



Bankruptcy and the Recession: New Life for an Old Property Tax Remedy

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Increase in Bankruptcy Filings Since BAPCPA

- A noticeable decline in bankruptcy filings occurred once the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) took effect.
- Bankruptcy filings have risen steadily since then and per the June 2009 report of Administrative Office of the U.S. Courts, the March 2009 total filings are the highest since BAPCA was implemented.



Rise in Chapter 11 Filings

- Predictions in 2008 of a “tsunami” of filings of major chapter 11 cases are now apparently proving correct as major entities continue to seek chapter 11 protection.
 - Chrysler
 - General Motors



Rise in Chapter 11 Filings (cont.)

- Bankruptcy filings for the 12-month period ending March 31, 2009, jumped 33.3 percent over bankruptcy filings for the 12-month period ending March 31, 2008, according to statistics released in June 2009 by the Administrative Office of the U.S. Courts.
- **The largest percentage increase occurred in Chapter 11 filings, an astounding 69.1 percent increase over March 2008 Chapter 11 filings.**



Complex Chapter 11 Filings

- The filing of many of the large chapter 11 cases does not come as a surprise.
- Typically the company has been working with its lenders to refinance or extend debt and those efforts fail and the debtor is forced into bankruptcy.



First Day Motions That May Attempt to Diminish The Priority of Secured Tax Claims

- Debtor in Possession Financing – may attempt to grant superpriority pre and post-petition liens to third party lenders/creditors.
- Cash Collateral Issues – monitoring for depleting inventories and/or selling off of equipment.



Expedited Sale Motions

- Many struggling businesses opt to use Chapter 11 bankruptcy as a means to sell substantially all of their assets and may do so on an expedited basis (e.g. Chrysler).
 - Debtors can sell assets under very buyer-friendly conditions.
 - Clear trend in favor of quick liquidation by sale motion.



Expedited Sale Motions (cont.)

- Debtors often file expedited sale motions because time is of the essence as the debtor is (or soon will be) unable to meet operating expenses.



Reviewing the Chapter 11 Plan

- Impaired vs. Unimpaired
- Categorizing Ad Valorem Tax Claims: “Secured Tax Claims” vs. “Priority Tax Claims.”
- The plan should acknowledge the tax liens and provide for lien retention until paid in full.
- Default language (defaults in plan payments)



Reviewing the Chapter 11 Plan (cont.)

- 11 U.S.C. §§ 1129(a)(9)(C) and (D) – tax claims must be paid:
 1. over a period not to exceed 5 years from the petition date,
 2. in regular installments,
 3. and in a manner which is no less favorable than the most favored non-priority unsecured claim.
- 11 U.S.C. § 511 – interest payable for all tax claims at the statutory rate (12% per annum per Texas Property Tax Code § 33.01(c) for Texas ad valorem taxes)



Determination of Tax Liability

- 11 U.S.C § 505:

- § 505(a)(2)(A) allows a bankruptcy court to redetermine the amount or legality of any tax, fine or penalty, except when previously adjudicated (which was the law pre-BACPA)



Determination of Tax Liability (cont.)

- However, § 505(a)(2)(C) adds that the court may not redetermine “... an ad valorem tax on real or personal property of the estate if the applicable period for contesting or redetermining that amount under any law (other than a bankruptcy law) has expired.”
- Thus, where the administrative deadlines for challenging value have lapsed, the bankruptcy court may not determine the tax liability.



When the Debtor Defaults in a Plan Payment

- Reviewing the Chapter 11 Plan is critical - including default language in the plan ensures that the debtor makes all plan payments timely.
- Pursuing state law remedies without further permission from the bankruptcy court.



Conclusion

- Perhaps as the recession grows deeper, one will see a further increase in chapter 11 filings and more and more business debtors will seek to sell their assets early on in the chapter 11 process.