

October 2013

After-Recorded Mortgage Beats IRS Lien

Restivo Auto Body, Inc. owned real estate in Carroll County, Maryland. On January 4, 2005, Restivo borrowed \$1,006,065.72 from Susquehanna bank, secured by a mortgage on its property. On January 10, 2005, the IRS filed a Notice of Federal Tax Lien against Restivo in the Circuit Court for Carroll County. On February 11, 2005, Susquehanna recorded its mortgage in the Carroll County land records.

The property was sold in Restivo's bankruptcy case, with Susquehanna and the IRS each seeking to receive the proceeds from the sale. A federal judge in Maryland decided that the bank had first claim to the proceeds from the sale. The court reasoned that under Maryland law, a tax lien is no different from a lien of a judgment creditor. In Maryland, judgment creditors are junior to prior, undisclosed interests in property. In this case, the bank's mortgage, although unrecorded, was prior to the tax lien.

IRS v. Susquehanna Bank (In re Restivo Auto Body, Inc.), 2013 U.S. Dist. LEXIS 113055 (D. Md. Aug. 12, 2013).

Noncompete Agreement Lacks Value

The board of Adam Aircraft Industries sought the resignation of its president, Joseph Walker. The board and Walker agreed that in connection with the resignation, Walker would serve as a consultant and would not join any competitor for two years, would not sue AAI, and would present AAI positively to the public. In exchange, Walker would receive monthly payments at the rate of \$250,000 per year. AAI filed a Chapter 7 petition one year later.

The Chapter 7 trustee sued to recover from Walker the payments received during the 90 days preceding the bankruptcy filing. Walker defended, claiming that the payments were in exchange for his agreement not to compete with AAI, which provided new value to AAI.

A Colorado bankruptcy court rejected Walker's arguments, concluding that Walker's agreements not to take a competing position, not to file suit against AAI and to present AAI positively to the public did not actually "enhance the worth" of AAI.

Weinman v. Walker (In re Adam Aircraft Industries, Inc.), 493 B.R. 834 (Bankr. D. Colo. 2013).

Tax Filing Status is not Estate Property

In July 2012, this newsletter noted the decision of the Delaware bankruptcy court in *Majestic Star Casino*, concluding that a debtor's subchapter S or QSub status under the Internal Revenue Code is property of the bankruptcy estate. (The July 2012 issue of *Notes on Debtor/Creditor Relations* is available at www.jamesolsonattorney.com/newsletter_archives.html.)

The federal appeals court in Philadelphia recently reversed that decision, holding that subchapter S or QSub status is not property of the bankruptcy estate. *Majestic Star Casino, LLC v. Barden Development, Inc. (In re Majestic Star Casino, LLC)*, 716 F.3d 736 (3d Cir. 2013).

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