

# DEBTOR/CREDITOR

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## *Rare Landlord Victory*

Shopping center leases usually contain a provision requiring the tenant to pay a pro rata portion of the real estate taxes incurred by the shopping center. Typically, the center bills its tenants after the taxes have accrued and after the center has received a bill from the taxing authority. Where a tenant files a Chapter 11 petition and remains in the leased premises, the landlord often bills the tenant post-petition for taxes that accrued prior to commencement of the bankruptcy case.

Most courts have ruled that the status of the pass-through real estate taxes is determined by the date the underlying taxes accrued. Thus, the tax portion of the tenant's rental payment would be treated as an unsecured, pre-petition claim to be satisfied as part of the tenant's plan of reorganization. However, a federal appeals court in Philadelphia recently ruled that the claim for pass-through taxes arises in the month that it is billed to the debtor/tenant pursuant to the lease and must be paid by the debtor in full as an ongoing, post-petition expense of operations.

The United States Court of Appeals for the Fourth Circuit, which covers Maryland, has not decided this issue, although Maryland bankruptcy judges have previously followed the majority position. Landlords in this district may now have reason to press the issue to seek a change in the Maryland practice.

*CenterPoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp)*, 268 F.3d 205 (3d Cir. 2001).

## *Security Interest in Patent Perfected*

The federal bankruptcy statute gives a trustee or debtor in possession the power to void a security interest that has

not been perfected properly. Outside of bankruptcy, unperfected security interests are junior to later, perfected security interests. In a bankruptcy case, this special power of the trustee or debtor in possession leaves the "secured creditor" with no rights to the collateral and merely an unsecured claim.

A federal appeals court in San Francisco recently held that the proper method for perfecting a security interest in a patent is through filing a financing statement in the appropriate state recording office pursuant to the Uniform Commercial Code. In Maryland, this is the State Department of Assessments and Taxation.

The bankruptcy trustee had sought to void the creditor's security interest in the patent by arguing that the correct method of perfecting a security interest was through filing a notice in the United States Patent Office, the same office where any transfer of ownership in the patent is recorded. By rejecting the trustee's argument, the decision implies that a notice filed in the Patent Office does not perfect the security interest and would leave the security interest subject to attack in a bankruptcy case.

Given the ambiguity in the statute, a creditor holding a security interest in a patent should file in both locations. *Petitioning Creditors v. Matsco, Inc. (In re Cybernetic Services, Inc.)*, 252 F.3d 1039 (9<sup>th</sup> Cir. 2001).

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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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