

# DEBTOR/CREDITOR

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## *Landlord Gets Attorney's Fees*

A federal appeals court in Richmond recently clarified the ability of a landlord to recover attorney's fees when a tenant files for bankruptcy protection.

The lease at issue made the tenant liable for reasonable attorney's fees incurred "to collect any sum due under the lease or enforce any obligation of the lessee." The bankruptcy court had denied the landlord reimbursement of any attorney's fees incurred after commencement of the bankruptcy case, reasoning that the litigation of issues particular to bankruptcy law were not sufficiently related to the lease default to be recovered. The appeals court reversed, directing the bankruptcy court to reexamine the issue and determine whether the bankruptcy litigation was an attempt to enforce obligations of the lease or for some other purpose.

*Three Sisters Partners v. Harden (In re Shangra-La, Inc.)*, 1999 U.S. App. LEXIS 594 (4<sup>th</sup> Cir. Jan. 19, 1999).

## *Financing Statement Inadequate*

In 1989, Bank loaned Borrower \$750,000 secured by collateral listed in the loan agreement. In order to perfect its security interest, Bank filed a financing statement, which lapsed after five years. In 1996, Bank filed another financing statement, which included a notation that it was for "collateral as to which the filing has lapsed." The 1996 financing statement described the collateral solely by referring to the 1989 financing statement.

In Borrower's subsequent bankruptcy case, the Kansas bankruptcy court determined that the 1996 financing statement did not perfect a security interest in the collateral, leaving Bank wholly unsecured. The court reasoned that describing the collateral by reference to a lapsed financing statement was inadequate, because the lapsed statement

could have been destroyed by a filing clerk, even though it had not been in fact.

*In re Bailey*, 228 B.R. 267 (Bankr. D. Kan. 1998).

## *Subchapter S Election Reversed*

Two weeks prior to filing a bankruptcy petition, the sole shareholder of a corporation revoked the corporation's Subchapter S status (under which the corporation's profit and loss pass through to the shareholder) and elected to treat the corporation as a "C" corporation for federal income tax purposes. The apparent purpose of the election was to shift to the corporation capital gains tax that would arise from the future foreclosure of the corporation's assets.

After the corporation filed a bankruptcy petition, the corporation's trustee successfully sued to undo the revocation of Subchapter S status. The court reasoned that the change in status constituted a transfer of the corporate debtor's property which could be undone if the corporation received less than equivalent value for the transfer or if the transfer was done with actual intent to hinder, delay or defraud creditors.

*Parker v. Saunders (In re Bakersfield Weststar, Inc.)*, 226 B.R. 227 (Bankr. 9<sup>th</sup> Cir. 1998).

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*This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.*

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