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"They Sold My House — and You Said It Was Safe!"

Celine de la Foscade-Condon,
Moderator

Massachusetts Department of Revenue; Boston

Hon. Elizabeth D. Katz

U.S. Bankruptcy Court (D. Mass.); Springfield

Bonnie C. Mangan

Law Office of Bonnie C. Mangan, P.C.; South Windsor, Conn.

Gary M. Weiner

Weiner Law Firm, P.C.; Springfield, Mass.

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Bonnie C. Mangan, Esq.
Law Office of Bonnie C. Mangan, P.C.
1050 Sullivan Avenue, Suite A3
South Windsor, CT 06074
bonnie.mangan@manganlaw.com

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What is the nature of the interest?

Is it secured?

Can it be removed?

IRS/Property Taxes/Superfund

Can it be avoided?

What is the difference?

Who has priority in the collateral?

Who has standing?

11 U.S.C.

§ 724(a)-AVOIDANCE POWERS—TREATMENT OF CERTAIN LIENS—

II. RELATION TO OTHER CODE SECTIONS

- **11 U.S.C. § 101(37)**--The term “lien” means charge against or interest in property to secure payment of a debt or performance of an obligation.

11 U.S.C. § 349(b)(1)(B)—upon dismissal a lien avoided under 11 U.S.C. § 724 is reinstated. This does not apply to conversion under any other chapter. This is because a lien of the type referenced in 11 U.S.C. §724(a) is voidable rather than void.

11 U.S.C. § 363(f) Gives the Trustee or debtor authority to sell property of the bankruptcy estate “free and clear of any interest in such property” if at least one of five conditions in the statute are met.

11 U.S.C. § 507—Proceeds received from property subject to a lien securing an allowed claim for taxes are distributed pursuant to the schedule set out in 11 U.S.C. 724(b). Accordingly, claims entitled to priority under 11 U.S.C. §§ 507(a)(1) through (a)(7) are included in the distribution. Tax claims entitled to priority under 11 U.S.C. § 507(a)(8) are not entitled to the benefit of 11 U.S.C. § 724(b) nor are any priority claims that are junior in priority to such claims.

11 U.S.C. § 522 (c)(2)—subordinates all of the debtor's exemptions to a tax lien where notice of the lien has been properly filed. § 522(c)(2)(B) gives tax liens priority over homestead exemption—Trustee does not need to file an objection to the Debtor's claim of homestead exemption *In re Bolden*—327 B.R. 657,663 (Bankr. C.D. Cal.2005).

11 U.S.C. § 522(g)—If the debtor could have claimed an exemption in property pursuant to 11 U.S.C. § 522(b), 11 U.S.C. § 522(g) allowed the debtor to claim an exemption in property that the Trustee brings into the estate after using 11 U.S.C. §724(a) to the same extent of the exemption that could have been claimed. The claim of exemption will not be permitted if the property recovered was voluntarily transferred by the debtor or concealed.

11 U.S.C. § 522(h) --If the Trustee decides not to avoid a lien that could be avoided under 11 U.S.C. § 724(a), and the debtor could have claimed an exemption in the property that would have been brought back into the estate had the lien been avoided, then the authority to avoid the lien can be exercised by the debtor. This only applies in Chapter 7 cases because the debtor's ability to avoid the lien arises from the Trustee's power to do so.

Under the right set of facts, 11 U.S.C. §§ 522(g) and (h) allow the debtor to free up otherwise encumbered property via 11 U.S.C. § 724(a) so it can be claimed as exempt.

11 U.S.C. § 551—a lien that is avoided under 11 U.S.C. § 724 is preserved for the benefit of the estate. The value of the lien is preserved for creditors, and junior creditors are prevented from improving their position at the expense of the estate—but nothing affects the allowance of the underlying claim. As long as the claim is an allowed claim it will receive distribution in accordance with 11 U.S.C. § 726(a).

11 U.S.C. § 726(a)(4)—claims for any fine, penalty or forfeiture which are not compensation for actual pecuniary loss

Pursuant to 11 U.S.C. §724(a), the Chapter 7 Trustee has the authority to avoid a lien that secures a claim as specified in 11 U.S.C. § 726(a)(4)—

11 U.S.C. §726(a)(4) controls distribution of estate property as follows—

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim.

26 U.S.C. § 6323—in conjunction with distribution under § 724(d), sets out the manner in which validity and priority against certain persons are recognized.

26 U.S.C. § 6502(a)(1)—if the IRS is a creditor, the Trustee can use the extended, ten year, statute of limitations period afforded to avoid fraudulent transfers instead of the two year statute of limitations under 11 U.S.C. § 548 or the four year statute of limitations under the Uniform Fraudulent Transfer Act. *Sharer v. Tepsic (In re Emergency Monitoring Technologies, Inc.)* 347 B.R. 17 (Bankr. W.D. Pa 2006).

11 U.S.C. § 724(b)—TREATMENT OF SECURED TAX CLAIMS IN THE DISTRIBUTION OF PROCEEDS FROM ENCUMBERED PROPERTY

11 U.S.C. § 724(b) refers to a “lien that is not avoidable under this title and that secures an allowed claim for taxes.” If the lien can be avoided under another section of the Code, 11 U.S.C. § 506, 11 U.S.C. § 522(f) for example, then the avoided lien would be preserved for the benefit of the estate.

11 U.S.C. § 724(b) provides a way to subordinate certain tax liens to the payment of certain unsecured priority claims. It provides that proceeds from property that are subject to a lien securing an allowed claim for taxes, other than *ad valorem* taxes, will be distributed in accordance with the priority schedule set out in 11 U.S.C. § 724(b). The unsecured priority claimants step into the shoes of the tax collector. *H.R. Rep. No. 595, 95th Cong., 1st Sess. 3821 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6338.* Secured tax claims are

subordinated under § 724(b) only when there are insufficient unencumbered assets to pay unsecured priority claims. This assures some payment to the unsecured priority claims in § 507(1)-(7).

The priority schedule is as follows:

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate) and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—
(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;

(2) second, to any holder of a claim of a kind specified in section 507(a)(1)(C) or 507(a)(2) (except that such expenses under each such section, other than claims for wages, salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under this chapter and shall not include expenses incurred under chapter 11 of this title), 507(a)(1)(A), 507(a)(1)(B), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate (general unsecured claims get what is left).

11 U.S.C. § 724(b) does not affect liens that are senior or junior to a tax lien. See *Marc Stuart Goldberg, P.C. v. City of New York (In re Navis Realty)*, 193 B.R. 998, 1004 (1996).

11 U.S.C. § 724(c)—priorities determined under non bankruptcy law.

If there are multiple claims entitled to distribution under 11 U.S.C. § 724(b), 11 U.S.C. § 724(c) provides that distribution to the holders of such claims will be made in the same order distributions would have been made other than under 11 U.S.C. § 724. See *United States v. Darnell (In re Darnell)*, 834 F.2d 1263, 17 C.D.C.2d 1106 (6th Cir. 1987).

11 U.S.C. § 724(d)—priority of a statutory lien are determined in the same manner as priority of a tax lien under 26 U.S.C. § 6323 shall be treated in the same manner under 11 U.S.C. § 724(b) as a tax lien. *United States v. Rhodney (In re R&W Enterprises)*, 181 R.R. 624 (*Bankr. N.D. Fla. 1994*)(11 U.S.C. § 724(d) cannot be invoked to require state real property tax liens to be recorded in the same manner as liens under Internal Revenue Code § 6323). It is unlikely that the priority of other liens are established in the same manner as those under Internal Revenue Code § 6323 unless the liens specifically refer to the complex priority waterfall found in Internal Revenue Code § 6323.

11 U.S.C. § 724(e)—resolves pre BAPCPA conflicts concerning when the Trustee can utilize 11 U.S.C. § 724(b). Tax lien cannot be subordinated under 11 U.S.C. § 724(b) unless the Trustee has exhausted the unencumbered assets of the estate and recovered any funds available to the trustee via surcharge to a secured creditor's collateral for certain costs of preserving or disposing of the collateral pursuant to 11 U.S.C. § 506(c).

11 U.S.C. § 724(f)—shifts the priorities of 11 U.S.C. § 507 re: *ad valorem* tax liens—

11 U.S.C. § 724(b) is not generally applicable to the *ad valorem* tax liens (taxes asses based on the value of property). 11 U.S.C. § 724(f) contains an exception because it can be utilized to pay claims for wages, salaries and commissions that are entitled to priority under 11 U.S.C. § 507(a)(4) and to pay claims for contributions to employee benefit plans under 11 U.S.C. § 507(a)(5) in certain situations. Namely, if distribution from the estate is not sufficient to pay all administrative expenses of the estate, 11 U.S.C. § 724(f) alters the priorities in 11 U.S.C. § 507 by allowing proceeds obtained from the subordination of *ad valorem* tax liens to pay claims with a lower priority than senior claims not being paid in full. Once again, the Trustee has to exhaust all other sources of payment for the claims under 11 U.S.C. §§ 507(a)(4) and (5) before an *ad valorem* tax lien can be subordinated under 11 U.S.C. § 724(f).

III. PROCEDURAL CONSIDERATIONS

---The Federal Tax lien attaches to “all property and rights to property, whether real or personal, belonging to the taxpayer. 26 U.S.C. § 6321. However, the presence of a tax lien is not an impediment to the Trustee liquidating the debtor’s assets.

---Federal Tax Liens, once “fixed” are excepted from avoidance as a preference under 11 U.S.C. § 547(c)(6) of the Bankruptcy Code. see *In re Rogers Refrigeration, Inc.* 33 B.R. 59, 60 (Bankr. D. Or. 1983).

----If property appears to have value, the Trustee should take steps to identify the tax lien –the liens should be disclosed on Schedule D of the bankruptcy schedules, but the Trustee may also need to inquire about liens to taxing authorities that are disclosed on Schedules E and F as well. In the alternative, the Trustee can also confirm the existence of a tax lien by a search of the public records such as land records and/or Secretary of State. Government is only required to provide other creditors with “constructive notice” rather than actual notice of the lien. *United States v. Sirico*, 247 F. Supp. 421, 422 (S.D.N.Y. 1965).

---Trustee can ask taxing authority to release the lien to create equity for the bankruptcy estate—priority tax claims are paid ahead of general unsecured debt. There is no disadvantage for the taxing authority to voluntarily release the lien. The release may help expedite the sale process and the taxing

authority will still have a claim against the debtor post discharge for the unpaid non-dischargeable portion of the tax debt.

--**11 U.S.C. § 363 Sale**—at a minimum, notice must be provided to creditors and parties in interest in accordance with Federal Rule of Bankruptcy Procedure 6004. Therefore, if there are no objections to the sale of assets, then the sale may be effective without judicial review. *In re Telesphere Communications, Inc. et al* 179 B.R. 5, 552 (Bankr. ND Ill. 1994).

---If the Trustee intends to sell property “free and clear” of liens, then a noticed motion is served in accordance with Federal Rule of Bankruptcy Procedure 6004(c) and one of the five requirements of the statute must be satisfied.

--Each Bankruptcy Court may have its own procedure for 363 sales.

--Procedure to determine the validity, priority and extent of a lien (not its value) require an adversary proceeding. Federal Rule of Bankruptcy Procedure 7001(2). *In re Manssary-Ruffin*, 530 R.3d 230 (3rd Cir. 2008).

11 U.S.C. 704__The Trustee’s fiduciary duties flow to all creditors, *not just unsecured creditors*. *In re Troy Dodson Constr. Co.* 993 F.2d 1211, 1216 (Fifth Cir. 1993). --therefore, it may be appropriate for the Trustee to sell assets to pay domestic support obligations, wages, and tax claims even if the unsecured creditor body does not receive a distribution. Claims are claims; Congress decided what should be paid and the Trustee’s fiduciary duty extends to all parties in the bankruptcy case.

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Gary M. Weiner, Esq.
Weiner Law Firm, P.C.
Springfield, MA 01103
GWeiner@Weinerlegal.com

Issues to Consider:

Knowing that your client has a tax lien should be part of counsel's analysis and the impact a lien could have on the Debtor's assets. Even if the asset is exempt the Trustee still may be able to liquidate the asset pursuant to 11 USC § 724. The tax lien could be a federal, state, or county lien and it is relevant to this section.

When the petition is filed the Trustee should examine the Debtor's schedules to determine if a tax lien is listed. It is not uncommon for the schedules to not correctly list a tax lien under Schedule D. An examination of the Registry of Deeds by the Trustee will be necessary to determine if a tax lien is on record.

The Trustee's role is to find assets to administer the estate. Under 11 USC § 541 (a)(1), property which the debtor has a legal or equitable interest is property of the bankruptcy estate. The Trustee must determine whether the assets of the estate can be administered. Exemptions under 11 USC § 522 and assets which are "fully" secured will impact on whether the Trustee may choose to, or can administer the asset.

Fully secured claims on property via a mortgage or other consensual lien are generally not administered by the trustee since they will not provide for a distribution to unsecured creditors.

The Chapter 7 Trustee Manual provides guidelines in which the trustee is directed to only administer assets where there will be a meaningful distribution to unsecured creditors. Whereas, 11 U.S.C. § 724 allows the trustee to administer and liquidate an asset fully encumbered with the goal of paying administrative claimants. This is an example of a statute superseding a regulation. See "Selling Property Subject to Tax Liens", Martin P. Sheehan, NABT, Winter 2013.

A homestead exemption does not have priority over tax liens. See In re Bolden, 327 B.R. 657 (Bankr. CA 2005), Treas. Reg. on Proc and Admin. §301.6334-1(c); United States v. Estes, 450 F.2d 62, 65(5th Cir. 1971); Davenport v. United States, 136 B.R. 125 127-28(Bankr. W.D. Ky. 1991) (a state created homestead exemption is ineffective against a federal tax lien, but the proceeds of a sale of property are subject to a valid tax lien under § 522).

Abandonment:

Debtor's counsel may seek to have the Trustee abandon the estate's interest in the property upon filing a petition where the amount of the secured debt, tax debt exceed the value of the collateral. At this point the Trustee may be willing to abandon the estate interest under 11 U.S.C. § 554. However if there is a tax lien which has penalties the Trustee may use his ability under §724(a) to avoid the penalty portion of the tax lien and preserve same for the benefit of the estate under 11 U.S.C. § 551. See In re Bolden, 327 BR. 657, (Bankr. CA, 2005) and In re Gill, 574 Br. 709 (9th Cir BAP, 2017).

Federal Tax Lien

26 U.S.C. 6321 provides that, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to the property, whether real or personal, belonging to such person".

IRS has its own exemption scheme and a state homestead exemption does not erect a barrier around a taxpayer's home sturdy enough to keep out the Commissioner of Internal Revenue. United States v. Estes, 450 F.2d at 65(no provision of a state's law may exempt property or rights in property from levy for the collection of federal taxes owed.). The Supreme Court has concluded that the Supremacy Clause allows the federal government to "sweep aside state-created exemptions." United States v. Rodgers, 461 U.S. 677, 701, 76 L.Ed. 2d 236, 103 S.Ct. 2132(1983).

A federal tax lien attaches to all real property in the county where the lien is recorded and to all personal property of the debtor anywhere in the world once the lien is recorded in the county in which the debtor lives. See 26 U.S.C. § 6321 and United States v. McDermott, 507 U.S. 447(1993).

Application of § 724 by the Chapter 7 Trustee

§ 724 (a) provides that a Trustee may avoid a lien that secures a claim of kind specified in § 726(a)(4).

§ 726(a)(4) provides that the fourth priority in distribution of property of the estate is "payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a Trustee to the extent that such fine, penalty, forfeiture or damages are not compensation for actual pecuniary loss suffered by the holder of the such claim."

Tax penalties must be punitive in nature and assessed to punish a failure to pay taxes. See In re Bolden, 327 B.R. 657, (Bankr. CA, 2005) and In re Gill, 574 Br. 709 (9th Cir BAP, 2017). The Debtor may not avoid the tax lien even if the Trustee elects not to. The right to avoid a tax lien is only a right of the Trustee under § 724(a), see In re Hutchinson, 579 B.R. 860 (Bankr. ED CA, 2018); Rice v. United States (In re Odom Antennas, Inc.) 258 B.R. 376 (Bankr. E.D. Ark., 2001).

Trustee is required to exhaust all unencumbered funds of the estate in the payment of administrative expenses before resorting to the priming option of taxing administrative expenses against the proceeds encumbered by a taxing entity's lien. In re Granite Lumber Company, 63 Bankr. 466, 473 (Bankr. D. Mont. 1986). BAPCPA has codified this interpretation under §724 (e).

To the extent a lien is displaced it becomes a special category of unsecured claim which is payable prior to a distribution to general unsecured claims. In re Dowco Petroleum, Inc. 137 B.R 207 (Bankr. E.D. Tex. 1992); In re Darnell, 834 F. 2d 1263, 1268 (6th Cir. 1987)

The Supreme Court has explained that the bankruptcy statute “manifests a congressional purpose to bar all claims of any kind against a bankruptcy except those based on a pecuniary loss.” Simonson v. Granquist, 369 U.S. 38, 7 L.Ed. 2d 557, 82 S. Ct. 537,538-39, 1962-1 C.B. 302(1962). The Court reasoned: “Tax penalties are imposed at least in part as punitive measures against persons who have been guilty of some default or wrong. Enforcement of penalties against the estates of bankrupts, however, would serve not to punish the delinquent taxpayers, but rather their entirely innocent creditors.” Id. At 539. This congressional intent to protect innocent creditors from delinquent taxpayers has been preserved in present § 724(a). In re Bolden, 327 B.R. 657.

11 USC §551 allows the Trustee the statutory right to preserve any liens avoided under § 724(a) for the benefit of the estate. Therefore, once a Trustee avoids an IRS tax penalty lien under § 724(a) the trustee has the statutory right to preserve the liens avoided for the benefit of the estate.

Avoided tax penalties are distributed in accordance with § 726(a) consistent with 11 USC § 507, so unsecured creditors will only receive funds if all priority claims are paid in full.

Avoiding the IRS's claim is no different for the Trustee then seeking to avoid a defective mortgage and preserve same for the benefit of the estate. In both of these instances Debtor's counsel will be wise to have examined the Registry of Deeds to see what if any encumbrances are on record.

The taxing authorities will most likely be in favor of the Trustee's actions as the taxing authority is unlikely or may be prohibited from selling the debtor's property. See 26 U.S.C. § 6334 (a) (13). The secured lender may also be unwilling to sell the Debtor's home and as result a Trustee's motion to sell maybe something both the Federal Government and the secured lender will assent to.

Avoidance of the penalties is only as to claims against the Debtor and if the penalties were assessed against the estate for late filing of a return, the Trustee cannot avoid the penalties under § 724. In re Colony Beach & Tennis Club, Ltd., 578 B.R. 909 (Bankr. MD FL, 2017).

Trustee Dilemma

Trustee Manual - Does a sale wherein unsecured creditors do not get a distribution satisfy the requirements of the Trustee's fiduciary duty? If only administrative and/ or priority claimants are being paid a dividend is this a meaningful distribution that the UST and Courts will approve of? Is the Trustee's fiduciary duty only to "unsecured creditors"? Trustee's handbook provides a Trustee may only sell assets if the sale will result in a meaningful distribution to creditors.

Generally a Trustee should not sell property with no equity over and above the secured claim unless the sale generates funds for the benefits of unsecured creditor. The theory being the secured creditor can protect its own interests through enforcement of its security interest.

§ 724 is an exception to that rule as the Code specifically provides for the Trustee to take steps to sell an asset where the likelihood is that the only benefit is to secured and § 507 priority claimants.

Priority unsecured creditors have the right to obtain only that portion of proceeds equaling the amount of the tax liens; the priority unsecured claims are to be paid only up to the amount of the subordinated tax lien. If the priority unsecured claims are less than or equal to the amount the tax lien, they are paid in full. On the other hand, if the priority unsecured claims exceed the amount of the tax lien, they are paid only in part, up to the amount of the tax lien. In re Markair, Inc., 308 F. 3d 1057, (9th Cir, 2002);

§ 724(b)(3) provides that in certain circumstances the Trustee must pay part of the tax lienholder's claim when the amount of the tax lien exceeds the amount of priority unsecured claims, the tax lien creditor must be paid the difference between the two amounts.

§ 724(b)(4) provides a junior tax lienholder gets paid only after the full amount of the tax lien is paid out under paragraphs (b)(2) and (b)(3). Junior lienholders occupy the same position that they would otherwise have had in absence of the statute. In re Markair at 1062.

§ 724(b)(5) provides the Trustee must pay the tax lienholder. The amount of this payment varies depending on the amount if any paid out under (b)(2) and (b)(3). To the extent the tax lienor did not recover the amount of it's otherwise allowed tax lien under (b)(3) the tax lienor gets reimbursed under (b)(5). Id.

§ 724 subordinates payment of allowed secured tax liens to payment of allowed unsecured priority claims of kind specified under 11 U.S.C. § 507, § 724 does not convert allowed secured tax claims into unsecured tax claims of kind specified in § 507(a)(8). In re C.J. Milligan, Inc. 252 BR 465(Bankr. ED MO, 2000).

The question answered by this section is that a Trustee can justifiably attempt to sell fully encumbered property that has no value to the estate rather than abandon the property where the terms of the sale include a benefit for the estate. See Reeves v. Calloway, 546 Fed. Appx. 235, 241 (4th Cir. 2013); In re Feinstein Family P'ship, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2001).

Fully encumbered property is still property of the estate until it either abandoned by the Trustee pursuant to § 554(a) or released upon stay relief and sold by the creditor. In re Feinstein at 507.

Homestead exemption does not take priority over payment of secured claim and tax lien which took priority after payment of secured obligations under § 724(b); In re Laredo, 334 BR 401 (Bankr. ND Ill, 2005).

§ 724(b) is inapplicable in case filed under Chapter 11 but may be applied when a case is converted under Chapter 7, In re Frank Meador Buick, Inc. 59 BR, 787, (Bankr. WD VA, 1986).

Constitutional considerations

§724(b) is a proper exercise of congressional authority and does not violate rights of states under 10th Amendment. In re Stroud Wholesale, Inc. 37 BR 734 (Bankr. ED NC, 1984) revd. In part on other grounds 47 BR 999 (Bankr. ED NC, 1985).

Subordination of tax claims and liens of city and county to Chapter 7 estate's administration under § 724 while depriving city and county of private property for public use without just compensation, does not constitute "taking" prohibited by Fifth Amendment nor does it violate Tenth Amendment. In re Kamstra 51 BR 826, (Bankr. WD Mich, 1985).

Subordination of state tax lien does not violate 10th amendment, In re Hirsch-Franklin Enters. 63 BR 864, (Bankr. MD GA, 1986); In re Cropper Co. 63 Br 874 (Bankr. MD GA, 1986).

Legislative history indicates that Congress made a policy decision to favor the claims of wage earners, the costs of administration of the estate, and other priority claims over tax liens. H.R. Rep. No. 686, 89th Cong. 1st sess. (1965) U.S. Code & Admin. News at 2442, 2462. See also In re Bino's, 182 B.R. 784 (Bankr. N.D Ill. 1995). In effect, a priority claimant is allowed to "step into the shoes of the tax collector." H.R. Rep. 595, 95th Cong., 1st Sess. 382 (1977), the rights and claims of both senior and junior lienors and the holders of non-priority unsecured claims are left undisturbed. Id.

Issues to Consider IV

2. Cash Collateral considerations – IRS attempted to argue that because of the cash collateral agreement entered into during the Chapter 11 stage of the proceeding that the IRS tax lien was transformed into a non tax lien as such the tax lien could not be avoided when the case was converted to Chapter 7. In re Life Imaging, Corp., 131 B.R. 174 (Bankr. D. Colo. 1991). Parties to an order may not effectively bargain away the rights provided to priority claimants by Congress in §724, see In re Bino's, 182 B.R. 784 (Bankr. N.D. Ill. 1995). Contrast that finding with the decision in In re Buzzworm, Inc. 178 B.R. 503 (Bankr. D. Colo. 1994) where a different Colorado Bankruptcy Court found that a cash collateral agreement entered into by a Chapter 11

Debtor in Possession may be enforceable against a subsequently appointed Chapter 7 Trustee, if undertaken in a correct and legally sufficient manner. The court reasoned that there are strong practical and policy reasons for enforcing such agreements because it would encourage lien creators to better cooperate with a reorganizing debtor and reduce pressure early in the case to litigate and perhaps prematurely “pull the plug” on a debtor. *Id.* at 509.

IRS will likely seek to have distribution occur from a sale of an encumbered asset during a Chapter 11 proceeding and prior to conversion of the case where the Trustee can invoke §724(b) and subordinate the IRS tax lien to pay administrative and priority claims pursuant to §507(a). See *In re Howard Furniture, Inc.* 222 B.R. 795 (Bankr. N.D. Miss, 1998).

3. *In re Fialkowski*, 483 BR 590 (Bank. W.D. N.Y. 2012) dealt with a bank account and not real estate. Debtor’s bank account was fully exempt and Trustee sought a turnover order under 11 U.S.C. § 542 and the Debtor sought to compel abandonment of the exempt bank account under 11 U.S.C. § 554. IRS had placed a tax lien and levy on the bank account. This Court did not allow the Trustee’s motion it seems because no there were no creditors who would be a beneficiary of the Trustee’s exercise of § 724(b) powers. Court made no reference to the avoidance of penalties under § 726(4).

4. Subordination of tax liens under 11 USC § 724 - effect of this section is to take tax claimant’s lien and give it to the administrative claimants under § 507 (a)(1)-(a)(8). In subordination cases it is clear that the law as amended under BACPA (§ 724(e)), the Trustee must exhaust the unencumbered assets before subordinating a tax lien on real or personal property of the estate except as to §§ 507 (a)(4) and (a)(5) claims. How this impacts on a lien which has been avoided under §724(a) is different as avoidance is not subordination.

5. Marshalling - Following legislative history for § 724 it would appear that marshalling is not a method in which the taxing authorities can avoid the subordination under § 724.

6. Timing- Courts have ruled that impact of a sale and distribution of proceeds cannot be fully determined until all §507 priority claims have filed a proof of claim along with administrative claims. See *In re Dowco Petroleum, Inc.* 137 B.R. 207 (Bankr. Ed. Tex. 1992) where the court ordered that the proceeds from the sale of the property should remain intact in the bankruptcy estate until the Trustee liquidated the remainder of the estate so that a complete and accurate distribution could be made at the end of administration.

7. Payment of administrative claims- see 11 USC § 724(e) *In re Dowco Petroleum, Inc.* 137 B.R. 207 (Bankr. ED Tex. 1992). Similar to *In re Granite* this Court took the position that if the estate contained enough unencumbered funds to satisfy administrative claims (no mention of priority), no justification existed for priming the liens of the taxing authorities (in this case school district and county liens).