 - -

20 MR. MANN: - - - decide not to renew her
21 lease.

22 JUDGE RIVERA: So there's nothing in the
23 estate - - -

24 MR. MANN: That - - -

25 JUDGE RIVERA: - - - that the trustee could

1 have, indeed, sold, is what you're saying - - -

2 MR. MANN: That is our position.

3 JUDGE RIVERA: Your side.

4 JUDGE SMITH: And if - - - if - - - even -
5 - - but you've listed it as exempt property. If
6 you're right, it's hers, right? It does - - -
7 doesn't pass the trustee.

8 MR. MANN: Well, the statute provides
9 benefits that are tied to this particular leasehold,
10 and I would say that they - - - those benefits - - -

11 JUDGE SMITH: Do - - - do - - - do you - -
12 - do you con - - - do you claim that it's exempt
13 property or not?

14 MR. MANN: It's our position that the
15 simplest way to resolve this case is to say that it's
16 exempt from the estate. It's covered by the
17 exemption. And it would be exempt - - -

18 JUDGE RIVERA: What - - -

19 JUDGE SMITH: So - - - so why can't - - -
20 and if it's exempt, why can't you - - - why can't
21 she, if she wants to, do what the trustee - - - I
22 mean, maybe - - - maybe you're - - - maybe it's true
23 that she wouldn't take 150,000 for the privilege of
24 remaining her - - - the rest of her life in this
25 apartment. But there must be people in the world who

1 would. Why shouldn't they be allowed to do that?

2 MR. MANN: Well, I think it's a technical
3 matter, thinking as a real estate lawyer, of what it
4 is that she would be able to do. I don't think,
5 technically, that she has the capacity to sell her
6 leasehold. I do think that she can decide not to
7 renew her lease and move out.

8 JUDGE SMITH: But is it in - - - is - - -
9 is that in her interest for you to make that argument
10 to say that she can't sell it no matter what the
11 price?

12 MR. MANN: Well, I don't know whether it's
13 - - - it's - - - it's - - - my interest is telling
14 you how I think the law fits together as a coherent
15 picture.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 JUDGE RIVERA: Well, again - - - I'm sorry.

18 CHIEF JUDGE LIPPMAN: I'm sorry. Judge
19 Rivera.

20 JUDGE RIVERA: But I just - - - but I just
21 want to clarify this. I - - - I thought you were
22 arguing that the only possible thing that the trustee
23 and this landlord would have an interest in is
24 exactly what she cannot sell, which is the successor
25 rights and the ability to - - - to transform this

1 from a regulated apartment to a deregulated
2 apartment.

3 MR. MANN: I think that's the interest
4 that, in our view, is not within her bankruptcy
5 estate.

6 JUDGE RIVERA: And - - - and that that's
7 what the trustee and the landlord only have an
8 interest in - - -

9 MR. MANN: That's the - - -

10 JUDGE RIVERA: - - - because they've given
11 her a life tenancy.

12 MR. MANN: Well - - -

13 JUDGE RIVERA: Or they've attempted to.
14 Let's just stick with that.

15 MR. MANN: I would say they have not - - -
16 no has yet offered her a life tenancy. And if
17 someone offered her a life tenancy, I'm inclined to
18 think she would accept. But they have - - - no one
19 has offered that who has capacity to actually offer
20 that - - -

21 JUDGE RIVERA: I see.

22 MR. MANN: - - - who owns the real estate.

23 JUDGE RIVERA: Okay.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 Thanks, counsel.

1 JUDGE RIVERA: All right.

2 MS. DASGUPTA: Anisha Dasgupta. I'm the
3 deputy solicitor general. I represent the State of
4 New York, and I'm here on behalf of the state and the
5 city to make clear that the state law protections of
6 rent stabilization cannot be sold by a bankruptcy
7 trustee.

8 JUDGE SMITH: Has - - - ha - - - has the
9 Second Circuit asked us that question?

10 MS. DASGUPTA: Yes, it has, Your Honor.
11 When the Second Circuit - - -

12 JUDGE SMITH: Is it - - - is it a question
13 of state law what a bankruptcy can - - - trustee can
14 sell or not?

15 MS. DASGUPTA: Yes, under federal
16 bankruptcy law - - - federal bankruptcy law looks to
17 state - - - how state property is defined under state
18 law.

19 JUDGE GRAFFEO: Is that - - - is that
20 because - - -

21 JUDGE SMITH: There are a couple - - -

22 JUDGE GRAFFEO: - - - the state opted out
23 under the federal statute and established its own
24 exemptions?

25 MS. DASGUPTA: No, Your Honor, that's a

1 separate question. So - - - so the certified
2 question has two parts. The first is whether this is
3 property that's within the bankruptcy estate in the
4 first place. The question Your Honor is averting to
5 is the second part, which is if it is regarded as
6 property under the state law exemptions, is it
7 exempt. The question of whether or not it's property
8 - - -

9 JUDGE GRAFFEO: So you want to answer the
10 first question?

11 MS. DASGUPTA: Well, in the State's view,
12 this is just - - - this is simply not property. So
13 the - - - the decisions of this court have made clear
14 that - - -

15 JUDGE RIVERA: But if it's not property,
16 what is it?

17 MS. DASGUPTA: So it's a public welfare
18 scheme that provides certain protections to people
19 under state law so, for example, here a tenant.

20 JUDGE READ: Well, there is that, but
21 there's a lease, isn't there?

22 MS. DASGUPTA: There doesn't need to be a
23 lease for rent stabilization. So a rent-stabilized
24 tenant has the right to continue in tenancy
25 regardless of whether or not there is a lease. And

1 the - - - the terms that provide what the Second
2 Circuit referred to as the protected value, so when
3 the Second Circuit certified this question - - -
4 certified the question the protected value in the
5 rent stabiliz - - - rent-stabilized lease. So the
6 Second Circuit recognized something here beyond a
7 lease. What it is is the protected value that's made
8 up of the state program.

9 JUDGE SMITH: If I could return you - - -

10 JUDGE ABDUS-SALAAM: So let me ask - - -

11 JUDGE SMITH: - - - for a minute to the
12 question I was asking before. The - - - the - - -
13 the couple of federal bankruptcy judges, I guess
14 Judge Bernstein and Judge Lifland, have held that
15 this sort of thing does pass to the bankruptcy
16 trustee and they treat it as a fed - - - as a
17 question of federal law. You say they were wrong, of
18 course.

19 MS. DASGUPTA: Yes, they - - - they assumed
20 if - - -

21 JUDGE SMITH: But we - - - my question is
22 it for us to say that federal judges are getting
23 federal law wrong, getting the choice of law question
24 wrong?

25 MS. DASGUPTA: Well, the question that's

1 before this court is not the federal law question.
2 It's the question of what attributes, under state law
3 - - -

4 JUDGE SMITH: Well, but - - - well, but - -
5 - but - - - but isn't there a preliminary question
6 whether state or federal law governs?

7 MS. DASGUPTA: Well - - -

8 JUDGE SMITH: Two bankruptcy judges, right
9 or wrong, have held that federal law governs. I
10 don't see anything in the Second Circuit opinion that
11 says federal law doesn't govern. How - - - wh - - -
12 how can we - - - isn't it presumptuous for us to say
13 oh, no, these bankruptcy judges don't understand the
14 law, this is a state law issue?

15 MS. DASGUPTA: Well, the certification of
16 this question recognizes that the outcome of this
17 case is controlled by important questions of state
18 law.

19 JUDGE SMITH: Yeah, but - - - but you - - -
20 of course you said they certified two questions, but
21 it might look like one to the casual observer.

22 MS. DASGUPTA: Well, if Your Honor looks at
23 the certification opinion, when the Second Circuit
24 analyzes why certification is appropriate in this
25 instance, the Second Circuit notes that this question

1 is controlled, in part, by the question of whether
2 rent stabilization is property at all. And that's
3 something that no New York court has addressed. So
4 federal bankruptcy courts had certainly assumed that
5 this is property, but that assumption doesn't bind
6 this court, and federal bankruptcy law is very clear
7 and federal appellate courts construing federal
8 bankruptcy law have made very clear. The question of
9 - - -

10 JUDGE SMITH: Well, you say that the
11 federal courts have assumed that this is a federal
12 question. You say that doesn't bind this court.
13 Does it not bind us in asking a certified question
14 from a federal court? Are we not - - - are - - - are
15 we supposed to reach our own opinion on a question of
16 federal law?

17 MS. DASGUPTA: Well, what they've assumed,
18 Your Honor, are the attributes of rent stabilization.
19 So federal courts understand that, under federal law,
20 if something is transferable and monetizable, then
21 it's part of a federal bankruptcy estate. They've
22 assumed that rent-stabilization protections are
23 transferrable and monetizable. In fact, they are not
24 and that - - -

25 JUDGE ABDUS-SALAAM: But isn't what they've

1 assumed, counsel, that there's a lease that is
2 transferrable and monetizable, not that the rent-
3 stabilization law is monetizable or transferrable?
4 So if this were not rent stabilization, as you said,
5 there is - - - there are not always leases involved
6 in rent stabilization and certainly not always in
7 rent control. But if there were no lease, would we
8 be here?

9 MS. DASGUPTA: Well, presumably, we would
10 be here even if there weren't a lease, because
11 there's a tenancy. And in the tenancy and
12 termination of that rent-stabilized tenancy is what
13 the bankruptcy trustee and the landlord have seen to
14 be of value. But the issue of the - - -

15 JUDGE SMITH: Yeah, but don't the federal
16 cases hold, not that in a - - - they aren't - - - I
17 don't know, I'm getting a little confused about the
18 state law. Don't they hold, right or wrong, that the
19 federal bankruptcy law overrides the state law
20 protections?

21 MS. DASGUPTA: They don't, Your Honor.
22 There is a Second Circuit case, Resolution Trust
23 Corp. v. Diamond, that dealt with rent stabilization
24 within the context of a different statutory, so that
25 - - -

1 JUDGE SMITH: That - - - that, as I
2 understand it, says that the land - - - that a
3 bankrupt landlord can evict a stabilized tenant?

4 MS. DASGUPTA: Well, what - - - what that
5 did was that was a particular federal statute that -
6 - - for failing thrift savings institutions allowed
7 receivers to repudiate leases. So that was a
8 situation where the federal law directly conflicted
9 with state law and so that was a case of conflict
10 preemption. Here the federal bankruptcy law looks to
11 state law and it - - -

12 JUDGE SMITH: Yeah, but I guess - - - this
13 is - - - this is getting to what's bothering me.
14 You're making an argument, maybe a good one, as to
15 how to interpret federal cases interpreting the
16 federal bankruptcy law. Why are we doing that? I -
17 - - I - - - why - - - why shouldn't we read this
18 question as saying please read Section 282 of the
19 debtor and creditor law and tell us what it means?

20 MS. DASGUPTA: Well, perhaps the answer to
21 Your Honor's question is to look to the definition of
22 what is property of the estate under federal law. So
23 - - -

24 JUDGE SMITH: Well, if - - - if we - - - if
25 we can - - - yeah, if we can answer the question by

1 saying these aren't local public assistance benefits,
2 that's all there is to it, goodbye, why should we say
3 anything else?

4 MS. DASGUPTA: Well, in part, because,
5 certainly, if the court is only to address the second
6 part of the question and to find that they are local
7 public assistance benefits that are exempt, the court
8 can assume that they're property for purposes of that
9 analysis. But if the court is going to conclude that
10 these are not exempt, then the court has to have
11 concluded that these are property. And to say that
12 these are property - - -

13 JUDGE SMITH: Have to - - - we have to
14 conclude - - - we have to conclude that they're - - -
15 that they're property in order to answer this
16 question no?

17 MS. DASGUPTA: In order to conclude that
18 they're part of the bankruptcy estate, certainly.
19 Because that - - - to - - - to be - - -

20 JUDGE SMITH: Well, yeah - - -

21 MS. DASGUPTA: - - - to be part of the - - -
22 -

23 JUDGE SMITH: - - - but - - - but they
24 didn't ask us and they certainly wouldn't ask whether
25 these things were part of the bankruptcy estate.

1 MS. DASGUPTA: Well, in - - - in - - - in
2 fact, the Second Circuit certification, I think it
3 does - - -

4 JUDGE SMITH: Your question is whether - -
5 - whether - - - whether there's a property - - -
6 whether they have a property interest that may be
7 exempted from the bankruptcy estate pursuant to New
8 York State Debtor and Creditor Law 282(2). If we - -
9 - I mean, why - - - why isn't the simplest way to
10 read that question does 282(2) exempt these benefits
11 or not? Either it does or it doesn't. If they are
12 local public assistance benefits, it does. If it
13 doesn't - - - if it doesn't - - - if it doesn't - - -
14 it doesn't, then let the Second Circuit worry about
15 the - - - worry about all the stuff you're talking
16 about?

17 MS. DASGUPTA: Well, certainly, that is one
18 way to answer the question. But in certifying this
19 question to the court, the Second Circuit said that
20 part of the reason why it was certifying is that no
21 New York court had addressed whether the protections
22 provided are personal or property rights. So the
23 Second Circuit recognized that when we talk about the
24 protected value of a rent-stabilized lease, when
25 we're talking about first the status of a rent-

1 stabilized - - -

2 JUDGE SMITH: Yeah, but if they wanted to
3 settle are these personal or property rights, they're
4 allowed to ask a second question that says that.

5 MS. DASGUPTA: Well, the - - - the
6 certified question, again, looking to the federal
7 bankruptcy law, makes clear that something has to
8 have the attributes of property under state law. And
9 the essential - - - but certainly there's a federal
10 law question, Your Honor, as to whether something
11 with particular attributes is property for bankruptcy
12 purposes. But the question of what those attributes
13 are when we're talking about an interest that's
14 created by a state program, that's a question of
15 state law. It's a pure question of state law, and
16 it's for this court to decide.

17 JUDGE SMITH: Isn't it - - - isn't it
18 really a very easy question of state law in a way?
19 There - - - the - - - the law is pretty clear that a
20 - - - a tenant is not supposed to sell her - - - or
21 can't sell her interest in the rent-stabilized
22 apartment. Is that - - -

23 MS. DASGUPTA: That's - - - that's
24 precisely right. Numerous decisions of this court
25 have said - - -

1 JUDGE SMITH: Are - - - they're really
2 asking us whether state law says that?

3 MS. DASGUPTA: Well, the Second Circuit in
4 the question is asking this court to apply its other
5 holdings to this particular context. So certainly
6 many decisions of this court have noted rent-
7 stabilized protect - - - the protections of rent
8 stabilization can't be transferred and they can't be
9 sold. And those are the two essential
10 characteristics - - -

11 JUDGE SMITH: But is this some unsettled
12 question of state law that the Second Circuit needs
13 enlightenment about?

14 MS. DASGUPTA: As to federal bankruptcy,
15 yes. So - - - so this court - - -

16 JUDGE SMITH: I understand they need it
17 from federal bankruptcy. But they wouldn't ask - - -
18 ask for it from us.

19 MS. DASGUPTA: Well, as to the attributes
20 of the - - - of rent stabilization under state law
21 that is a question for this court. And the Second
22 Circuit did note that the authority of New York State
23 courts, the - - - it's un - - - it's an unsettled
24 question as to the New York lower courts. Federal
25 bankruptcy courts have assumed this. But, again,

1 those situations, is housing security the kind of
2 essential public safety-net benefit that the
3 legislature would have understood tenants should
4 continue to receive when they're in bankruptcy. And
5 the answer to that, absolutely, is yes. Everything
6 about the legislative purposes, the structure of the
7 scheme, the people who it helps - - -

8 JUDGE GRAFFEO: I was just going to ask you
9 is there anything specific in the legislative history
10 that refers to rent-stabilized or rent-controlled
11 housing?

12 MS. DASGUPTA: No, Your Honor. And - - -
13 and there wouldn't - - - there wouldn't have to be
14 because if rent stabilization has the attributes of
15 the kinds of public assistance benefits that the
16 legislature intended to exclude, that would be
17 enough.

18 And one wouldn't necessarily expect there
19 to be mention of rent stabilization in the
20 legislative history, because this practice of
21 trustees trying to seize and monetize people's rent-
22 stabilized leases is something that emerged
23 relatively recently. And so it's not something that
24 the legislature had any reason to contemplate when it
25 enacted the statute. Certainly, rent-stabilized

1 leases are exempt from attachment by judgment
2 creditors. They - - - there is no context in which
3 they are treated as property under state law.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 Thank you.

6 Counselor?

7 MR. DANTZLER: Good afternoon, Your Honor.

8 My name's David Dantzler. I'm with Troutman Sanders,
9 and we represent John Pereira, the Chapter 7 Trustee.
10 With respect to the second point here on - - -

11 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

12 MR. DANTZLER: - - - whether there's a
13 separate property interest. The Second Circuit,
14 which is not binding on this court, specifically - -
15 - but the Second Circuit did - - - we believe did not
16 include that issue in the question because it has
17 decided the issue. In the Diamond cases it focused
18 on and rejected the precise arguments that have just
19 been made to this court regarding whether or not some
20 interest, separate from the lease, is created by
21 rent-stabilized - - -

22 JUDGE SMITH: Is that a state or federal
23 law question?

24 MR. DANTZLER: Your Honor, I think that is
25 a - - - I think it is a - - - it is a fair question.

1 I think in the context of whether these transactions
2 governed by federal law, in the Re - - - in the
3 Diamond case it was FIRREA, the financial bankruptcy
4 law.

5 JUDGE SMITH: But the - - - the - - - the -
6 - - the Diamond case was an act - - - didn't - - -
7 doesn't read like a state law decision to me.

8 MR. DANTZLER: I - - - I - - - and I don't
9 think that it is, Your Honor. I mean I don't think
10 it has to be. I think this court could - - - I think
11 it'd be a big mistake, but I think this court could
12 disagree with the Diamond decision and conclude that
13 outside of the federal context, there is some right
14 out there that doesn't attach to the lease. I think
15 that's nonsensical. And I think if you look at it in
16 the context of these leases, if one - - - if you look
17 at both the - - - the bankruptcy cases, Toledano and
18 the Stein cases - - -

19 JUDGE SMITH: Well, I mean, if you go - - -
20 you know, if you go to the - - - I mean, I - - - I -
21 - - I'm a little skeptical of whether we should - - -

22 MR. DANTZLER: I think you should - - -

23 JUDGE SMITH: - - - but if you go to the
24 merits of this, isn't - - - aren't - - - aren't they
25 right in saying that the trustee shouldn't - - -

1 can't take more than the debtor had. And the debtor
2 never had the right to sell this. Debtors can't sell
3 their rent-stabilization rights.

4 MR. DANTZLER: That issue has been - - -
5 that - - - that issue was specifically addressed in
6 the Diamond case. And the prohibition on the sale is
7 state law, is New York State law. Bankruptcy law
8 absolutely authorizes assumption and sales - - -

9 JUDGE SMITH: You - - - so you're - - -
10 you're saying federal law - - -

11 MR. DANTZLER: - - - and there's pre - - -

12 JUDGE SMITH: - - - overrides the state law
13 - - -

14 MR. DANTZLER: On that issue it does.

15 JUDGE SMITH: - - - and maybe - - - and
16 maybe - - - and does say no, I mean, but I guess - -
17 - well, hey, obviously you would agree with me.
18 That's for a federal court to decide whichever law -
19 - -

20 MR. DANTZLER: Exactly.

21 JUDGE SMITH: - - - overrides.

22 MR. DANTZLER: And that's - - - that's why
23 I'm saying - - - I - - - I think that the Second
24 Circuit has decided this issue, and that's why I
25 believe it is not in the question.

1 bankruptcy pursuant to which this lease - - - this
2 transaction must be approved, and other bidders could
3 come in. And we're not - - - we were not involved -
4 - - my firm was not involved in the underlying
5 transaction. But I think that the question here and
6 - - - one, I think the question here really is one
7 for the legislature. And I think the argument - - -

8 JUDGE PIGOTT: Well, now, let's go back - -
9 - just fundamentally for my - - - for my edification,
10 I guess.

11 MR. DANTZLER: Okay.

12 JUDGE PIGOTT: I don't get it that the
13 landlord who - - - who everyone seems to think has a
14 - - - has a predatory reason here to get rid of a
15 rent-stabilized lease is allowed to be the - - - the
16 only one to bid. And the second part of that is if
17 he's bidding that much she may not qualify for
18 bankruptcy. She may have more assets than she has
19 debts.

20 MR. DANTZLER: First, she is not being paid
21 anything as a result of this.

22 JUDGE PIGOTT: But she may be if - - -
23 depending on who bids.

24 MR. DANTZLER: Well, it - - - it - - - I
25 think - - -

1 JUDGE SMITH: If - - - if you lose this
2 case, I - - - I'm - - - I'm not sure what your
3 adversary said, but it would seem to me that at least
4 there's a possibility that she could - - - now he - -
5 - he - - - he says she would never do it unless it
6 were millions because she loves her apartment so
7 much, but - - - but - - - but she could sell her
8 apartment for what the market would bear?

9 MR. DANTZLER: I don't think that's right,
10 Your Honor, because I believe that the - - - if this
11 - - - if you determine that this lease is somehow
12 encompassed in the definition of local public
13 assistance benefit as used in this statute, which we
14 believe would be an erroneous construction, but if
15 you do that, then it is not subject to being
16 administered by the trustee as a part of her estate.
17 You revert to state law, and state law would not
18 allow her to sell, though, the State leaves open as
19 to - - - or somebody leaves open in one of these
20 briefs that I've read, that there is - - - it's - - -
21 it's unsettled whether the landlord could then go
22 make a deal with her to pay her to vacate.

23 JUDGE PIGOTT: Well, look, you can always
24 do that behind the curtain, but that's the - - -
25 that's the skill incuribis (ph.) it seems to me.

1 Either - - - either it's a public benefit, as they're
2 suggesting, in which case it's not in and this case
3 is over. Or it's not a public benefit, in which case
4 it's conceivable that she has more assets than debts.

5 MR. DANTZLER: It is conceiv - - - there
6 are circumstances under which what you postulate is -
7 - - is conceivable, but it - - - the - - - the lease
8 would only have the kind of value that you are
9 wrestling with.

10 JUDGE PIGOTT: Right.

11 JUDGE ABDUS-SALAAM: And what - - -

12 JUDGE RIVERA: I guess I'm not
13 understanding that. What - - - what's that value if
14 she can't assign it? I - - - I'm totally confused
15 now by this argument. What's - - - what's the value
16 you're talking about that she can profit so
17 significantly from?

18 MR. DANTZLER: She has a below-market
19 lease. And that lease has value. And in bankruptcy
20 - - -

21 JUDGE RIVERA: For her.

22 MR. DANTZLER: Well, it has value to her
23 creditors. A bankruptcy at its core - - -

24 JUDGE RIVERA: So I understand someone else
25 wants to get paid for it. I get that. But who - - -

1 when - - - when she goes about the business of trying
2 to sell this, what is she selling?

3 MR. DANTZLER: She - - -

4 JUDGE RIVERA: She's not selling successor
5 rights. She can't keep it - - - she can't trans - -
6 - change this to a nonregulated apartment. What is
7 she selling?

8 MR. DANTZLER: She is not selling.

9 JUDGE RIVERA: Okay.

10 MR. DANTZLER: The trustee is selling.

11 JUDGE RIVERA: All right, fine, whoever's
12 selling it. What - - - what is - - - what is on the
13 chopping block?

14 MR. DANTZLER: What the trustee is selling
15 - - -

16 JUDGE RIVERA: Um-hum, yes.

17 MR. DANTZLER: - - - here is, ultimately -
18 - -

19 JUDGE RIVERA: Um-hum.

20 MR. DANTZLER: - - - is selling the
21 leasehold on terms - - -

22 JUDGE RIVERA: Um-hum.

23 MR. DANTZLER: - - - that ultimately have
24 value to the purchaser, the landlord.

25 JUDGE SMITH: Now, okay, it's perfectly - -

1 - it's perfectly clear that - - - that - - - that
2 Mrs. Santiago-Monteverde couldn't have sold the
3 leasehold.

4 MR. DANTZLER: Correct, not outside of
5 bankruptcy.

6 JUDGE SMITH: So how - - - so how come the
7 trustee can?

8 MR. DANTZLER: Because - - -

9 JUDGE SMITH: The answer has to be because
10 federal law overrides the state protection.

11 MR. DANTZLER: That's exactly the answer,
12 Your Honor. 365 of the Bankruptcy Code allows trust
13 - - - treats leases as assets of the states and
14 allows trustees to assume the - - -

15 JUDGE ABDUS-SALAAM: Why - - -

16 JUDGE RIVERA: What about 365(c)(1)? 365 -
17 - - unless I'm misunderstanding that section of the
18 Code, I thought the landlord had to consent, and they
19 can't consent.

20 MR. DANTZLER: I'm not sure I understand.

21 JUDGE RIVERA: 365(c). The six - - -

22 MR. DANTZLER: The landlord - - -

23 JUDGE RIVERA: Let me ask you this. Let me
24 ask you this.

25 MR. DANTZLER: The landlord does consent

1 here.

2 JUDGE RIVERA: I'm sorry. Does 365(c)
3 prohibit what you're describing? Let me ask it that
4 way.

5 MR. DANTZLER: No, Your Honor.

6 JUDGE RIVERA: Why not?

7 MR. DANTZLER: I don't - - - I'm not a
8 bankruptcy lawyer, so you'll have to give me the
9 language. But I can - - -

10 JUDGE ABDUS-SALAAM: Can I take you back -
11 - -

12 MR. DANTZLER: But I can tell you that - -
13 - that the bankruptcy court has approved this
14 transaction after full litigation, as has the
15 district court approved it.

16 JUDGE RIVERA: Um-hum, okay.

17 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

18 JUDGE ABDUS-SALAAM: Let me take you back,
19 counsel, to what you said earlier about if we decided
20 this was a public assistance benefit - - -

21 MR. DANTZLER: Yes.

22 JUDGE ABDUS-SALAAM: - - - it would be the
23 wrong construction. Why?

24 MR. DANTZLER: Several reasons, Your Honor.
25 First that term must be construed in the context of

1 this statute in an effort to divine the intent of the
2 legislature in enacting not rent-stabilization laws,
3 but these exemption statutes which were intended to
4 limit the number of assets available for exemption
5 from an administration in a bankruptcy. If you look
6 at the - - - if you look at the words, as have been
7 construed in those instances that courts have looked
8 at them, they typically involve payment, they
9 typically are - - -

10 JUDGE ABDUS-SALAAM: Well, they typically
11 involve payment. Do they always involve payment?
12 Medical benefits are not always paid.

13 MR. DANTZLER: But - - - but you have to
14 read it, Your Honor, in - - - in the context - - -

15 JUDGE ABDUS-SALAAM: Veterans' benefits
16 aren't.

17 MR. DANTZLER: - - - you have to read it in
18 the context of the statute. And - - - and this is
19 used in a string of words that do use payments from
20 the government, Social Security benefits,
21 unemployment compensation, or a local public
22 assistance benefit. Read in that context, you can
23 only conclude that it refers to payments from the
24 government. Public assistance also is directed
25 toward the poor and needy. Rent-stabilization laws

1 are not limited. It attaches to the apartment, not
2 to the condition of the tenant.

3 JUDGE RIVERA: Coun - - - counsel, if - - -
4 if - - - if government had sent her the check
5 herself, is that, then, a public assistance benefit?
6 Is the difference merely that she pays the rent
7 versus the government paying it to the landlord
8 directly.

9 MR. DANTZLER: Well, I - - - I - - - I - -
10 - with all due respect, Your Honor, I think that
11 misapprehends the relationship here.

12 JUDGE RIVERA: Um-hum.

13 MR. DANTZLER: The benefit in rent
14 stabilization - - -

15 JUDGE RIVERA: Yes.

16 MR. DANTZLER: - - - is not paid for by the
17 government. It's paid for by the landlords - - -

18 JUDGE SMITH: But - - - but - - - is - - -

19 JUDGE RIVERA: No, but that wasn't my
20 question. My quest - - - yeah, right.

21 JUDGE SMITH: Is your answer yes?

22 MR. DANTZLER: Excuse me?

23 JUDGE SMITH: Isn't your answer to Judge
24 Rivera yes? If they - - - if they pay the rent - - -

25 MR. DANTZLER: If the - - - if - - - yeah,

1 if we were talking about a payment she received from
2 the government - - -

3 JUDGE RIVERA: Right.

4 MR. DANTZLER: - - - then I think the
5 argument would be much more credible.

6 JUDGE RIVERA: So ple - - - so please tell
7 me what makes this so different from the government?

8 MR. DANTZLER: Well - - -

9 JUDGE RIVERA: Just give me the - - - that
10 can only be used for rent. She can't use it for
11 anything else.

12 JUDGE SMITH: That's not - - -

13 MR. DANTZLER: There is no payment here.

14 JUDGE RIVERA: I understand that.

15 MR. DANTZLER: The benefit is not conferred
16 by the government. The benefit is conferred by the
17 landlord or the other tenants who were paying more to
18 subsidize this discount. The economic benefit does
19 not come - - -

20 JUDGE SMITH: But it's conferred - - - but
21 it's - - - but the government requires them to - - -
22 to confer that.

23 MR. DANTZLER: Sure, it's a regulatory
24 scheme that attaches and adjusts fundamental contract
25 and property rights.

1 JUDGE ABDUS-SALAAM: So you - - - you would
2 say then that this would be different than a public
3 housing apartment where the government is actually,
4 what, paying for it?

5 MR. DANTZLER: And provides the housing. I
6 would say it's very much different.

7 JUDGE GRAFFEO: So a tenant in a Section 8,
8 it would be treated differently from this tenant?

9 MR. DANTZLER: It's a - - - it's - - -

10 JUDGE GRAFFEO: Where's there a - - - where
11 there's a subsidy - - -

12 MR. DANTZLER: I don't know - - - I don't
13 know the - - - I don't know the answer to that.

14 JUDGE GRAFFEO: - - - there's - - - there's
15 a subsidy being paid by the government?

16 MR. DANTZLER: I believe so. And what
17 little I know about Section 8, I believe that is a
18 distinction.

19 JUDGE RIVERA: But it - - - it - - - it
20 sounds to me like you've got the same end result.
21 And I - - - so this is why I'm not understanding the
22 - - - the distinction you're making between
23 government sending you a check that can only be used
24 for rent, you cash it, you give - - - or you even
25 sign it off to the landlord and what we have going on

1 here.

2 CHIEF JUDGE LIPPMAN: Isn't it form over
3 substance is, I think, what we're asking.

4 MR. DANTZLER: Is that - - - is that your
5 question, I think - - -

6 CHIEF JUDGE LIPPMAN: Yes, it is.

7 MR. DANTZLER: No, I think is not because -
8 - -

9 CHIEF JUDGE LIPPMAN: Is - - - is there a
10 real difference in theory about what the government
11 is doing and - - -

12 MR. DANTZLER: Absolutely.

13 CHIEF JUDGE LIPPMAN: But doesn't this
14 legislation, in effect - - -

15 MR. DANTZLER: But - - -

16 CHIEF JUDGE LIPPMAN: Isn't it the same
17 thing as handing them a check?

18 MR. DANTZLER: No, it is not. It is the
19 government requiring the landlord to hand them a
20 check. That's what's happening here. But I think
21 that one of the things that I - - - I really am
22 afraid, at least in the tenor of the questions that
23 are being missed here, is this term must be construed
24 in the context of this statute. And if you look at
25 this statute - - -

1 JUDGE RIVERA: So - - - so - - -

2 MR. DANTZLER: - - - there is nothing - - -

3 JUDGE RIVERA: - - - what about - - - what
4 about their argument that it doesn't say payment. It
5 says benefit. Which must suggest it's something
6 broader than the check?

7 MR. DANTZLER: I believe we are straining
8 at gnats here. I think that the - - - that the - - -
9 if you look at this statute and you apply all of the
10 rules of construction that are laid out in our briefs
11 - - -

12 CHIEF JUDGE LIPPMAN: What if you just use
13 the plain meaning of the - - - of the language?

14 MR. DANTZLER: I would say that it is still
15 a benefit conferred - - -

16 CHIEF JUDGE LIPPMAN: Is - - - is it at the
17 - - -

18 MR. DANTZLER: - - - by the government at
19 the expense of - - -

20 CHIEF JUDGE LIPPMAN: - - - term?

21 MR. DANTZLER: Yes, the - - - the benefit
22 here - - -

23 CHIEF JUDGE LIPPMAN: That you can
24 interpret it the way you're - - - you're - - -

25 MR. DANTZLER: Yes, because the benefit - -

1 - the ultimate benefit here, though required by the
2 government, is not provided by the government.

3 JUDGE RIVERA: What - - - what - - -

4 MR. DANTZLER: The benefit here is provided
5 by private citizens.

6 JUDGE RIVERA: Counsel, what - - -

7 JUDGE GRAFFEO: Wasn't it - - - it is an
8 advantage provided to these tenants. If you manage
9 to - - - to - - -

10 MR. DANTZLER: It's - - - it's - - -

11 JUDGE GRAFFEO: - - - acquire a tenancy in
12 a rent-stabilized apartment - - -

13 MR. DANTZLER: It's an advantage that - - -

14 JUDGE GRAFFEO: - - - there's a - - -
15 there's a monetary advantage every month.

16 MR. DANTZLER: - - - that attaches to the
17 apartment.

18 JUDGE GRAFFEO: Yes.

19 MR. DANTZLER: Not to the - - - not to the
20 tenant. The tenant realizes the benefit.

21 JUDGE RIVERA: Coun - - - counsel - - -

22 MR. DANTZLER: But - - -

23 JUDGE RIVERA: - - - what - - - what if - -
24 - what if, instead of doing what has gone on here,
25 instead, the government said you can deduct from your

1 taxes the price of that apartment? Is that now a
2 benefit? You deduct your rent. Is that a benefit?

3 MR. DANTZLER: Well, I - - - I - - - I
4 think it would depend if it - - - if that were - - -
5 if it were limited to people of a certain income
6 level. If it were - - -

7 JUDGE SMITH: Well - - - well - - - well,
8 they do let people deduct mortgage interest, which
9 would be - - -

10 MR. DANTZLER: Sure, I - - - I - - - there
11 are things that we could conceive of that might fit
12 here. I don't believe that this is one of them. And
13 I - - - and the legislature - - -

14 JUDGE SMITH: Well, but you're not - - -
15 you're not conceding that the mortgage interest
16 deduction is a local public assistance?

17 MR. DANTZLER: Oh, no, absolutely. No,
18 absolutely not. Sorry, no, I thought you were
19 agreeing with the policy.

20 JUDGE SMITH: What - - - what's the meaning
21 of the words "public assistance"?

22 MR. DANTZLER: There are - - -

23 JUDGE SMITH: Is it - - - I give my part -
24 - - is - - - and - - - and I'm giving you a softball
25 - - -

1 MR. DANTZLER: Sure.

2 JUDGE SMITH: - - - but isn't it - - -
3 isn't it a synonym for - - - for welfare?

4 MR. DANTZLER: Yes, I mean, I think it - -
5 - what I think it is is payment or other monetary
6 benefits provided by the government to people - - -

7 CHIEF JUDGE LIPPMAN: This is not a
8 monetary benefit?

9 MR. DANTZLER: Not provided by the
10 government. It's required but not provided by the
11 government. And I - - - I think this whole
12 discussion points out, one, the world is not going to
13 come to an end if you answer this question no. The -
14 - - this has happened before.

15 CHIEF JUDGE LIPPMAN: Is the world going to
16 come to an end if we answer it yes?

17 MR. DANTZLER: No, I - - - well, I - - - I
18 guess not come to an end. But the argument - - - but
19 this - - - this entire conversation points out that
20 this really is a legislative issue. It's politically
21 charged. There's a bill pending before the
22 legislature with - - -

23 JUDGE ABDUS-SALAAM: The legislature says
24 that the bill is just to clarify what it already
25 thought was going on, that you couldn't monetize or

1 transfer or sign a - - - sell a - - - a rent-
2 stabilized lease.

3 MR. DANTZLER: The - - - the - - - the
4 sponsor of the bill thought that there was a
5 different circumstance. I believe if you look at - -
6 - and somebody asked this question earlier, at the
7 legislative history of DCL 282, there is not one
8 mention of leases, rent-stabilized leases. It would
9 be impossible that - - - I submit, for this court to
10 conclude that the legislature intended that these
11 leaseholds be included in this exemption.

12 JUDGE READ: But - - -

13 MR. DANTZLER: There is a - - -

14 JUDGE READ: But they could do it in the
15 future, is your point.

16 MR. DANTZLER: Absolutely, and that's where
17 the decision ought to be made.

18 JUDGE RIVERA: But we're not - - -

19 MR. DANTZLER: We're not arguing that this
20 - - -

21 JUDGE RIVERA: But - - - if - - -

22 MR. DANTZLER: - - - is a bad idea.

23 JUDGE RIVERA: But if it's not - - -

24 MR. DANTZLER: We're arguing it's not been
25 done.

1 JUDGE RIVERA: If - - - if it's not
2 exempted, aren't you undermining the exact goal of
3 the legislature with the rent-stabilization laws?

4 MR. DANTZLER: Oh, no, not at all.

5 JUDGE RIVERA: Why not? Why is that?

6 MR. DANTZLER: In fact, the rent - - - one
7 of the rent-stabilization laws and one of the cases
8 that I would - - - that was cited by the other side,
9 but Braschi is a - - -

10 JUDGE RIVERA: Um-hum.

11 MR. DANTZLER: - - - a case where, in fact,
12 you were construing the - - - this court was
13 construing the rent-stabilized laws. And there they
14 made clear that rent stabilization is not intended as
15 a permanent condition with respect to a structure.
16 The - - - the purpose is to allow for some orderly
17 transition fro - - - of rent stabilization, which is
18 different from other affordable housing programs.
19 But rent-stabilization was intended to ease the
20 transition from below market to moving tenancies and
21 apartments into the market. And this court
22 acknowledged and recognized that in Braschi.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 Thanks a lot.

25 MR. DANTZLER: Thank you.

1 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

2 MR. MANN: All right, there's several
3 things here I'd like to comment on.

4 CHIEF JUDGE LIPPMAN: Go for it.

5 MR. MANN: I would say that if he's
6 conceded that public housing is covered and he's
7 conceded that this is a benefit, it's - - -

8 JUDGE SMITH: Okay, well, he's conceded
9 that Section 8, I guess, is covered.

10 MR. MANN: A little difficult to tell it's
11 still - - - but let me talk specifically about
12 there's - - -

13 JUDGE SMITH: Pub - - - pub - - - public
14 housing, I mean, I didn't - - - I didn't hear him
15 concede - - - public housing, you mean like housing
16 built by the community - - - built - - - built by the
17 city for tenants. I don't think he conceded that was
18 covered.

19 MR. MANN: Well - - -

20 JUDGE SMITH: You say it is? You say every
21 public housing tenant has something that's exempt?

22 MR. MANN: You - - - you can interpret what
23 he conceded. Let me look at the language of Section
24 282(2)(a) and read it really carefully in light of
25 some of the things he said. It extends to a Social

1 Security benefit, unemployment compensation, or a
2 local public assistance benefit. Now compensation
3 sounds a lot more like writing you a check than
4 benefit. And Social Sec - - -

5 JUDGE PIGOTT: So if you got a VA - - - if
6 you got a VA loan to buy your house you got a public
7 benefit and your house is exempt?

8 MR. MANN: A Social Security benefit is
9 plainly not - - -

10 JUDGE PIGOTT: Are you agreeing with me or
11 not? I - - - I'm just curious because you - - - you
12 get into some really murky areas in terms of what is
13 a public benefit, you know, with your four - - - four
14 criteria.

15 MR. MANN: Well, I think - - - I'm not
16 familiar with the program of which you're speaking.
17 If the program of which you're speaking does not - -
18 -

19 JUDGE PIGOTT: No, let me - - -

20 MR. MANN: - - - include any state - - -

21 JUDGE PIGOTT: Let me ask you - - - Mr.
22 Mann, VA loans. They're very common.

23 MR. MANN: That's right.

24 JUDGE PIGOTT: You know, if you're in the
25 military, you come back, you get a break. They - - -

1 you know, they - - - they're subsidized by the - - -
2 by the federal government. The rent's low. You
3 don't need as much of a down payment. I would think
4 that's a public benefit. I don't think it's a public
5 benefit in the context of what you're - - - of what
6 you're saying in 282(2).

7 MR. MANN: Well, I actually do.

8 JUDGE PIGOTT: That's where we're in the
9 murky area.

10 MR. MANN: The - - - the benefit is the
11 ability to get a - - - a low-price loan. And I'm
12 going to say that if I am a veteran and I come back
13 from Afghanistan and I file for bankruptcy and the
14 price for my VA loan is six percentage points below
15 the market rate, the trustee shouldn't be able to
16 sell to some third party the right to go get a VA
17 loan based on me being a veteran. And I think it's
18 not - - -

19 JUDGE SMITH: He's - - -

20 MR. MANN: - - - part of the estate.

21 JUDGE PIGOTT: Well, sell the house, what
22 you're talking about.

23 MR. MANN: No, the hou - - - the house is
24 not provided by the government. What's provided is a
25 low-price loan.

1 JUDGE PIGOTT: That's his argument.

2 MR. MANN: The statute provides a low-
3 priced loan.

4 JUDGE PIGOTT: That's his argument. He's
5 saying a public benefit is provided but the lease
6 itself is not. And that - - - and that, much like a
7 home that's subsidized by some federal agency, can't
8 be sold.

9 MR. MANN: Well, we're - - - we're not
10 saying the lease is protected. We're saying that the
11 bankruptcy estate does not include the protections
12 that come from the state law scheme. And if - - -
13 your problem is they seem so ethereal that it's hard
14 to get your fingers around it. Well, that's just
15 makes it even clearer. It's hard to believe that the
16 New York legislature would intend them to be exempt.
17 Now let me say two things about that statute here.

18 JUDGE SMITH: The - - - the words, "local
19 public assistance benefit" are in the federal
20 statute, too, aren't they, in the bankruptcy law?

21 MR. MANN: Yes, that's the most impor - - -

22 JUDGE SMITH: Have - - - have they been
23 interpreted?

24 MR. MANN: Let me say something about that
25 with respect to your statutory argument. They have

1 been interpreted, but I would characterize none of
2 the cases being particularly close to this. But the
3 most important thing is the genesis of the language
4 that's in your statute that you're construing. He
5 makes a big deal out of well, they didn't talk about
6 - - -

7 JUDGE SMITH: Is that - - - that - - - the
8 genesis in our - - - is it in our statute or the
9 federal statute?

10 MR. MANN: It is in your statute. But the
11 genesis evidence of it is when Congress drafted the
12 Bankruptcy Act of 1978, they put these exemptions in
13 the statute. And they told the states if you like
14 the federal exemptions you can have them.

15 JUDGE SMITH: And then we - - - we copied
16 it.

17 MR. MANN: You copied them. So - - -

18 JUDGE SMITH: So - - - so should we - - -
19 should we answer the Second Circuit by saying why
20 don't you tell us, it's really your statute?

21 MR. MANN: Well, and that's what Judge - -
22 - Judge Raggi asked me to argue. She says well, can
23 the New York Court of Appeals interpret these words
24 to mean something different than we can. I said
25 well, yes, it's their statute. They can interpret it

1 to mean anything they want. It's up to them. But
2 the - - - but the - - -

3 JUDGE SMITH: Well, yeah, and we could
4 answer it if, I suppose - - - may - - - maybe we
5 shouldn't. We could answer it by saying well, we
6 interpret it exactly the way the federal courts would
7 so you take care of it.

8 MR. MANN: I sup - - - I suppose you could
9 say that. And I think that would not be particularly
10 responsive to their request - - -

11 JUDGE SMITH: Fair enough.

12 MR. MANN: - - - but, obviously, this is
13 something they're asking you for a favor and they
14 would like you to be helpful. And you're supposed to
15 be as helpful as you choose to be.

16 I would like to say a couple other things.
17 The goal of this statute is to set up an exclusive
18 mechanism for terminating these tenancies. What's
19 happening in this case is directly contrary to that.

20 The second thing I want to say before I go
21 away is talk about Judge Smith's questions about
22 what's federal and state law because I think that
23 this - - - you - - - you could put your finger on it.
24 The specific thing that they've asked you is whether
25 these - - - what these are for purpose of Section

1 282(2), and you're the final authority about that.
2 Can be anything you want. You could say lots of
3 things. You could say they're not properties; they
4 don't even fall under 282(2) as a matter of state
5 law. So under New York law they are within the
6 statute because they're not property. You could say
7 hard to know whether they're property, but whether or
8 not they're property they're local public assistance
9 benefits and so they're exempt because that seems to
10 us to make sense. You could even, I suppose, say - -
11 -

12 JUDGE SMITH: I mean, if - - - if I'm
13 hearing you right you say we can say either yes or no
14 to the question. You win both ways.

15 MR. MANN: I - - - I think that's right.
16 Now the federal question - - - there is a federal
17 aspect to this and this is what I want to point out.
18 The federal question that's lurking behind us is if
19 they are property for purposes of Section 541(a)(1),
20 on which you're not the final authority, well, then
21 they wouldn't get in their estate, anyway.

22 But the Supreme Court has - - - has really
23 strongly emphasized that state courts are supposed to
24 decide property questions. And federal law isn't
25 going to cast those determinations away if they don't

1 need to. And so if you say, as a matter of state
2 law, this is not property because it's not
3 transferrable, it can't be devised, all the things
4 the state said, here's what the Second Circuit has to
5 deal with. "Property interests are created and
6 defined by state law," quoting from Butner by the
7 Supreme Court. "Unless some federal interest
8 requires a different result, there is no reason why
9 such interests should be analyzed differently simply
10 because an interested party is involved in a
11 bankruptcy proceeding. Uniform treatment of property
12 interests by both state and federal - - - federal
13 courts serve to reduce uncertainty, to discourage
14 forum shopping, and to prevent a party from receiving
15 a windfall merely by reason of the happenstance of
16 bankruptcy." I think that's what the Second Circuit
17 faces.

18 JUDGE RIVERA: Coun - - - coun - - -

19 MR. MANN: So if you say it's not property,
20 it's not a local public assistance benefit whether or
21 not it's property, any of those things, it goes back
22 and they're going to say well, it's not the case.

23 JUDGE RIVERA: Coun - - - counsel is it - -
24 - is it possible that some of the interests are
25 property and some are not?

1 MR. MANN: Well - - -

2 JUDGE RIVERA: Is her - - - is her lease -
3 - -

4 MR. MANN: To me - - -

5 JUDGE RIVERA: - - - have aspects of
6 property but the succession rights, the other rights
7 about deregulation perhaps not property?

8 MR. MANN: To me - - -

9 JUDGE RIVERA: Is that a way to deal with
10 this?

11 MR. MANN: In fact, with what I do for a
12 full-time job, I think the question whether something
13 is or is not property is - - - is really malleable.
14 And it's likely to have different answers in
15 different con - - - contexts. And so you see working
16 by these questions well, if it's property does that
17 mean it's subject to the takings clause? Well,
18 that's an important question.

19 JUDGE RIVERA: Um-hum.

20 MR. MANN: And could have important
21 consequences for all sorts of things. We don't think
22 that it's property primarily because, you know, if
23 you want to find a touchstone for something you name
24 property, you ought to think that the person can
25 either transfer it or devise it in some way, and they

1 can't.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 Thanks.

4 MR. MANN: Thank you.

5 CHIEF JUDGE LIPPMAN: Thank all of you,
6 appreciate it.

7 (Court is adjourned)

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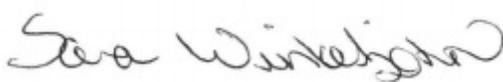
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Mary Veronica Santiago-Monteverde v. John S. Pereira, Chapter 7 Trustee, No. 180 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 18, 2014