

# DEBTOR/CREDITOR

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## *Late Filed Tax Return Ignored*

A debtor in bankruptcy may discharge certain old tax obligations. However, even these old taxes are not discharged, if the taxpayer has not filed a return for that year.

The federal appeals court in Richmond recently determined that tax returns filed after the IRS prepared its own assessment of the taxes are not “returns” for the purpose of the discharge in bankruptcy. This means that an individual or corporation that fails to file tax returns may be prevented from later correcting this omission.

*Moroney v. IRS (In re Moroney)*, 352 F.3d 902 (4<sup>th</sup> Cir. 2003).

## *Bonded Payment Not Preference*

The federal bankruptcy statute permits a bankruptcy trustee to recover from a creditor certain preferential transfers – generally defined as payments to a creditor within 90 days prior to the commencement of the bankruptcy case. However, there are numerous defenses that the creditor may be able to raise in order to retain the payment.

For example, where the creditor’s claim is secured by collateral with a value greater than the claim, no preference results, because the creditor would have received the same payment on its secured claim in a bankruptcy case. A Maryland bankruptcy judge recently extended this example to a case where the creditor did not have a secured claim.

The debtor/general contractor on a bonded construction job paid its subcontractor with 90 days prior to filing a bankruptcy petition. The general contractor’s Chapter 7 trustee sued the subcontractor to recover the payment as a preference. The court ruled in favor of the subcontractor, explaining that if the debtor had made no payment, the bonding company would have paid the subcontractor. As the bonding company had collateral to cover its claim for

reimbursement, the bankruptcy estate would have had to pay the same amount in any case.

*Field v. Insituform East, Inc. (In re Abatement Environmental Resources, Inc.)*, 2004 Bankr. LEXIS 437 (Bankr. D. Md. Mar. 31, 2004).

## *Reclamation Rights Preserved*

The Uniform Commercial Code allows a seller 10 days to reclaim goods from an insolvent buyer. The bankruptcy statute preserves this right. A seller whose buyer commences a bankruptcy must deliver a written demand for reclamation within 10 days from delivery of the goods.

The bankruptcy court may deny reclamation, but must grant the seller a priority claim or a lien for the cost of the goods. An Ohio bankruptcy judge recently considered whether sellers denied reclamation by the court had rights to payment superior to the rights of a creditor with a security interest in the same goods. The court held that a lender’s pre-existing security interest generally is senior to the rights of subsequent reclaiming sellers, leaving the sellers with only non-priority unsecured claims.

However, in the case before the court, the debtor fully paid its existing secured lender with new secured financing during its Chapter 11 case. With the prior lender’s security interest extinguished, the pre-existing reclamation rights trumped the security interest of the new lender.

*In re Phar-Mor, Inc.*, 301 B.R. 482 (Bankr. N.D. Ohio 2003).



*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.*

Prepared by James C. Olson, Attorney and Counselor at Law