NOTES ON

# DEBTOR/CREDITOR

RELATIONS

**July 2004**

## *Tax Assessment Timely*

The Internal Revenue Code requires that taxes be assessed within three years after a return is filed. If the tax is timely assessed, the government has 10 years from the date of assessment to collect the tax. The Supreme Court recently determined that timely assessment against a partnership also extends the collection period for the individual partners.

A partnership failed to pay its federal employment tax. The IRS timely assessed the taxes against the partnership, but never against the individual partners, who were also liable for payment. When the IRS filed claims for the unpaid tax in the partners' bankruptcy cases, the partners objected, arguing that the IRS was barred by its failure to assess a tax against them. The lower federal courts agreed. However, the Supreme Court reversed, explaining that the assessment against the partnership was sufficient to extend by 10 years the time within which the IRS could collect from the individual partners.

*U.S. v. Galletti*, 124 S.Ct. 1548 (2004).

## *Lease Assignment Denied*

The federal bankruptcy statute generally permits a debtor to assign a lease or contract not withstanding a provision in the contract which restricts assignment. However, the law provides special protections to shopping center landlords.

In a recent example, Trak Auto filed a Chapter 11 case and sought court approval to assign its lease at a shopping center in Virginia to a discount apparel retailer in exchange for $80,000. The landlord objected, because the lease required the premises to be used solely to sell automobile parts. Although the bankruptcy court decided that the use limitation was an unreasonable restriction on assignment, the appeals court disagreed, holding that bankruptcy law does not permit a modification of the original bargain between the landlord and tenant.

A well-crafted use restriction in a shopping center lease can make assignment practically impossible, enabling the landlord to retain the value of the lease in a tenant's bankruptcy.

*Trak Auto Corp. v. West Town Center, LLC ( In re Trak Auto Corp.*), 367 F. 3d 237 (4th Cir. 2004).

## *Plan Silence Defeats Lawsuit*

A Maryland bankruptcy court has determined that a debtor's failure to disclose a potentially valuable claim against another party precludes a suit to enforce that claim.

The debtor claimed $11,000,000 in damages against one of its vendors for alleged breach of contract. However, the debtor did not list this claim on its schedules, did not mention this claim in the disclosure statement filed in support of its plan and did not include any potential recovery from the claim as part of the funding in its plan. After confirmation of the plan, the debtor filed the lawsuit.

The court dismissed the lawsuit, holding that the debtor could not take inconsistent positions before the court. The court confirmed the plan based on the assets disclosed, and the debtor could not now argue that it had significant other assets.

*USinternetworking*, *Inc v. General Growth Management, Inc*. *(In re USinternetworking, Inc)*, 310 B. R. 274 ( Bankr. D. Md. 2004).

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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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