

BANKRUPTCY AND PROPERTY TAX COLLECTION

A Brief Update

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David R. Connell
Legal Services Counsel

James F. Raymond
Upton & Hatfield, LLP

Local Government Center Annual Conference

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James F. Raymond
Upton & Hatfield, LLP
10 Centre Street
Concord, NH 03301
(603) 224-7791

David R. Connell
Legal Services Counsel
Local Government Center
PO Box 617
Concord, NH 03302-0617
(603) 224-7447

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A. Introduction

With the apparently unending economic slowdown, tax collectors and other municipal officials continue to face the challenges of peering into the world of bankruptcy practice, with its own special, undecipherable terminology and arcane rules. David Connell offered a detailed analysis of bankruptcy law for municipal officials in his article for the September, 2010, edition of Town and City. (One of the presenters would modify the reference to David's article by adding the adjectives "scholarly and thorough"; the other, being modest, overruled him). This summary borrows liberally from David's article (indeed, incorporates portions wholesale) to give some background bankruptcy theory and practice pointers, and updates his article with a discussion of a few recent cases, and particularly the case of *In Re: Doolan*, decided on March 14, 2011.

B. Bankruptcy Law Overview

1. The Bankruptcy Code. What is it?

As authorized by the Constitution, Congress has adopted uniform national laws to deal with debtors unable to pay their obligations. The federal bankruptcy statutes appear in Title 11 of the United States Code, and are referred to as the Bankruptcy Code. Citations to the Bankruptcy Code appear formally by reference to sections in the United States Code, as 11 U.S.C. § __. We'll just refer to Title 11 as the "Code." The federal bankruptcy law represents a compromise between the policy of allowing debtors a "fresh start," in part to encourage entrepreneurial risk taking, and the interests of creditors in orderly recovery of debts, as reflected by the extensive lobbying of the banking and credit industry that lay behind the recent amendments to the Bankruptcy Code in the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 ("BAPCPA").

Congress has established a separate federal bankruptcy court system, with each state having at least one court. The federal bankruptcy court for the District of New Hampshire sits in Manchester. With the recent retirement of Judge Vaughn, we have only one sitting judge, Judge Michael Deasy, although he is occasionally backstopped by visiting judges.

The Code poses a challenge where it conflicts with New Hampshire real tax collection statutes and practice. As federal law, under the supremacy clause of the United States Constitution, the Bankruptcy Code takes precedence over state law. Thus, Rule #1: Do not argue with the Bankruptcy Code; the Code will win.

2. Chapters. What are they?

The Code is divided into chapters, designated by odd numbers, Chapters 1, 3, 5, *etc.*, but including, confusingly, Chapter 12, for "family farmers and fisherman," of which three chapters, designating the types of bankruptcy filings that private debtors may elect, Chapters 7, 11, and 13, are most frequently cited. (You may have read recently of Chapter 9, Adjustments of Debts of a

Municipality. We hope that chapter will never be used in New Hampshire, but if it is, we will hold a separate seminar, and we will not discuss it here). What are the differences among Chapters 7, 11, and 13? In short, Chapter 7 is liquidation, while Chapters 11 and 13 allow reorganizations. Chapter 11 applies to businesses and individual debtors with large assets and debts. Chapter 13 is for adjustment of debts for individuals with fewer assets and debts.

In slightly more detail:

a. Chapter 7, "Liquidation"

A debtor who files a bankruptcy petition under Chapter 7 of the Code surrenders all non-exempt assets in exchange for a discharge of debts. A trustee is appointed to collect and sell all the nonexempt assets and to distribute the proceeds to creditors according to their status. Secured claims must be paid in full from proceeds of property subject to the liens before unsecured claims can be paid. Typically, unsecured creditors receive dividends substantially less than their claims, or none at all. The debtor, if an individual, will receive a discharge from most of his or her debts, but if the property subject to a secured creditor's lien or mortgage has sufficient value, the secured creditor may retain its lien or mortgage.

b. Chapter 11, "Reorganization"

Chapter 11 allows businesses and individuals with high debts and assets to restructure payment of their debts while they continue operations and possession of their assets. A successful Chapter 11 results in a court approved reorganization plan that classifies claims and provides for payment in full or in part, as assets permit. The Code contains several requirements for plan approval, including that creditors receive more under the plan than they would in liquidation under Chapter 7. Typically the debtor remains in possession of its assets during the

bankruptcy (a “debtor in possession”) and has the power of a trustee in bankruptcy, subject to administrative oversight by the office of the United States Trustee.

c. Chapter 13, “Adjustments of Debts”

Chapter 13, as the “wage earner” chapter, allows financially distressed individuals to repay creditors through a repayment plan extending over three to five years, but to retain assets. The plan must provide for payment of secured claims, including interest, or secured claims may be paid outside the plan. As with the other chapters, unsecured creditors receive substantially less. A trustee collects payments by the debtor and disburses to the creditors in accordance with the approved plan. At the conclusion of the plan, the debtor receives a discharge.

3. Basic Concepts

An understanding of a few bankruptcy concepts may shed some light on how the Code balances the competing purposes of the fresh start and orderly payment of creditors with the town’s goal of collecting taxes. We will look at three of those concepts, the bankruptcy estate, the automatic stay, and claims.

a. The Estate

A bankruptcy case commences when either a debtor, as a voluntary case, or a certain number of creditors, as an involuntary case, files a petition with the bankruptcy court. The filing of a bankruptcy petition creates a bankruptcy estate, which is separate from the debtor, and consists of all the legal or equitable interests of the debtor in property as of the commencement of the case. This concept of the estate, although somewhat metaphysical, underlies the treatment of the debtor and its property and the rights of creditors through the bankruptcy process. For example, after the debtor in a Chapter 7 case receives a discharge, the

case, and the automatic stay on property of the estate, may continue for some time thereafter while the trustee completes the administration of the estate. Therefore, a town cannot assume it can proceed with tax decedding when the court issues a discharge, but may have to wait until the case is closed.

b. The Automatic Stay

You will hear reference to businesses in trouble seeking “relief from their creditors,” to gain time to put together a business plan that will allow them to reorganize (although, for most businesses, more typically to postpone the inevitable). The primary tool they rely on is the automatic stay, which arises automatically as a statutory injunction on the filing of a bankruptcy petition, under Code § 362. With some important exceptions, the basic rule is that a creditor, including a town, cannot take any action against a debtor on account of pre-petition debts (*i.e.*, debts that arose before the bankruptcy filing) until the stay ends or the creditor obtains relief from the court. As applied to the stay of tax collection, the three most applicable restrictions are Code §§ 363(a)(4), (5), and (6), under which the filing of the bankruptcy petition stays:

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; [and]

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

The automatic stay remains in effect, for actions against property of the estate, until the asset is longer property of the estate, and in all other actions, until the case is closed or dismissed, or the debtor receives a discharge, Code § 362(c) (1) and (2). A creditor may also seek permission from the court to take certain actions against the debtor or the property of the estate by filing a motion, referred to as a “Motion for Relief from the Stay.” A creditor who violates the automatic stay is subject to sanctions. In short, don’t do it. The Code, fortunately, contains exceptions to the automatic stay, which we will discuss later as they apply to tax collections.

c. Classification of Claims

A creditor’s right to payment or some other form of relief or action from the debtor for pre-petition obligations is referred to as a “claim.” For example, a town may have a claim against the debtor for unpaid taxes or water bills. Creditors notify the bankruptcy court of their right to payment by filing a “proof of claim,” a written statement detailing the amount and nature of the alleged obligation, using a form from the bankruptcy court. Claims are classified in the Code. For our purposes, the three most useful categories of claims for payment are: (1) secured claims, (2) priority claims and (3) general unsecured claims. Secured claims are obligations that are secured by a lien or other interest in the debtor’s property, such as a mortgage, for which the value of the property is sufficient to cover the amount of the claim. Creditors are entitled to full payment of their allowed secured claims, plus interest if provided by the underlying agreement or payment right, to the extent there is enough value in the property subject to the lien. Priority claims, listed in Code § 507, include, for example, certain costs of administration, wages, and, alluringly, some types of taxes, including certain property taxes, which are entitled to payment from the debtor’s assets before general unsecured claims.

Whatever is left over is typically a general unsecured claim, including the unsecured portion of a claim that is otherwise secured and debts for which the creditor does not hold a security interest, lien, or mortgage. Unsecured claims usually have the lowest priority for payment.

C. Property Tax Collection and Bankruptcy

1. The Automatic Stay

a. Who is subject to the Automatic Stay?

When a debtor files a petition in bankruptcy, the court sends a notice of filing to all of the creditors listed in the bankruptcy petition. Upon receipt of that notice, or if the Town learns of the bankruptcy filing from some other source, the Town becomes subject to the automatic stay. If notice is sent to some town representative, the entire town government may be considered to have notice, and is subject to the stay. Therefore, any municipal official receiving notice of a bankruptcy should share the information with other officials.

b. What is barred by the automatic stay?

All efforts at collection of prepetition debts, including taxes, with some exceptions, are barred by the automatic stay. In short, do nothing to collect taxes unless you can identify an exception: don't call, write, send notices of tax deeding, *etc.*, without an exception. Fortunately, there are broad exceptions that cover most routine tax collection activities, with some limitations and conditions. We will focus on those exceptions.

c. Exceptions to the Automatic Stay

Over the last twenty-odd years, the Code has been amended several times to carve out exceptions to the automatic stay to allow most tax collection in the ordinary course. For example, assessing and billing property taxes is permitted by Code § 362(b)(9). Perfection of a

lien for taxes already billed as of the filing of the bankruptcy petition is permitted by Code § 362(b)(3), but see the conditions imposed by *Doolan*, below. Creation and perfection of property tax liens for taxes that are assessed and due postpetition is permitted by Code § 362(b)(18). Thus, ordinary tax collection procedures are allowed to perfect a lien for delinquent taxes, but not tax deeding until the property is released from the automatic stay or the town obtains relief from the stay, although our court seldom grants towns that relief.

2. Filing a Proof of Claim

a. Do We Need to File?

As a general rule, file a proof of claim in all cases, except possibly when the court's notice of the case advises that proofs of claims need not be filed, typically in a "no asset" Chapter 7 case. The bankruptcy notice will give you a bar date by which governmental entities must file proofs of claim. Mark it in large red letters on your calendar.

b. Filling Out the Proof of Claim Form

The proof of claim form requests certain information, including the amount of the claim, the basis of the claim, amount of secured claim, interest rate, value of property subject to lien, and amount entitled to priority and type of priority; and requests attached documents that evidence the claim and perfected lien.

c. What amount should be claimed?

The amount of the claim is the total amount owed to the creditor as of the date of bankruptcy filing. But what amount is that? Property taxes are assessed as of April 1st. Does that mean the entire amount to be billed in the June and December bills is deemed to be owed on any date following April 1st? Or is the amount determined on a pro-rata per diem basis for the

days between April 1st and the petition date? Or is the amount owed limited to what has actually been billed, plus interest? All three methods have been used in the past. Since the passage of BAPCPA, with some wording changes in the form, the third method has generally been accepted. Accordingly, if bankruptcy is filed before the June bill, nothing is yet owed for that year. If bankruptcy is filed in October, the amount owed will be the first bill plus interest. After the November bills are due, the full unpaid amount for the year should be entered on the form.

The amount claimed in the proof of claim should also include all arrearages from previous years, plus costs and all interest as of bankruptcy filing date. Also include post petition interest in the blank provided for that purpose.

d. Do we call the claim a secured claim, a priority claim, or both?

Code § 507 gives priority status to certain taxes, including, in Code § 507 (a)(8)(B), “a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition.” Sounds pretty good, doesn’t it? “Priority” must mean we come first, and this class specifically includes property taxes. So let’s check priority claim. Wrong! Remember that the Code is federal legislation that applies to all states, including states that do not give local real estate taxes the same secured status as New Hampshire. Which leads us to Rule #2: Do not be lured by the siren song of priority claim status; with certain rare exceptions, always check secured status, not priority status. As a general rule, nothing is better than a secured claim. This rule is especially important when filing a proof of claim for a bankruptcy case filed in another state, where the court may not understand New Hampshire tax collection practice, but now, after the *Doolan* case, is just as important in New Hampshire. Reread this paragraph, three times.

e. What documents do we attach to the proof of claim form?

You may just file a naked proof of claim form. A better practice is to attach a copy of the account as of the date of bankruptcy filing. Why? Attaching the evidence to support the claim shifts the burden onto the trustee or debtor to disprove or challenge the amount. The New Hampshire Chapter 13 trustee usually requires the back up materials to entitle the town to payments under a confirmed Chapter 13 plan. In cases filed in other states, where the court or trustee may not understand New Hampshire tax liens, you might also attach copies of relevant sections of the New Hampshire statutes on the tax lien process and the recorded notice of lien execution.

3. What happens if we do nothing else?

In a Chapter 7 case, typically, timely filing of a properly filled out and documented proof of claim is sufficient to protect the town's interest. For Chapter 11 and 13 cases, before *Doolan*, there were hints that once town filed a proof of claim, it had to monitor the case to make sure its claim was treated correctly in the reorganization plan. For example, in *In re Burrell*, 346 B.R. 561 (BAP 1st Cir. 2006), , the town's proof of claim did not include a claim for post-petition interest on prepetition taxes, and the town failed to object to a proposed Chapter 13 plan that did not include payment of post-petition interest. The court held that by failing to object, the town was bound by the erroneous amount in the plan and could not collect its interest outside the plan. Although this case arose from the appeal of a Massachusetts bankruptcy court case, and was not widely noted in New Hampshire, two of the three judges sitting on the Bankruptcy Appellate Panel hearing the appeal were the New Hampshire bankruptcy judges, and the opinion was written by Judge Deasy, which should have forecasted his decision in *Doolan*.

4. What is the post petition interest rate on a tax claim?

Before the Code was amended in 2005, courts had determined the post petition interest rate based on prevailing market rates, or, in New Hampshire for taxes, on treasury bond rates with a slight risk adjustment. See *In re DeMaggio*, 175 B.R. 144 (Bankr. D.N.H. 1994). In 2005 Congress enacted a new Code section 511, which provides that interest on a property tax claim shall be determined under “applicable non-bankruptcy law,” which for us means state law, and, for a Chapter 11 or 13 case with a confirmed plan, “the rate of interest as of the calendar month in which the plan is confirmed.” Does that mean that the actual rate then in effect, *i.e.*, 12% if notice of lien was not yet recorded as of the plan confirmation date, or does it allow the rate to adjust automatically to 18% when the notice is later recorded? Again, *Doolan* raises its fair head, and suggests that the rate actually in effect will govern, unless the plan provides for a different rate.

5. What about taxes that are payable after the bankruptcy filing?

Chapter 11 and 13 plans must provide for payment of post petition property taxes as well as the scheduled payment of prepetition taxes. Post petition taxes may be paid as administrative expenses or outside the plan. If the debtor fails to pay post petition taxes, town counsel may be able to move for dismissal of the plan or for relief from the stay to permit tax-deeding, if the town is otherwise entitled to tax deed. For Chapter 7 cases, in which there is no plan, there is really little to do differently from non-bankruptcy practice once the case closes, except that if the debtor is discharged, the Town loses its right to pursue collection from the taxpayer individually. As discussed in *Doolan*, the tax collector must make sure that payments for pre and postpetition taxes are separately accounted for. You cannot simply apply tax payments to the oldest outstanding taxes, as typically occurs outside of bankruptcy, when the plan provides otherwise, and, especially in light of *Doolan*, you must accrue interest only at the

rate approved in the plan. As noted in *Doolan*, until the plan is confirmed, the debtor's tax payments should be applied to post petition taxes. The court will not accept as an excuse that your computer program applies payments that way; you may have to calculate the accrual of interest and apply payments the old fashioned way to make sure that payments are properly allocated.

6. Can the debtor redeem previously tax-deeded property?

One interesting question raised by the relative new redemption rights created in RSA 80:89 is whether the debtor retains those redemption rights after tax deeding, and can redeem the property but make the redemption payments over time through a Chapter 11 or 13 plan. In a recent case, *In re Stevens*, 374 B.R. 31 (Bankr. D.N.H. 2007), the court ruled that the debtor could. There, the town had tax-deeded about three weeks before the filing of the debtor's Chapter 13 petition. The taxpayer's Chapter 13 plan required the Town to re-convey the property to the Debtor, and the debtor would then make the redemption payments through the plan. The town contended that the property was no longer in the debtor's estate in bankruptcy as a result of the tax deed, so the debtor had lost her redemption right, similar to a mortgage foreclosure sale when the auctioneer's hammer falls. The court disagreed, reasoning that the estate included all interests of the debtor, including the right of redemption, and held that the right to repurchase the property under RSA 80:89 entitled the debtor to exercise the right to repurchase by making payments through the Chapter 13 plan.

D. Recent Developments

1. Water and Utility Liens

Although not a tax, charges for municipal utilities, including water and sewer charges, may be collected by the tax collector, who has “the same rights and remedies, including a lien on the real estate” as for the collection of real estate taxes. RSA 38:22; 149-A:11. A question is whether the town’s collection of water and sewer charges has the same status and exemptions from the automatic stay as the collection of real estate taxes. A recent 9th Circuit Court of Appeals case, from Wisconsin, *In Re: Grede Foundries, Inc.*, 651 F 3rd 786 (9th Cir. 2011), received national attention by ruling that a water lien did not fall within the exceptions to the automatic stay used for tax collection, Code Section 362(b)(3) and (18), reasoning that although state law may try to dress utility liens in the clothing of a tax, they are not a tax as intended by the Bankruptcy Code, and are therefore not entitled to the special provisions for tax collection.

Under the Wisconsin statute, apparently, the statutory lien did not arise upon provision of services, but upon either billing or some later notice of non-payment sent to the debtor. In contrast, arguably, the wording of the New Hampshire utility lien process may be sufficiently different to fall within at least 362(b)(3), for services provided and billed before the bankruptcy filing. Under RSA 38:22 the charges for services create a lien, although apparently not provision of services themselves, and the lien continues for eighteen months from the date of the last unpaid bill. We will not know until there is a published case in New Hampshire how the New Hampshire Bankruptcy Court may view the status of utility liens in bankruptcy if a lien has not been filed.

Contrary to the understanding of some debtors’ lawyers, a utility is not compelled to continue to provide utility services if the debtor does not pay. Under Code Section 366, a utility may not refuse or discontinue service on the basis of a bankruptcy filing or debtor’s owing a debt

for pre-petition services. The utility, though, may discontinue services within twenty days of the petition date (thirty days for a Chapter 11 case, Code Section 366(c)(2)), unless the debtor provides “adequate assurance of payment, in the form of a deposit or other security for service after such date.” Section 366 then goes on to describe what that form of security may be. Although under this code section, the burden rests with the debtor or trustee to provide adequate assurance of payment, a better practice may be to contact the trustee or the debtor’s lawyer, but probably not the debtor him or herself, notifying them of this provision, or if there is a substantial question, to file a motion for relief to allow discontinuance of utility service.

2. Real Estate Taxes

Doolan has garnered considerable comment, and is the latest word from our court on the interplay of bankruptcy law and real estate tax collection. As, surprisingly, the first case, at least since the Public Service Company bankruptcy in the early 1990’s, to rule expressly on the issue (a so-called case of first impression), *Doolan* provides instructions to tax collectors on how to make their tax lien notices and other notices compliant with the automatic stay under Code § 362. By adopting and discussing aspects of the recent United States Supreme Court case of *United Student Aid Funds, Inc. v. Espinosa*, ___ U.S. ___ (March 23, 2010), *Doolan* also, though, gives some warning shots on what we will need to do in future Chapter 11 and 13 cases to protect the town’s tax liens and right to payment that may differ from prior practice.

a. *United Student Aids Funds, Inc. v. Espinosa* – The Plan wins over the Code.

Espinosa was not a New Hampshire case and was not a tax case. It does, though, teach us that a creditor, including a creditor with special status under the Bankruptcy Code, cannot sleep on its rights, but must participate actively in the bankruptcy case, including by objecting to any proposed plan provisions that are contrary to the treatment allowed by the Code,

and cannot rely on the court to deny the plan or rely on a later assertion of those Code provisions. In a greatly simplified, Reader's Digest version of the case, Mr. Espinosa had student loans. Student loans receive special status under bankruptcy. They can only be discharged if the debt would create an "undue hardship," on the debtor and his dependents, determined by the debtor's filing in an adversary proceeding in the Bankruptcy Court. Mr. Espinosa filed a Chapter 13 plan that proposed to discharge a portion of his student debt, but he did not commence an adversary proceeding, as the Bankruptcy rules require. The United Student Aids Funds, Inc., the creditor and successor to the rights of the student loan lender, received notice of the plan, filed a proof of claim, but did not object and did not appeal the Bankruptcy Court's confirmation of the plan.

Down the road several years, when Mr. Espinosa refused to pay the loans, United filed a motion requesting that the court's confirmation be declared void because the plan violated the Code and the Bankruptcy rules, which was denied. The Supreme Court on appeal reasoned that the Bankruptcy Court's decision was not void, even if wrong, because the court had jurisdiction and the creditor received adequate notice of the bankruptcy and the plan, and therefore its due process rights were satisfied. Instead, with the creditor's receipt of the bankruptcy notice, the burden shifted to the creditor to file an objection to protect its interests. As the court reasoned, the Code "does not provide a license for litigants to sleep on their rights." Therefore, because the creditor failed to object, after receiving notice of the plan's content, it was subject to the plan provisions, even though they violated the Code.

The lesson from *Espinosa* is that a creditor must object if the proposed plan incorrectly treats the creditor's claim. The court, however, left the door slightly open by noting that the creditor in *Espinosa* filed a proof of claim, and thus subjected itself to the Bankruptcy Court's jurisdiction. Arguably, therefore, a town could avoid the court's jurisdiction simply by not filing

a proof of claim or an appearance. That door, though, may have been shut by the New Hampshire Bankruptcy Court's decision in *Doolan*, at least until we have a more definitive decision on sovereign immunity.

b. *In Re: Doolan - A new direction or more of the same?*

The New Hampshire Bankruptcy Court decision of *In Re: Doolan*, Bankruptcy # 09-14300-JMD, and its companion case, of *Gaff v. Town of Pembroke*, New Hampshire Bankruptcy # 07-12763-JMD, reported as 447 B.R. 51 (Bankr NH 2011), received considerable attention when it was decided in March, 2011, including articles in Town and City and notices from the New Hampshire Tax Collectors Association. Most of those comments, though, focused on additions or supplements to the forms for notices that tax collectors send to taxpayers. The greater consequence, though, may lie in the two other issues that the court addressed, following the themes hinted at in *Burrell* and directly held in *Espinosa*, that the towns cannot sleep on their rights and must actively participate in Chapters 11 and 13 cases.

i. Notices.

Remember earlier we said that any effort at tax collection must fall within one of the exceptions to the automatic stay, particularly in Code § 362(b)(3),(9), and (18). Those provisions provide that the filing of a petition does not create an automatic stay under § 362 (a) for:

(3) ... any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under Section 546(b) of this title...;

(9)(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency; and

(18) ... the creation or perfection of a statutory lien for an ad valorem property tax ... imposed by a governmental unit, if such tax ... becomes due after the date of the filing of the petition.

Tax collectors are required to send certain notices to delinquent taxpayers, including a notice of impending tax deeding, without which the town will not be able to continue its statutory tax lien, RSA 80:60, and the notice of arrearage required by RSA 76:11-b. In *Doolan*, the notices sent by the towns might be described as a bit over-enthusiastic.

For Pembroke, the 76:11-b notice stated:

According to RSA 80:59 any outstanding 2007 tax not paid in full, including interest and costs, will be subject to the tax lien process. To avoid initiation of the tax lien process and associated additional expenses, payment in full must be made by January 25, 2008.

The notice of impending tax lien included:

IF A LIEN IS PLACED IT WILL BE LISTED ON YOUR CREDIT HISTORY.

If the total amounts including interests and costs are not paid before 4 P.M. on Monday, March 10, 2008 a " Real Estate Tax Lien" will be executed to the Town of Pembroke and recorded in Merrimack County Registry of Deeds. This tax lien will entitle the Town to legal interest in the property unless, within two (2) years of the execution of the tax lien, the property is redeemed by payment of the amount due plus all accrued interests and costs. If payment is made before March 10, 2008 please call my office at 603-485-4747 extension 208 for the correct amount due.

For Derry, the 76:11-b notice stated:

To avoid initiation of the tax lien process as required by State statute and associated additional expense of \$18.00 Certified Lien Notice Fee, you should pay the total amount due (tax and interest) on or before March 25, 2010 for all levies listed not previously liened;

and the 80:60 notice included:

If the total amounts are not paid before the date stated above, a " Real Estate Tax Lien" will be executed to the Town of Derry and recorded at the Rockingham County Registry of Deeds. This tax lien will entitle the Town of Derry to legal interest in the property described above unless, within two (2) years of the execution of the tax lien, the property is redeemed by payment of the amount listed below, plus all accrued interest and costs.

What's the problem with these notices? Go back to the exceptions. As the court observed, they went well beyond the actions permitted by the exceptions to the automatic stay, by warning what would happen to the debtors if they did not fully pay, including, eventually, tax deeding. That, as the court reasoned, acts as a demand for payment and is not within the Code exceptions.

The court, however, recognized the statutory requirements that tax collectors must follow to preserve the tax lien. Therefore, rejecting the debtors' contention that the whole tax lien process was invalid, the court fashioned a remedy that balanced the New Hampshire statutory tax lien process with the Code by requiring that the tax collector either 1) eliminate all language not necessary under state law to maintain the lien for unpaid property taxes, or, and this is the option that the New Hampshire Tax Collectors Association suggests, (2) give a notice to the taxpayers and other persons with an interest in the property that:

a) the tax collector or town is only acting to maintain the perfection of its statutory lien and is not attempting to collect any delinquent property tax debt, (b) the tax collector or town will not deliver a tax deed or impair a debtor's interest in the property, (c) the tax collector or town will not increase the interest rate on unpaid property taxes without seeking appropriate bankruptcy court approval, and (d) the provisions of federal bankruptcy law may affect the rights of the town under state law, as long as the debtor is in bankruptcy.

The court did not specify any particular form of notice, and the Tax Collectors Association and others have created forms to provide that notice. Therefore, for a taxpayer in bankruptcy, any notices should include this additional wording, either included in the standard notice or as a supplement. Otherwise, towns can continue to follow the usual procedures for

notification for billing and liens, but not still not tax deeding, as that action does not fall within any of the exceptions to the automatic stay.

ii. The reach of *Espinosa*.

Remember that in *Espinosa* the court held that the creditor was subject to provisions in an approved Chapter 13 plan that were inconsistent with the Code. Similarly, in *Doolan*, although Pembroke filed a proof of claim, the debtor's plan proposed to treat the tax arrearage as a priority claim payable over five years without interest. Pembroke did not object, and the plan was confirmed. Derry filed a secured claim, but the plan proposed to pay the outstanding taxes as an unsecured priority claim with interest at twelve percent. Derry similarly did not object to its treatment. As the court has pointed out in other hearings, a priority creditor is not entitled to interest, so this treatment was a bit of a hybrid. The court did not dwell on these inconsistencies in the confirmed plan, as the focus of its decision lay in whether the tax lien process violated the automatic stay. The court, though, tips its hat in footnotes 12 and 13, both citing *Espinosa*, and noting that neither town appealed and they were therefore bound by the provisions of the confirmed plan. *Doolan* at 71.

What do we take from this? In the good old pre-*Doolan* and pre-*Espinosa* days, towns frequently would not bother to object to incorrect plan treatment, particularly provisions that treated them as priority creditors, on the theory that they could still retain their liens and collect interest, as the Code required that treatment, irrespective of the plan. *Espinosa* and *Doolan* took away that luxury. As a consequence, if they wish to protect their interests as a secured creditor entitled to interest at the statutory rate, towns may have to participate actively in bankruptcy cases, including filing objections to plans and attending hearings.

iii. Interest Rates

Earlier, we questioned whether the new Code Section 511 allowed interest to increase from twelve to eighteen percent under a plan upon the execution of a tax lien after plan confirmation. The court in *Doolan* did not have to address that issue directly, and we still do not know the answer. The taxpayers had contended that the statutory increase in interest, irrespective of when it occurred, violated the automatic stay. The court responded that because the increase occurred by operation of law when the lien is executed, it is not a violation.

In contrast, the town's applying payments made by the debtor after the bankruptcy filing, not designated under the plan for pre-petition taxes, could not be applied to either pre-petition taxes or interest, as that would violate the automatic stay. On the issue of whether the interest rate could increase automatically, irrespective of the plan, the court noted, in footnote 9: "The court noted that the town may require a plan to pay the statutory rate of interest as of the calendar month the plan is confirmed, even if that rate increased post-petition," citing Code § 511. We might conclude from the court's footnote that if the lien is executed between the petition date and plan confirmation, the town can obtain the benefit of the higher interest rate. What, though, happens if the plan is confirmed before execution of the tax lien for pre-petition taxes? Is the debtor only obligated to pay twelve percent thereafter under the plan? The court's footnotes suggest that could be the result. In a typical chapter 13 case, the difference in interest is probably not worth litigating. In any larger case, though, it may be prudent to file an objection, if the plan does not provide for increased interest upon lien execution, at least to put that issue before the court. What is the applicable interest rate, though, may remain a question for later court decisions.

iv. Conclusion

Doolan represents both a victory and a slight setback for towns. It was a victory, in that the court did not grant the taxpayers' request for a ruling that the statutory tax lien process in itself violates the automatic stay and is invalid. Instead, the court now requires towns either to amend their tax notices or to provide a supplement to their notices to debtors to bring them within the exceptions to the automatic stay. On the downside, although as a logical next step to *Espinosa*, towns can no longer sit on their hands, but must participate in chapter 11 and 13 bankruptcy cases to protect the secured status of tax liens, if the plan does not treat them properly. That may be a good result for municipal lawyers, but not for the town's line item for legal expenses.

E. Resources

www.uscourts.gov/bankruptcycourts/basics.html Basic explanation of bankruptcy system

www.uscourts.gov/formsandfees/forms/bankruptcyforms Proof of claim and other forms

www.nhb.uscourts.gov NH Bankruptcy Court: Information, forms, rules, opinions

www.bmcgroup.com Case information and filing for certain large bankruptcies

www.nh.gov/revenue DRA site with resources for tax collectors

www.nhtaxcollectors.com NH Tax Collectors' Association

List of Exhibits

- A. Proof of Claim
- B. New Hampshire Tax Collector's Notice of Arrearage
- C. New Hampshire Tax Collector's Notice of Impending Lien

UNITED STATES BANKRUPTCY COURT		PROOF OF CLAIM
Name of Debtor: _____		Case Number: _____
NOTE: <i>This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property): _____		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim. Court Claim Number: _____ <i>(If known)</i> Filed on: _____
Name and address where notices should be sent: Telephone number: _____		
Name and address where payment should be sent (if different from above): Telephone number: _____		
1. Amount of Claim as of Date Case Filed: \$ _____ If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____). Amount entitled to priority: \$ _____ <i>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>
2. Basis for Claim: _____ (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: \$ _____ Annual Interest Rate ____ % Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.		
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. <i>(See definition of "redacted" on reverse side.)</i> DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain: _____		
Date: _____	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	
		FOR COURT USE ONLY

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. Secured Claim:

Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien

documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). Do not send original documents, as attachments may be destroyed after scanning.

Date and Signature:

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

INFORMATION

Debtor

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor

A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing.

Claim

A claim is the creditor's right to receive payment on a debt that was owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

Acknowledgment of Filing of Claim

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

**IMPORTANT NOTICE TO ASSESSED PROPERTY OWNERS
CURRENTLY IN BANKRUPTCY**

If you are currently in bankruptcy and subject to the protections of the Automatic Stay provisions of Section 362 (a) of the Bankruptcy Code, then the language of the enclosed "Notice of Tax Delinquencies" or "Notice of Arrearage" is hereby modified as follows:

- a) The enclosed Notice is a requirement of New Hampshire law in order for the Town to provide legally required notice of unpaid taxes to current property owners. By sending this Notice, the Town is not attempting to collect any delinquent property tax debt from property owner(s) in bankruptcy and the notice should not be interpreted as requiring payment.
- b) So long as the assessed property owner is in bankruptcy, a tax collector's deed cannot and will not be issued without appropriate Bankruptcy Court approval. A tax lien may be imposed, and the Town is required to give separate notice of that action.
- c) The Tax Collector or Town may not increase the rate of interest on unpaid property taxes in cases where the Court has set such rate (e.g., an approved "Plan") without seeking appropriate Bankruptcy Court approval.
- d) The provisions of federal bankruptcy law may affect the rights of the municipality under state law as long as the assessed property owner is in bankruptcy.

If you have any questions about the matters set forth in this special notice, you are advised to seek legal counsel from a person who is familiar with the Federal Bankruptcy Code. The tax collector's office cannot provide any legal advice.

Dated: _____

Tax Collector

**IMPORTANT NOTICE TO ASSESSED PROPERTY OWNERS
CURRENTLY IN BANKRUPTCY**

If you are currently in bankruptcy and subject to the protections of the Automatic Stay provisions of Section 362 (a) of the Bankruptcy Code, then the language of the enclosed "Notice of Impending Lien" or "Impending Lien Notice" is hereby modified as follows:

- a) The Notice of Impending Tax Lien is a requirement of New Hampshire law in order for the Town to perfect its statutory lien. By sending this notice, the Town is not attempting to collect any delinquent property tax debt from property owner(s) in bankruptcy and the notice should not be interpreted as requiring payment.
- b) So long as the assessed property owner is in bankruptcy, a tax collector's deed cannot and will not be issued without appropriate Bankruptcy Court approval.
- c) The Tax Collector or Town may not increase the rate of interest on unpaid property taxes in cases where the Court has set such rate (e.g., an approved "Plan") without seeking appropriate Bankruptcy Court approval.
- d) The provisions of federal bankruptcy law may affect the rights of the municipality under state law as long as the assessed property owner is in bankruptcy.

If you have any questions about the matters set forth in this special notice, you are advised to seek legal counsel from a person who is familiar with the Federal Bankruptcy Code. The tax collector's office cannot provide any legal advice.

Dated: _____

Tax Collector