A BANKRUPTCY PRIMER FOR

MUNICIPAL TAX OFFICIALS

Prepared for N.H. Tax Collector's Association
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I INTRODUCTION

The concept of Bankruptcy Law as we know it is a relatively modern concept. Almost until the time of the American Revolution, the response for non-payment of Debt was punitive in nature. The following example of case language is noted in Norton Bankruptcy Law and Practice 2nd Ed. (1994), a well known treatise on the subject of bankruptcy law:

> " Neither the Plaintiff at whose suit he is arrested, nor the Sheriff who took him, is bound to find him meat, drink or clothes; he must live on his own, or on the charity of others, and if no man will relieve him, let him die in the name of God..."
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> Manby vs. Scott, 86 Eng. Rep 781, 786 (Exch. 1659).

Fortunately today, a more enlightened approach has evolved. The evolution involved several steps. Early bankruptcy laws were created primarily to benefit Creditors. They introduced the concept of "even-handed liquidation" of a Debtor's property. The Debtor still did not obtain a release of his liabilities. Only later did the law evolve to allow discharge of liability, and later still, the "exemption" of certain property from seizure.

In the United States, the Constitution grants authority to Congress to make uniform laws governing bankruptcy. Art I, Sec 8 U.S. Const. As a consequence, bankruptcy laws are part of the Federal Law, administered through the Federal Bankruptcy Court process, and their operation is uniform throughout the United States. Under the so-called "Supremacy Clause" (Article VI) of the US Constitution, states may not regulate this area of the law, or affect the operation of the federal law.

The evolving history of the Bankruptcy Code is beyond the scope of this outline, but it should be noted that the first bankruptcy laws were passed by Congress in 1800 [2 US Stat. 19 (1800)], but were repealed three (3) years later. This first statute allowed only creditors to file bankruptcy against certain classes of debtors. It did include early versions of exemption from sale of certain personal assets. The country continued without bankruptcy laws until a second attempt in 1841 [5 US Stat. 440 (1841)], which lasted less than two (2) years. This statute allowed debtors to actually initiate filings, and expanded upon the concept of discharge of liability. A comprehensive Bankruptcy Act was enacted in 1867, shortly after the Civil War, and lasted for ten (10) years. The "modern" bankruptcy laws were primarily adopted by a wholesale rewrite of prior law by the Bankruptcy Act of 1898. 30 US Stat. 544 (1898). This set of laws governed bankruptcy

proceedings (with various amendments along the way) until the Bankruptcy Reform Act of 1978 enacted most of the current statutory language on October 11, 1979. There have been periodic amendments since that time, the most substantial being the "Bankruptcy Abuse Prevention and Consumer Protection Act" (BAPCPA) of 2005 (Pub. L 109-8).

II STRUCTURE OF BANKRUPTCY CODE

The current language of the Federal Bankruptcy Code is found in Title 11 of the United States Code (not to be confused with "Chapter 11"). The Title is broken down into a series of "Chapters", including the well-known sections designated as "Chapter 7", "Chapter 11" and "Chapter 13". A listing of the Bankruptcy Chapters under Title 11 helps in understanding the structure of the Federal Bankruptcy law:

Chapter 1 - General Provisions
Chapter 3 - Case Administration
Chapter 5 - Creditors, the Debtor and the Estate
Chapter 7 - Liquidation
Chapter 9 - Adjustment of Debts of Municipality
Chapter 11 - Reorganization
Chapter 12 - Adjustment of Debts of Family Farmer of Fisherman
Chapter 13 - Adjustment of Debts of Individual with Regular Income
Chapter 15- Ancillary and Other Cross-Border Cases

In general, the provisions of Chapters 1, 3 and 5 apply to all cases brought in Bankruptcy Court. 11 USC § 103(a). These contain definitions, concepts and procedures which apply to all types of cases. The provisions of Chapters 7, 9, 11, 12 and 13 are intended to apply to the specific type of Debtor in bankruptcy.

Chapter 1 (which includes Sections 101 through 109) contains items such as Definitions, Rules of Construction, and the rather important provisions of Section 109

designating who may be a Debtor under each of the later Sections. The general rule requires that only a "person" (which includes corporations, partnerships) who resides, has a domicile, a place of business or property in the United States may file for Bankruptcy Protection. 11 USC §109 (a). One question that recurs in the Court is whether a "trust" can be a debtor. Generally, the answer is "No". In limited circumstances a trust can argue that it is a "business trust" which functions the same as a corporation, and may therefore file bankruptcy. The New Hampshire Courts have established stringent tests for determining whether a trust is a "family trust" (and ineligible to file) or a "business trust" and eligible to file. See, In Re: BKC Realty Trust, 125 B.R. 65 (Bkrtcy. D. NH 1991). Id. There are also specific restrictions against certain entities being Debtors under certain Chapters. Banks, insurance companies and railroads may not "liquidate" under Chapter 7. 11 USC §109 (b). The prohibition against Chapter 7 filings includes HMO's, which are regulated as insurance companies. See, In Re: Beacon Health, 105 B.R. 178 (Bkrtcy. D. NH 1989). Only municipalities may file under Chapter 9. 11 USC §109 (c). Likewise Chapter 12 is restricted to family farmers and fishermen (as defined in such sections). 11 USC §109 (f). There are also specific restrictions on Debtors in Chapter 13, which will be covered later.

Also in Section 109 are prohibitions on immediate re-filings where a prior case was dismissed within 180 days, and the new BAPCPA provisions which generally require credit counseling before an individual can file for relief. Also new in Chapter 1 are provisions regulating non-profit credit counseling agencies. 11 USC §111.

The first part of Chapter 3 deals with commencement of bankruptcy cases. Bankruptcy cases can be started in one of two fashions, voluntarily by a Debtor (11 USC §301), or involuntarily by a Petition of Creditors. 11 USC §303. There are requirements for the numbers of Creditors needed to put a person into involuntary bankruptcy. A proposed Debtor may object to being "pushed" into Bankruptcy by Creditors. A hearing is then held by the Court. A person may be subject to involuntary bankruptcy if the Court finds that the Debtor is not generally paying debts as they become due unless the debts are subject to a bona fide dispute. 11 USC §303 (h). These two (2) alternative processes highlight the two (2) principals of bankruptcy; debt relief, and even-handed distribution among Creditors.

III AUTOMATIC STAY

By far the most important provisions of Chapter 3, and perhaps the whole Bankruptcy Code, are the provisions of 11 USC §362, the provision for automatic stay. This Section provides that the filing of a Bankruptcy Petition operates to "stay" i.e., stop, cease, or prevent, collection actions against the Debtor, or property of the Debtor. There are certain exceptions, found primarily in 11 USC §362 (b), but also in other Sections as well. Some of the more well known actions which are <u>not</u> halted by bankruptcy filing include: (i) criminal actions, (ii) establishment of paternity, divorce, child support proceedings and collection of alimony, (iii) certain actions to enforce governmental ordinances and regulations, (iv) certain government foreclosure actions and (v) certain types of eviction proceedings.

There are several specific exceptions to the automatic stay which affect the tax collection process. They are set forth in more detail below.

Under new BAPCPA provisions, in certain cases which are filed within one year of a prior bankruptcy dismissal, the stay may be limited or not effective except on specific Order of the Court.

The intention of providing this "stay" of proceedings is to give the Debtor some "breathing space", and give an opportunity to evaluate the Debtor's position. One of the areas that always come into question is whether a given action may "violate" the provision of the stay, since penalties exist for actions found to be in violation of the automatic stay. 11 USC §362 (k). The penalties can include actual damages, costs, and attorneys fees and possibility punitive damages. Id. In general, a Creditor is well advised to err on the side of complying with the stay and seeking relief (discussed below) if necessary. The Code provides that the stay is effective even without "official" notice, and that actions in violation of the stay, even innocently done, can be set aside (or penalized) as violations of the stay.

IV AUTOMATIC STAY AND TAX COLLECTION

There are three (3) specific exceptions to the Automatic Stay which impact the tax collection process. Under 11 USC 362 (b) (9) the stay does not stop tax audits, the issuance of notices of tax deficiency, or the making of assessments for taxes and the issuance of a notice for payment of the assessment. Under New Hampshire law, this means the process of assessing taxes through warrant, and the issuance of tax bills is not

affected by the filing of a bankruptcy case. As is noted below, this process must be strictly limited to what the law requires, as it relates to the billing process.

The collection process is affected by two (2) other exceptions. Taxes which are overdue, but for which a lien has not been imposed, are governed by 11 USC 362 (b) (3), which allows the "perfection" or continuation of a lien which can be perfected within a period allowed by state law. Under New Hampshire law, the tax "lien" for any year arises on April 1st, the first day of the tax year. RSA 80:19; RSA 76:2. In conjunction with language in 11 USC 546 (b), the municipality may complete or "perfect" the lien it acquired the prior April 1st, even though the taxpayer may have filed after the due date. Therefore, in any given tax year, if the filing is made before December 1st (or the later actual due date), this exception allows you to proceed with the imposition of liens. In 1994 Congress added 11 USC 362 (b) (18). This specifically provides for the creation or perfection of statutory real estate tax liens for taxes which came due after the filing of the Petition. Therefore, the law does allow the imposition of a statutory tax lien for real estate taxes regardless of the filing date.

As most Collectors are now aware, the scope of these "exceptions" to the automatic stay must be carefully complied with. In the case of Doolan vs Town of Derry, United States Bankruptcy Court, D. N.H. 09-14300-JMD, the Plaintiff/Debtors alleged that both the actual imposition of the liens, and the notices which preceded it, violated the provisions of the automatic stay. The Court analyzed all these exceptions to the stay. It first held that the exceptions to automatic stay must be read "narrowly. Id, citing, Hills Motors Inc vs Hawaii Auto Dealer's Ass'n. 997 F. 2nd 581 (9th Cir 1990). In drawing a distinction (which

the Author may disagree with) the Court held that "giving notice" of tax arrearages, or the intent to lien, is and must be separate from "attempting to collect" taxes, which is subject to the automatic stay. In general this was interpreted to mean that (for example) the Notices of Arrearage (RSA 76:11-b) can give notice of the prior unpaid taxes, but it cannot "coerce" payment by "threatening" the commencement of the tax lien procedure. Likewise the Court in Doolan held that the "Notice of Intent to Lien," and the actual imposition of tax liens did not violate the automatic stay, but language which "threatened" that a tax deed could issue was a violation. The Court determined that although certain notices must and can be given, "demand for payment" is not within the scope of the code exceptions.

The Court (Deasey, J) in Doolan acknowledges that this decision is "new" guidance for tax collectors, and so the decision has two specific features to it:

- The Court holds that its decision is "prospective only" meaning the Debtors who received such notices before the issuance of the decision may not claim a stay violation, and
- The Court includes in the decision specific suggestions for Tax Collectors to follow which can avoid future violations.

Based on the latter guidance, the Author, in concert with other counsel in Doolan and participants in the New Hampshire Bar Ass'n Municipal and Govt Law Section have crafted two "addendums" to be used for both Notices of Intent to Lien and Notices of Arrearage. See attached.

All of the foregoing relates to the imposition of the tax lien. The subsequent deeding is a different matter, covered in detail below.

V THE BASIC MECHANICS OF A CHAPTER 7 CASE

As noted in the title to the Chapter, a Debtor who files a Chapter 7 case is filing a "liquidation" case. A Debtor who files a Chapter 7 case effectively is asking to surrender all his "non-exempt" assets to be divided among his Creditors. As noted above, the filing of a Bankruptcy Petition operates as a "stay" of all proceedings against the Debtor (except those proceedings specifically exempted). Administratively, a "Trustee" is appointed for each Chapter 7 filing. By virtue of the act of filing, the appointed Trustee becomes the actual "owner" of any non-exempt property owned by the Debtor. 11 USC §541 (a). As part of the filing (except in involuntary cases), the Debtor must file schedules listing all his/her "assets and liabilities, a schedule of current income and current expenditures, and a statement of the Debtor's financial affairs." 11 USC §521 (1).

One of the reforms of the BAPCPA Act of 2005 was to establish a "means test" for Chapter 7 filers. The scope of how this applies is beyond this outline, but essentially, if you have lots of income, and modest debts, you may not be allowed to use Chapter 7. There is now a requirement for filing of copies of prior tax returns as part of the filing process.

The Debtor must also schedule all property which the Debtor believes is exempt, i.e. that which the Code allows a Debtor to retain free of claims of Creditors. Under the Bankruptcy Code, Debtors may have an option. They can avail themselves of a series of exemptions set out in the Code or they may elect to employ exemptions available under state law. 11 USC 522 (b). The federal exemptions are spelled out in 11 USC 522 (d),

while the state exemptions are found primarily in RSA 511, except the homestead exemption which is found in RSA 480. Under BAPCPA certain of the homestead exemptions are limited in value.

Once a Trustee has been named, an initial meeting of Creditors is established under 11 USC §341. Typically occurring within sixty (60) days of filing, the Debtor must appear and be questioned by the Trustee, and any Creditors who wish to appear. Following the meeting, the Trustee files a report with the Court advising if there is any non-exempt property available for Creditors.

It should be noted that Creditors fall into two (2) general categories; secured and unsecured. A secured Creditor is a Creditor who holds an interest in property to secure its debt, e.g. mortgage holders, lienholders on vehicles. A Debtor cannot discharge a secured debt (exception - certain transactions entered into within one (1) year and ninety (90) days can be set aside) at least as to the amount of debt which equals the value of the collateral. Debtors in Chapter 7, who own an asset with "equity" in it, surrender it to the Trustee, who will sell it, pay off the secured lender, then distribute the equity. If there is no equity in the asset, the Trustee may "abandon" his/her interest in the asset. The Debtor must then surrender the asset to the secured Creditor, or possibly reach a "reaffirmation" agreement with the lender.

If a Creditor is not secured, then it is an "unsecured" Creditor. Certain types of unsecured debts are entitled to a rank of "priority" ahead of general unsecured debts. The priority provisions are found in 11 USC §507. Items entitled to priority payment (ahead of general unsecured claims) include administrative expenses of the actual bankruptcy

process, wages due from the Debtor up to Ten Thousand and No/100ths ($10,000.00) Dollars per person, employee benefit plans, amounts due certain farmers and fishermen, certain consumer deposits to the value of One Thousand Eight and No/100ths ($1,800.00) Dollars, child support and alimony, most types of unsecured taxes (income, sales taxes, etc) and finally, amounts owed to the FDIC and similar entities.

Generally, the initial notice of Bankruptcy filing will advise Creditors if a possible distribution is expended. If so, Creditors are advised they must file their claims with the Trustee by a certain date. 11 USC §501. The Code provides a process to challenge the validity of claims. Generally, a Creditor must file a proof of claim (when noticed to do so), even though they are already listed on the Debtor's Schedule of liabilities (in Chapter 11 this is not the case). **NOTE**: Real estate taxes in New Hampshire are a **secured** claim, and are not classified as a "Priority" debt. As a general rule, all Towns should file a proof claim with the Trustees, noting that the taxes are a "secured" debt. The amount listed is the amount due as of the date the case was filed.

Unless complications arise, once the 341 meeting is over, there are two (2) further events in the process. Following a specified period of time, noticed to all Creditors, the Court issues a "Discharge" order. See, 11 USC §727. This order results in a release of the Debtor of all obligations except those the Debtor has chosen to reaffirm and those which are determined to be not dischargeable. This order is the effective "cancellation" of the debts of the Debtor, allowing a fresh start. 11 USC §727(b). A discharge is not available to a corporation, only to an "individual." Failure to complete certain personal financial management instruction may now prevent discharge.

Certain categories of debts cannot be discharged. See, 11 USC 523. These include certain types of taxes, debts and credit obtained by fraud, debts and Creditors not reported on schedules filed by the Debtor, alimony and child support, student loans, certain types of tort awards, and others. The failure to "behave" during the case itself can result in a denial of Discharge. 11 USC 727 (a).

The "Discharge" order is different from the "closure" of the case. The closure of the case may occur close in time after the Discharge, but it may be delayed if the Trustee is still in the process of distributing assets, or attempting to recover assets. It is generally the "closure" of the case which brings to an end the automatic stay at least as to property of the estate. If a "secured" lender has held off foreclosing or repossessing its property, it may do so once the case is closed.

VI RELIEF FROM STAY/ADEQUATE PROTECTION

As noted, the automatic stay stops all collection action, even those by secured Creditors. However, a secured lender has a couple of options available (Note: That a town, in collection of real estate taxes, is a "secured" Creditor, because its tax "debt" is "secured" by a "lien" on the real estate of the taxpayer): (i) A creditor can ask the Trustee to "abandon" the property (i.e., agree that he/she no longer needs to supervise it), taking it out of Court jurisdiction. 11 U.S.C. §554. If the Trustee agrees, he/she can file an "Intent to Abandon" or a creditor may file a request with the Court to order the Trustee to abandon, or (ii) In appropriate circumstances, a Creditor may petition the Court to "lift" or remove the automatic stay. This allows the Creditor to repossess or foreclose in order to

collect the debt due. See, 11 USC §362 (d). In Chapter 7 cases the two (2) most frequent grounds for relief are that (i) the Creditor has no equity in the collateral, and that it is not required for the Debtors reorganization, or (ii) due to accruing debt or decreasing collateral value, the Creditor is not "adequately protected". Motions to lift stay are directed to the Court, and may be objected to by the Debtor or the Trustee. If an objection is filed, the Court will hold a hearing on the request.

If the motion to lift stay is granted, the Creditor may repossess and sell the collateral. When the property is sold, if there are excess proceeds, they are turned over to the Trustee and/or Debtor (if exempt). If the "collateral" sells for less than what is owed, the difference, or "deficiency", then becomes an unsecured debt, subject to eventual discharge.

In the case of a municipality with a tax debt, the Town may not proceed against the property for a tax deeding unless:

i) The Trustee "abandons" the property – Once abandoned, property is outside the protection of the stay;

ii) The case is closed; or

iii) A Motion for Relief of Stay is filed.

A municipality would theoretically have a difficult time obtaining relief because its lien is usually the priority lien on the property, and unless the taxes are very old, they probably don't approximate the value of the property. There may be rare situations where the unpaid taxes may begin to impact the fiscal integrity of a community, which might result in a finding of "good cause" for relief.

A Debtor who wishes to try to hold onto an asset may be ordered to provide "adequate protection". See, 11 USC §361. The purpose of this is to make whole a secured Creditor, where the debt may be increasing, or the collateral value decreasing. In this event, the Bankrupt and/or Trustee may need to make cash payments to the Creditor, in order to give the Creditor the "equivalent value" of its interest in the property [11 USC §361 (1)], or require the Debtor to provide liens on other collateral in order to provide protection for the same principal amount. 11 USC §361 (2).

VII PREFERENCES/FRAUDULENT TRANSFERS/AVOIDANCE POWERS

Several provisions of the Bankruptcy Code deal with the ability to recover property previously transferred by or taken from the Debtor. These provisions are primarily designed to aid Creditors who may have been prejudiced by other transfers by the Debtor. These transfers fall into different categories. Under the provision of 11 USC §547 most transfers made within ninety (90) days of the filing date of the bankruptcy can be set aside as a "preference" transaction. These "preferences" are usually selective payments to Creditors, and are defined as payments to or for the benefit of a Creditor, greater than what a Creditor would receive under a Chapter 7 liquidation. 11 USC §547 (b). Transfers (or payments) made which were part of new funds or credits given to the Debtors are not subject to set-aside as a preference. See, 11 USC §547 (c). The preference set-aside period is extended up to one (1) year if the Creditor is considered an "insider". Preference set-asides must be brought by the Trustee, within two (2) years of the Trustee appointment, or the date the case is closed or dismissed.

A second type of avoidance is the set aside of "fraudulent" transfers. See, 11 USC §548. The statute defines "fraudulent" transfers as those you would normally think are "fraudulent" (i.e. transfers made with intent to hinder, delay or defraud), but also transfers made where the Debtor did not receive reasonably equivalent value, and the Debtor was or would become "insolvent". See, 11 USC §548 (a) (2). This is different from the preference set-aside, since preferences are subject to set-aside regardless of the Debtor's circumstances. Another difference is that on fraudulent conveyances, the potential look-back period is two (2) years. 11 USC §548 (a). This period is now extended to ten (10) years on certain transfers by a Debtor into a "self settled" trust. 11 U.S.C. §548 (e).

This fraudulent conveyance authority has an effect on the field of municipal real estate tax collection. In the case of C.F. Realty vs. Town of Hampstead, 160 BR. 461 (1993), Judge Yacos applied the provisions of 11 USC §548 to hold that a tax "deeding" was a fraudulent conveyance, subject to set-aside. The tax deeding obviously transferred property at far less than equivalent value, and the taxpayer happened to be insolvent by virtue of the transfer. This was decided before the statute allowing former owners certain repurchase rights for a thirty-six (36) month period following deeding. See, RSA 80:88, et seq. The New Hampshire Bankruptcy Court has affirmed that the repurchase rights can be exercised by the Trustee (or Debtor in possession), and that, in the context of a Chapter 13 case, the payments can be spread out over the life of the Chapter 13 Plan. In Re: Stevens, 374 B.R. 31 (Bkrtcy D.N.H. 2007).

The Bankruptcy Trustee is also given the status of a lien Creditor as to all assets of the Debtor, as well as power that a Debtor might have to cancel any transfer which the Debtor could cancel for whatever reason. 11 USC §544.

Trustees are also given certain rights to seek a re-determination of tax liabilities under 11 USC § 505. This section has been cited as authority for a bankruptcy court to allow the filing of abatement requests even after the passage of normal statutory deadlines. See, CGE Shattuck, LLC vs Town of Jaffrey, Bkrtcy D.N.H. Adv # 00-1148-JMD.

VIII CHAPTER ELEVEN BANKRUPTCIES

The title of Chapter 11 of Title 11 is "Reorganizations". Its primary use is by business organizations, or individuals who are operating a business, to seek relief from debt, but still continue in business in some fashion. Although infrequent, non-business Debtors may use Chapter 11. Creditors may also file a Petition for an Involuntary Chapter 11 case. The key to a Chapter 11 bankruptcy is the concept of a reorganization "Plan". A Debtor who files a Chapter 11 bankruptcy is given an opportunity to file a plan to reorganize its affairs. Generally, the Creditors of a Debtor may prepare their own plan for the Debtor if the Debtor does not do so within four (4) months, or does not obtain approval of a "plan" within six (6) months. 11 USC §1121 (c). There are longer time periods for certain "small businesses". The plan and an accompanying "disclosure statement" is prepared and submitted to the Court. The disclosure statement must contain "adequate information to inform Creditors of the affairs of the Debtor. 11 USC §1125 (b). This

disclosure statement must be approved by the Court. Once approved, the statement and the proposed plan are circulated to the Creditors for their consideration. There exist complex rules for voting and accepting a proposed confirmation plan. Following the voting, a confirmation hearing is held at which the Court can approve a plan. Generally, one primary test of a plan is whether the Creditors would fare better under the plan than if the Debtor were liquidated under Chapter 7. This means that a plan might propose to pay certain class of debts in percentage. Plans can also modify the terms of certain obligations (e.g. extend time for repayment of notes). On secured obligations, the concept of "adequate protection" still applies, and the plan must assure that the secured Creditor obtains the reasonably equivalent value of its claim, or it is subject to rejection.

One important point to be made is that, different from Chapter 7, a Trustee is not routinely appointed in Chapter 11 cases. The Debtor is statutorily granted the powers of a Trustee, being designated as a "Debtor-in-Possession". 11 USC §1107. The Debtor is generally allowed to continue to operate its business without a Court order. 11 USC §1108. A case Trustee is appointed only in those cases where there has been an allegation that the Debtor-in-Possession has committed fraud, dishonesty, or gross mismanagement. 11 USC §1104.

While there is normally no direct Trustee in a Chapter 11, there is administrative oversight through the office of the U.S. Trustee. This is an administrative position which oversees Chapter 11 cases. The US Trustee (or their representative) is the person who conducts and oversees the first meeting of Creditors under Section 341. The U.S. Trustee is required to receive regular reports on the operation of the Debtor while in Chapter 11.

The U.S. Trustee has the ability (along with other interested parties) to file a request to Dismiss or "convert" a Chapter 11 case to a Chapter 7 liquidation. 11 USC §1112. Generally, dismissal or conversion is appropriate when there are continuing losses, there is no likelihood of a confirmable plan, or unreasonable delay by the Debtor. Id.

In addition to the US Trustee (and an appointed Trustee in applicable cases), there are also provisions for Committees made up of classes of creditors. 11 U.S.C. §1102. The so-called "creditor committees" can retain professionals to investigate the Debtor and consult with the Debtor or Trustee on matters relating to the operation of the business.

Unlike a Chapter 7 liquidation, which is generally processed in only a few months, Chapter 11 cases can go on for many years. It can sometimes take longer than one (1) year to circulate, and finally approve a reorganization plan. Depending on the contents of the plan, it may take a considerable period to implement the plan. Confirmation of the plan binds the Debtor, and operates as a discharge of all otherwise dischargeable debts (remember, however, that a corporation does not obtain a "discharge". 11 USC §727). There are provisions to modify a plan once confirmed, and to vacate confirmation if it was obtained by fraud. 11 USC §1144.

IX CHAPTER 13

Chapter 13 operates in many ways like Chapter 11. Like Chapter 11, it includes the concept of the Debtor filing a plan to reorganize his/her financial affairs. Chapter 13 differs from Chapter 11 in the limitations on who may file:

(a) It is open to individuals (not corporations or partnerships).

(b) The individual must have "regular income".

(c) With secured debt less than $1,081,400 and unsecured debt less than $360,475 as of the date of filing.

11 USC § 109 (e)

These limitations assure that Chapter 13 is used only by individuals who are not in business, or sole proprietors with small businesses. More substantial businesses or corporations will need to file Chapter 11 filings. The filing requirements are now indexed to inflation and will change periodically. 11 USC 104 (b). Commodity and stockbrokers may not file Chapter 13 plans. "Regular income" can be self-employment, and even "seasonal" as long as it is "regular".

Unlike Chapter 7 or 11 cases, Creditors may not file an involuntary Chapter 13 case. 11 USC §303 (a). Unlike all other Chapters, the filing of a Chapter 13 operates as a stay of collection against the Debtor, and certain non-filing Co-Debtors. The stay applies to actions for consumer debt collection only. See, 11 USC §1301.

In accordance with idea that you cannot involuntarily force a Debtor into Chapter 13, only the Debtor may file a plan. 11 USC §1321. Creditors who feel the plan is not feasible, or who feel the Debtor is taking unreasonable time to file a plan, may move to convert the Chapter 13 case to a Chapter 7 liquidation case. 11 USC §1307. Conversion or dismissal is likewise available when a Debtor fails to abide by a plan already approved. Id.

In Chapter 13 cases, a Trustee is appointed by the office of the U.S. Trustee to manage and administer the Chapter 13 case. He/she presides at the initial meeting of Creditors under Section 341. The Trustee is also required to make recommendations on

the plan proposals of the Debtor. The Trustee's primary role is to collect plan payments made by the Debtor, and to make disbursements in accordance with the scheduled plan payments.

Like Chapter 11, the purpose of filing a Chapter 13 case is to allow a Debtor to attempt to cure defaults and/or salvage a business without submitting to the liquidation provisions of Chapter 7. By law, the plan shall/may provide

(a) for the Debtor to submit some portion of future earnings, to the control of the Trustee;

(b) a classifying of the claims of the Debtor;

(c) for modifying the rights of secured Creditors, except those secured by a mortgage on the Debtor's principal residence, provided that a plan can cure a default if regular payments are made; and

(d) for the curing and waiving of defaults.

11 USC §1322

Although Chapter 13 does not provide for a voting process, the Court must notify all parties of the plan and hold a confirmation hearing. 11 USC §1324.

While no vote is taken, secured Creditors must either (a) accept the plan, or (b) be allowed to retain their lien, and receive comparable value, or (c) accept surrender of the collateral. 11 USC §1325 (a) (15).

Normally, a plan provides for payment of secured arrearages and then some proportionate payments to other unsecured Creditors. Those priority claims under §503 must still be satisfied ahead of other claims. Payments to the Trustee must generally be completed within three (3) years, although the Court has authority to extend this period to five (5) years. 11 USC §1322 (d).

Confirmation of the plan operates to bind the Debtor and each Creditor of the Debtor. 11 USC §1327. The Discharge of the Debtor actually comes at the end of the completion of payments under the plan. 11 USC §1328. The Discharge operates to cancel all debts except those noted in the plan to survive (e.g., secured debt) or those general types of non-dischargeable debts under other Sections of the Code. Id. There do exist provisions to advance the Discharge hearing prior to complete payment, or in the absence of complete payment, provided that payments already made at least meet the "liquidation test" of Chapter 7, i.e. the Creditors have received the amount equivalent to that which they would have received under liquidation. 11 USC §1328 (b).

X CHAPTER 13 PLANS AND TAX COLLECTION

One issue that arises in both the context of Chapter 11 and Chapter 13 plans is the issue of interest to be paid on whatever amount is owned as of the filing date. In the New Hampshire Bankruptcy case of In Re: DeMaggio, 175 B.R. 144 (Bkrtcy. D. NH (1994)). Judge Yacos ruled that although "over secured" Creditors (such as municipalities holding tax liens) are entitled to post petition interest under 11 USC 506 (b), that the Bankruptcy Court was not bound to approve interest at the statutory rate. Some Courts adopted this theory, while Courts in other states continued to recognize statutory rates. As part of the 2005 BAPCPA changes, Congress adopted 11 U.S.C. §511, a new section which essentially states that if any interest is paid on allowed tax claims, it must be paid at the statutory rate. As a result, although not specifically ruled on in the New Hampshire Courts,

it is generally assumed that DeMaggio is now overruled, and the municipality is entitled to recover the statutory interest rate. See, In Re Bernbaum, 404 B.R. 39 (Bkrtcy D. Mass 2009); In Re: Courtner, 400 B.R. 608 (Bkrtcy S. D. Ohio 2009).

Although a municipality is entitled to receive its statutory interest rate, it must be diligent to make sure it receives it! One of the issues in the Doolan case related to the fact that one of the Debtors had proposed a Chapter 13 plan which did not pay the municipality's tax claim at the statutory rate. When the tax collector started applying the payments toward the statutory rate, it was found to be a violation of the automatic stay, entitled the Debtors to damages. See also, In Re: McLemore, 426 B.R. 728 (Bkrtcy S. D. Ohio, 2010) (Holder of tax certificate not entitled to statutory interest, despite 11 U.S.C. §511, where no objections were filed to plan and plan was approved); United Student Aid Funds, Inc vs Espinosa, __ U.S. ___, 130 S.Ct 1367 (2010)(US Supreme Court upholds a Chapter 13 plan which failed to pay student loan creditor interest they were statutorily entitled to, where creditor received notice of proposed plan, and did not object or appeal).

THE LESSON- Read the proposed Chapter 13 (and 11) plans – send them to legal counsel- file appropriate Objections if the tax claims are not being paid at the statutory rate! Otherwise the municipality may lose out on the interest it is entitled to. Local officials may still believe Debtors can "adjust" the interest rate they pay – Debtors are counting on it!

IMPORTANT NOTICE TO ASSESSED PROPERTY OWNERS CURRENTLY IN BANKRUPTCY

If you are currently in bankruptcy and subject to the protections of the Automatic Stay provisions of Section 362 (a) of the Bankruptcy Code, then the language of the enclosed "Notice of Tax Delinquencies" or "Notice of Arrearage" is hereby modified as follows:

a) The enclosed Notice is a requirement of New Hampshire law in order for the Town to provide legally required notice of unpaid taxes to current property owners. By sending this Notice, the Town is not attempting to collect any delinquent property tax debt from property owner(s) in bankruptcy and the notice should not be interpreted as requiring payment.

b) So long as the assessed property owner is in bankruptcy, a tax collector's deed cannot and will not be issued without appropriate Bankruptcy Court approval. A tax lien may be imposed, and the Town is required to give separate notice of that action.

c) The Tax Collector or Town may not increase the rate of interest on unpaid property taxes in cases where the Court has set such rate (e.g., an approved "Plan") without seeking appropriate Bankruptcy Court approval.

d) The provisions of federal bankruptcy law may affect the rights of the municipality under state law as long as the assessed property owner is in bankruptcy.

If you have any questions about the matters set forth in this special notice, you are advised to seek legal counsel from a person who is familiar with the Federal Bankruptcy Code. The tax collector's office cannot provide any legal advice.

Dated:_____ _____

Tax Collector

IMPORTANT NOTICE TO ASSESSED PROPERTY OWNERS CURRENTLY IN BANKRUPTCY

If you are currently in bankruptcy and subject to the protections of the Automatic Stay provisions of Section 362 (a) of the Bankruptcy Code, then the language of the enclosed "Notice of Impending Lien" or "Impending Lien Notice" is hereby modified as follows:

a) The Notice of Impending Tax Lien is a requirement of New Hampshire law in order for the Town to perfect its statutory lien. By sending this notice, the Town is not attempting to collect any delinquent property tax debt from property owner(s) in bankruptcy and the notice should not be interpreted as requiring payment.

b) So long as the assessed property owner is in bankruptcy, a tax collector's deed cannot and will not be issued without appropriate Bankruptcy Court approval.

c) The Tax Collector or Town may not increase the rate of interest on unpaid property taxes in cases where the Court has set such rate (e.g., an approved "Plan") without seeking appropriate Bankruptcy Court approval.

d) The provisions of federal bankruptcy law may affect the rights of the municipality under state law as long as the assessed property owner is in bankruptcy.

If you have any questions about the matters set forth in this special notice, you are advised to seek legal counsel from a person who is familiar with the Federal Bankruptcy Code. The tax collector's office cannot provide any legal advice.

Dated:_____

_____
Tax Collector