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**NORTHERN DISTRICT OF OHIO**  
**BANKRUPTCY BENCH-BAR SEMINAR**  
**OCTOBER 11, 2019**  
**GENEVA-ON-THE-LAKE, OHIO**

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**I. THE BRIEF BUT IMPORTANT OVERVIEW**

- A. State of Ohio is represented by the Ohio Attorney General's Office ("AGO").
- B. Debt delinquent more than 45 days is certified to the AGO for collection - O.R.C. § 131.02.
- C. AGO Collections Enforcement Section is section within AGO responsible for collection of State debt.
- D. The AGO collects debt for more than 200 State Departments, Boards, Commissions, Universities and Agencies.
- E. Certain Assistant Attorneys General within Collections Enforcement are tasked with representing the State of Ohio in U.S. Bankruptcy Courts in Ohio and nationwide.
- F. Our Bankruptcy Group includes 6 full time Assistant Attorneys General located in:

Columbus  
Cleveland  
Cincinnati  
Toledo  
Youngstown

- G. The AGO also contracts with private attorneys who are appointed Special Counsel to represent the state in bankruptcy and collections cases.

**COLLECTIONS ENFORCEMENT BANKRUPTCY AAG CONTACT INFORMATION**

<p><b>COLUMBUS OFFICE</b>  150 East Gay Street, 21st Floor  Columbus, Ohio 43215  Main Line: 614-466-8360</p> <p><b>Amy Kaufman, Senior AAG</b>  Direct Dial: 614-728-4324  Direct Fax: 866-523-8113  Email: <a href="mailto:Amy.Kaufman@ohioattorneygeneral.gov">Amy.Kaufman@ohioattorneygeneral.gov</a>  Covers Columbus Bankruptcy Court</p> <p><b>W. Travis Garrison, Senior AAG – by assignment</b>  <b>Joseph McCandlish, Senior AAG – by assignment</b></p>	<p><b>CLEVELAND OFFICE</b>  615 West Superior Avenue, 11th Floor  Cleveland, Ohio 44113  Main Line: 216-787-3030</p> <p><b>Alison Archer, Associate AAG</b>  Direct Dial: 216-787-4721  Direct Fax: 866-416-9729  Email: <a href="mailto:Alison.Archer@ohioattorneygeneral.gov">Alison.Archer@ohioattorneygeneral.gov</a>  Covers Cleveland &amp; Akron Bankruptcy Courts</p> <p><b>Trish Lazich, Director of Bankruptcy &amp; Legal Services</b>  Direct Dial: 216-787-3180  Direct Fax: 866-437-9074  Email: <a href="mailto:Trish.Lazich@ohioattorneygeneral.gov">Trish.Lazich@ohioattorneygeneral.gov</a>  Manages Bankruptcy Portfolio</p>
<p><b>CINCINNATI OFFICE</b>  1600 Carew Tower, 441 Vine Street  Cincinnati, Ohio 45202  Main Line: 513-852-3497</p> <p><b>James S. Harding, Senior AAG</b>  Direct Dial: 513-852-1536  Direct Fax: 866-371-1608  Email: <a href="mailto:James.Harding@ohioattorneygeneral.gov">James.Harding@ohioattorneygeneral.gov</a>  Covers Cincinnati &amp; Dayton Bankruptcy Courts</p>	<p><b>TOLEDO OFFICE</b>  One Government Center, Suite 1240  Toledo, Ohio 43604  Main Line: 419-245-2550</p> <p><b>Robert Doty, Associate AAG</b>  Direct Dial: 419-327-4493  Direct Fax: 877-626-9294  Email: <a href="mailto:Robert.Doty@ohioattorneygeneral.gov">Robert.Doty@ohioattorneygeneral.gov</a>  Covers Toledo Bankruptcy Court</p>
<p><b>YOUNGSTOWN OFFICE</b>  20 West Federal St., 3<sup>rd</sup> Floor  Youngstown, Ohio 44503  Main Line: 330-884-7500</p> <p><b>Jennifer Zap, Associate AAG/Collections Manager</b>  Direct Dial: 330-884-7519  Direct Fax: 866-452-9893  Email: <a href="mailto:Jennifer.Zap@ohioattorneygeneral.gov">Jennifer.Zap@ohioattorneygeneral.gov</a>  Covers Youngstown &amp; Canton Bankruptcy Courts</p>	

## **STATE OF OHIO CLAIMS IN BANKRUPTCY**

- H. Some of the more familiar government claims in bankruptcy include:
1. Ohio Department of Taxation
    - Sales
    - Income – Personal & Employer Withholding
    - Use
    - Corporate franchise
    - Commercial activity
  2. Ohio Bureau of Workers' Compensation
    - Premiums
    - Non-compliance claims
    - Self-insured assessments
    - Benefit overpayments
  3. Ohio Department of Job & Family Services
    - Contributions
    - Benefit overpayments
    - Franchise fees/Medicaid payments
  4. Student Debt from 40+ State Universities
    - Student loans
    - Tuition payments
    - Room & board
  5. Ohio Lottery Commission
    - Proceeds from agent ticket sales
  6. Ohio Department Services Agency (fka Department of Development)
    - Loans
  7. Ohio Supreme Court
    - Client security funds
    - Fines for noncompliance on Attorney CLEs/registration
    - Attorney Disciplinary fines
    - Unauthorized practice of law fines
  8. Environmental Protection Agency
    - Fines/penalties for air emissions, water issues
- I. Some of the bankruptcy issues the AGO becomes involved:

1. Claims objections
2. Dischargeability complaints
3. Plan confirmation issues
4. Cash collateral issues
5. Sale/Transfer of liquor permits
6. Relief from stay
7. Consumer issues – GOB sales/gift cards
8. Executory contracts
9. Avoidance actions
10. Liens
11. Property of estate issues
12. 363 sale issues
13. Setoff/recoupment
14. Adequate protection issues

## II. STATE OF OHIO SELECTED BANKRUPTCY ISSUES

### A. Priority of Ohio Taxes in Bankruptcy

1. **Trust Taxes Entitled To Priority** - § 507(a)(8)(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;
  - a. Sales – O.R.C. 5739
  - b. Withholding – O.R.C. 5747

Tax (no matter how old) & pre-petition interest entitled to priority

2. **Three Year or Assessable Within 240 Days** - Taxes Measured by Income or Gross Receipts - § 507(a)(8)(A) for a taxable year ending on or before the date of the filing of the petition:
  - a. for which a return was due within 3 years of petition date;
  - b. was assessed within 240 days before petition date – includes extension of time for 240 day period where taxes were subject to offer in compromise and for tolling due to automatic stay of prior bankruptcy case;
  - c. taxes which were not assessed before but are assessable after the commencement of the case other than those which are not dischargeable due to a failure to file a return [§ 523(a)(1)(B)] or which debtor made a fraudulent return or willfully attempted to evade a tax [§ 523(a)(1)(C)].
    - i. Income – O.R.C. 5747-  
- return due April 15th for prior year

- ii. Commercial Activities Tax or “CAT” – O.R.C. § 5751.051  
- return due within 40 days after close of calendar quarter– annual return may also be required.
- 3. **More Three Year Taxes – Excise taxes** - § 507(a)(8)(E) – tax on a transaction occurring prior to the petition date which a return is due within three years of petition date or if no return due, transaction occurred within three years of petition date
  - a. BWC premiums – See, *Ohio Bureau of Workers’ Comp. v. Yoder* (In re Suburban Motor Freight, Inc.) 998 F2d 338 (6th Cir. 1993) O.R.C. § 4123.35 Prior to July 1, 2015: semi-annual returns for 1st half [January – June] due August 31st and for 2nd half [July – December] due February 28<sup>th</sup>; As of July 1, 2015 BWC implemented prospective billing which requires payment before BWC provides coverage. BWC invoices employers for their estimated 12 month premium in June of each year based on previous year’s payroll. The policy year runs July 1 – June 30<sup>th</sup>. Employers select payment option which is effective for entire policy year. Employers must file payroll true-up 45 days after close of policy year on June 30<sup>th</sup> or by August 15<sup>th</sup>. O.R.C. §4123.322 \* O.A.C. 4123-17-14 (B) – (D).
  - b. BWC Self-Insured Assessments – O.R.C. §§ 4123.35, 4123.351 - See unpublished decision in the Northern District of Ohio which held that self-insured assessments were entitled to priority status as an excise tax. See In re: *Belden Locker Company*, Ch. 11 Case No. 06-60316, N.D. Ohio, Bankr., March 21, 2008, Judge Kendig
  - c. Unemployment Compensation Contributions – O.R.C. § 4141.20 Quarterly returns due end of month following quarter: 1st quarter due April 30<sup>th</sup>; 2nd quarter due July 31; 3rd quarter due October 31; 4th quarter due January 31<sup>st</sup>.
  - d. Corporate Franchise – O.R.C. 5733 (phased out in 2009 & replaced with commercial activity tax); Annual return due January 31 for prior year
- 4. Governmental Claims Not Entitled to § 507 (a)(8) Priority
  - a. Noncompliance BWC Claims – See, *Ohio Bureau of Workers’ Comp v. Yoder* (In re Suburban Motor Freight, Inc.) 36 F. 3d 484 (6th Cir. 1994) - claims incurred by BWC in paying compensation & benefits to injured worker when employer had no workers’ compensation coverage at time of injury

- b. Overpayment Claims
  - i. BWC overpayments against claimants – O.R.C. § 4123.511
  - ii. Unemployment overpayments against claimants – O.R.C. § 4141.35
  - iii. Tax Penalties – penalties associated with the claims of Ohio Department of Taxation, Ohio Bureau of Workers’ Compensation and Ohio Department of Job & Family Services are not likely to be considered “compensation for actual pecuniary loss” pursuant to § 507(a)(8)(G) and therefore, are not entitled to priority under the Bankruptcy Code.
  - iv. Educational debt – student tuition, fees or loans are general unsecured debt (unless secured by judgment) though certain educational debt is not discharged in any bankruptcy case pursuant to §523(a)(8) except in hardship cases.

### III. DISCHARGEABILITY (OR NOT) OF GOVERNMENT CLAIMS IN CHAPTER 7 AND INDIVIDUAL CH 11 CASES <sup>1</sup>

#### A. Nondischargeable Taxes in Chapter 7 or 11 Case of Individual <sup>2</sup>

- 1. Withholding and Sales Taxes
  - a. Tax and interest are never discharged -- §507(a)(8)(C) and 523(a)(1)(A)
  - b. Related penalty not discharged if it relates to a "transaction or event" that occurred within 3 years before the petition date ("**3 Year Rule**") -- §523(a)(7)
- 2. Personal Income, School District & Commercial Activity Tax
  - a. Tax and interest not discharged

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<sup>1</sup> Some of the materials on dischargeability were “borrowed” with permission from Nora Jones’ presentation at the 2007 Columbus Bar Association Bankruptcy Law Institute. Nora taught me never to “reinvent the wheel” when I don’t have to and I listened. Thanks Nora.

<sup>2</sup> This analysis treats all penalties, forfeitures, additional charges, and similar amounts (“penalties”) imposed by the Department of Taxation, the Bureau of Workers’ Compensation, and the Bureau of Unemployment Compensation Tax as “true penalties” under §523(a)(7) rather than §507(a)(8)(G) compensatory penalties which are nondischargeable by reason of §523(a)(1)(A). However, certain of the penalties may in fact compensate for the cost of calculating, imposing, and collecting the underlying assessments. If so, those penalties would be nondischargeable under §507(a)(8)(G) if the taxes to which they relate are nondischargeable under §507(a)(8)(A)-(F); the Three Year Rule is not applicable to §507(a)(8)(G) penalties.

- i. If the relevant tax return was last due, including extensions, within 3 years before the petition date ("**3 Year Return Rule**") -- §507(a)(8)(A)(i) and 523(a)(1)(A)
  - ii. If return (or amended return) was **not filed** <sup>3</sup> --§523(a)(1)(B)(i)
  - iii. If return was **tardily filed** after 2 years before the petition date -- §523(a)(1)(B)(ii)
  - iv. If the debtor filed a **fraudulent return** or "willfully attempted" to **evade or defeat** the tax – §523(a)(1)(C)
  - v. If the tax was "assessed" within **240 days** before the petition date -- §507(a)(8)(A)(ii) and 523(a)(1)(A)
  - vi. If the tax was **assessable** as of, but **not assessed** until after, the petition <sup>4</sup> -- §507(a)(8)(A)(iii) and 523(a)(1)(A)
- b. Penalty related to nondischargeable personal income or school district tax not discharged if **3 Year Return Rule** is satisfied -- §523(a)(7)
  - c. Tax, penalty and interest not discharged if return was **late** and was filed either after the petition or within **2 years** before the petition -- §523(a)(1)(B)(ii) and 523(a)(7)
  - d. Commercial Activity Tax is an annual tax imposed on the privilege of doing business in Ohio measured by gross receipts from business activities in Ohio. So why might you see a proof of claim in an individual bankruptcy case for this tax? An individual debtor having more than 50% of the value of their ownership interest owned or controlled, directly or constructively through related interests by common owners are members of a combined

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<sup>3</sup> An IRS audit which increases Federal Adjusted Gross Income also increases Ohio Adjusted Gross Income. Under those circumstances, O.R.C. §5747.10 requires that an amended state return be filed. If the required amended return is not filed, the provisions of 11 U.S.C. §523(a)(1)(B)(I) apply and the obligation is not discharged.

This position was endorsed in *Giacci v. United States (In re Giacci)*, 213 B.R. 517 (Bankr. S.D. Ohio 1997): "We are persuaded, however, by the majority view and the reasoning presented in *In re Haywood* and in *In re Blutter*, wherein both courts, after a thorough discussion of the issue, conclude that the debtor's failure to file an **amended state tax return to reflect Federal adjustments creates a nondischargeable debt under Section 523(a)(1)(B)(I)**". *Giacci* at 520 (emphasis added). See also *Nusseibeh v. Ohio Department of Taxation (In re Nusseibeh)*, Ch. 7 Case No. 99-61405, Adv. No. 09-06080 (N.D. Ohio, Jan. 11, 2010).

<sup>4</sup> For purposes of determining nondischargeability in bankruptcy cases, bankruptcy courts must translate state-created rights into the bankruptcy process. *In re King*, 961 F.2d 1423, at 1426 (9th Cir. 1992). A tax is assessed for purposes of the bankruptcy code when it becomes final under state law. *King* at 1427.



taxpayer group and has joint and several liability for the commercial activity tax. R.C. § 5751.012

3. Workers' Compensation Premiums<sup>5</sup>

- a. These premiums are considered excise taxes. *Yoder v. Ohio Bureau of Worker's Compensation (In re Suburban Motor Freight, Inc.)*, 998 F.2d 338 (6th Cir. 1993) (Suburban I); *Ohio Bureau of Workers' Comp. v. Mullins*, 747 N.E.2d 856, 140 Ohio App.3d 375, 2000-Ohio-2029 (2000).
- b. Premium and interest not discharged
  - i. If **3 Year Return** Rule is satisfied-- §507(a)(8)(E)(i) and 523(a)(1)(A)
  - ii. If return was **not filed** -- §523(a)(1)(B)(i)
  - iii. If return was late and was filed after **2 years** before the petition date -- §523(a)(1)(B)(ii)
  - iv. if debtor filed a **fraudulent return** or "willfully attempted" to **evade or defeat** payment of the premium - §523(a)(1)(C)
- c. Penalty related to nondischargeable premium not discharged
  - i. if **3 Year Rule** is satisfied -- §523(a)(7)

4. Workers' Compensation Noncompliance Claims

- a. These claims are "fees" rather than excise taxes and are therefore dischargeable. *See, Ohio Bureau of Workers' Compensation v. Yoder (In re Suburban Motor Freight)*, 36 F. 3d 484 (6th Cir. 1994) (Suburban II).

5. Unemployment Compensation Tax Contributions

- a. These are either an "employment tax" under 11 U.S.C. §507(a)(8)(D) or an "excise tax" under 11 U.S.C. §507(a)(8)(E)
- b. Contribution (tax) and interest not discharged
  - i. If **3 Year Return Rule** is satisfied-- §507(a)(8)(D) or (E)(i) and 523(a)(i)(A)

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<sup>5</sup> Beginning July 1, 2015 BWC switched to the industry standard of prospective billing for employer premiums. For more information visit <https://www.bwc.ohio.gov/employer/brochureware/ProspectiveBilling.asp>.

- ii. If return was **not filed** – §523(a)(1)(B)(i)
- iii. If return was **late** and was filed after 2 years before the petition date – §523(a)(1)(B)(ii) or
- iv. If debtor filed a **fraudulent return** or "willfully attempted" to **evade or defeat** payment of the contribution -- §□523(a)(1)(C)
- c. Forfeiture related to nondischargeable contribution not discharged if **3 Year Rule** is satisfied -- §523(a)(7)

6. § 523(a)(7) Discharge Exceptions

State debt which constitutes fines, penalties, forfeitures for non-pecuniary loss payable to and for benefit of a governmental unit – not discharged in individual Ch. 7 or 11 cases;

- a. Civil penalties assessed for violations of Consumer Sales Practice;
- b. Attorney disciplinary fines assessed by Supreme Court of Ohio. See *In re Bertsche*, 261 B.R. 436 (S.D. Ohio 2000); *Mitchell v. Supreme Court of Ohio*, (*In re Mitchell*), Case No. 1:14CV924, 2015 U.S. Dist. WL 1530626; 2015 U.S. Dist. LEXIS 44694 (N.D. Ohio April 6, 2015);
- c. Unauthorized practice of law fines assessed by Supreme Court of Ohio. See *In re Bertsche*, *supra*; *The Supreme Court of Ohio v. Jeffrey Lewis Norman*, Ch. 7 Case No. 13-12701; Adv. No. 14-01006 (C.D. California, Jan. 6, 2015);
- d. Client Security fund payments assessed by Supreme Court of Ohio. See *In re Bertsche*, *supra*;
- e. Fines for noncompliance on Attorney Continuing Legal Education requirements issued by Supreme Court of Ohio;
- f. EPA fines/penalties assessed for environmental clean-up;
- g. Fines/penalties assessed for violations of Ohio Election laws;
- h. Criminal restitution orders requiring repayment of overpaid workers' compensation or unemployment benefits – See *Kelly v. Robinson*, 479 U.S. 36 (1986);

B. Nondischargeable Taxes in Chapter 13

1. In 2005, BAPCPA expanded the list of debts excepted from the discharge granted upon completion of plan payments
  - a. §1328(a)(2) now refers to debts of the kind specified in §507(8)(C) (**trust fund taxes** such as withholding and sales), §523(a)(1)(B) (taxes for which **no return** was filed or for which a **late return** was filed after **2 years** before the petition date) and §523(a)(1)(C) (fraudulent return or willful attempt to **evade or defeat** the tax);
  - b. Educational debts pursuant to §523(a)(8) are not discharged in Chapter 13 including student loans (see *In re Merchant*, 958 F. 2d 738, 6<sup>th</sup> Cir. 1992 to determine what constitutes a loan); educational benefit overpayment and obligation to repay funds received;
2. By reason of §1328(c), all debts described in §523(a) are unaffected by the hardship discharge granted under §1328(b);

C. Discharge Determinations – Is It Discharged?

1. Determinations for most all exceptions to discharge are self-executing except for § 523(a)(2), (4), (6) which requires a timely filed complaint pursuant to Fed. R. Bankr. P. § 4007(c);
2. Ohio AGO makes a discharge determination on all certified debt owed to State of Ohio *so kindly contact us first before filing a complaint to determine discharge – especially on tax debt.*

#### IV. DELINQUENT STATE OF OHIO TAX RETURNS

- A. Several provisions of the Bankruptcy Code address the requirement and/or possible consequences for failure to file certain tax returns as required under State law;
1. §1308 requires all tax returns for all taxable periods ending during the 4 year period from the date of the petition be filed no later than one day before the first meeting of creditors is first scheduled;
  2. §1307(e) provides grounds to dismiss or convert a Ch. 13 case for failure to file a tax return referenced in §1308 upon the request of a party in interest and after notice and hearing;
  3. §1325(a)(9) provides grounds to deny plan confirmation for failure to file all applicable Federal, State & local tax returns required under §1308;
  4. §1112(b)(4)(I) provides grounds to dismiss/convert a Ch. 11 case for failure to timely file or pay taxes owed post-petition;
  5. §523(a)(1)(B)(i) excepts from discharge any tax for which a required return was not filed or (ii) filed late and after two years before the petition date in Ch. 7 cases

[§727(b)]; Ch. 13 cases [ §§1328(a)(2)&1328(c)(2)]; individual Ch. 11 cases [1141(d)(2)];

B. Ohio Taxing Authorities Now Designate on Their Claims Whether The Taxes Proofed are Based on Filed Returns or are Estimated. If the claim shows the tax assessment as estimated, the underlying debt (tax/interest) not paid through the bankruptcy will not be discharged.

C. Where to Send Delinquent Ohio Pre-petition Tax Returns?

For all business and personal **Ohio Department of Taxation** pre-petition returns, send originals via U.S. mail fax or email to:

Cory D. Steinmetz, Esq.  
Ohio Department of Taxation – Office of Chief Counsel  
30 East Broad Street, 21<sup>st</sup> flr  
Columbus, Ohio 43215  
Phone: 1. 614.728.9019  
Fax: 1.614.995.0164  
[Cory.steinmetz@tax.state.oh.us](mailto:Cory.steinmetz@tax.state.oh.us)

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For all business **Ohio Bureau of Workers’ Compensation** pre-petition returns, the best method is to send payroll reports (or reported true-up reports for all periods 7/1/15 to date) to:

Ohio Bureau of Workers’ Compensation  
Legal Division – Bankruptcy Unit  
P.O. Box 15567  
Columbus, Ohio 43215-0567

Alternatively, debtors can go online at [www.bwc.ohio.gov](http://www.bwc.ohio.gov) website to create an e-account (if not already created) to report the wages on line or call 1-800-OHIOBWC (1-800-644-6292) for customer contact center to report wages – however this information may not be timely transmitted to BWC Bankruptcy Unit in order to reflect changes on a proof of claim.

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For all business **Ohio Department of Job & Family Services** pre-petition returns, Ohio Administrative Code 4141-11-01 requires all quarterly contribution and wage reports to be filed electronically at <https://eric.ohio.gov>.

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## V. SETOFF & RECOUPMENT ISSUES

### A. Tax Refund Setoff

1. Under BAPCPA, State can setoff **pre-petition tax refund** against **pre-petition tax liability** without obtaining relief from stay - § 362(b)(26);
2. Otherwise, relief from stay is required to setoff post-petition tax refund against pre-petition debt - §§ 553, 362(a);

### B. NonBankruptcy Setting (or After Discharge is Granted)

1. O.R.C. § 5747.12 allows for the automatic setoff of a state tax refund against any certified debt pursuant to §§ 131.02, 131.021;
2. Treasury Offset Program - 26 U.S.C. § 6401(e) “TOPS” requires IRS tax refunds be held and applied only to any delinquent state income tax debt or unemployment benefit overpayments (both fraud and non-fraud);
3. O.R.C. § 3770.073 allows lottery prizes of \$5000 or more to be set off against any certified debt pursuant to §§ 131.02, 131.021 – *this includes prizes won at any of Ohio’s seven racinos*;

### C. Recoupment of State Debts

1. Recoupment is an equitable remedy not subject to the automatic stay or discharge injunction. *In re Flagstaff Realty Assoc.*, 60 F. 3d 1031 (3rd Cir. 1995). Recoupment merely reduces a debt rather than constitutes an independent basis for a debt – therefore, it is not a claim in bankruptcy nor subject to the discharge order. *In re Justice*, 224 B.R. 631, 639 (Bankr. S.D. Ohio 1998); *In re Maine*, 32 B.R. 452, 455 (Bankr. W.D. N.Y. 1983; *In re Harmon*, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995).
2. In bankruptcy, recoupment has been applied primarily where the relevant claims arise out the same contract. *In re Gaither*, 200 B.R. 847, 850 (Bankr. S.D. Ohio 1996).
3. Ohio BWC can recoup an overpayment of workers’ compensation benefits from any future workers’ comp benefits the debtor may be entitled. *In re Justice*, 224 B.R. 631 (S.D. Ohio 1998). This case involved a Chapter 13 debtor who filed a complaint to enjoin BWC from attempting to recoup overpayments of workers’ comp benefits from future payments on unrelated claims. There was no indication that any fraud was involved in the *Justice* case.

4. Recoupment of overpaid fraudulent unemployment benefits was found to be permissible and the State was not in contempt. *In re Gaither, supra*. The court determined that the debtor’s claims for unemployment compensation established a societal contract with the State, thereby arising out of the same contract.
5. Ohio law requires the Ohio Department of Job & Family Services (“ODJFS”) withhold making additional unemployment compensation benefits to a claimant until any overpaid benefits have been recouped in both fraud [O.R.C. § 4141.35(A)] and non-fraud situations [§ 4141.35 (B)].
6. Is fraud necessary to make recoupment permissible in bankruptcy setting? ODJFS is required under state law and certain federal mandates to recoup all overpaid unemployment benefits regardless of whether fraud was present or not.

## VI. LIQUOR PERMITS IN BANKRUPTCY

### A. Ohio Law

1. Ohio Department of Commerce, Division of Liquor Control (“DLC”) is the governing body responsible for controlling the manufacture, distribution, licensing, regulation, and merchandising of beer, wine, mixed beverages, and spirituous liquor within Ohio pursuant to Ohio Revised Code Chapters 4301 and 4303. Regulatory functions include the issuance of permits to manufacturers, distributors and retailers of alcoholic beverages. As a “control state” all beer and intoxicating liquor must be bought and sold pursuant to Ohio law. DLC’s website is at <http://www.com.ohio.gov/liqr/>
2. The Liquor Control Commission (“Commission”) is the governing body responsible for ensuring compliance with the liquor laws and regulations of the state of Ohio and to provide fair and impartial hearings for the protection of the public and liquor permit holders. See O.R.C. § 4301.022, et. seq. The Commission works in conjunction with the DLC and the Ohio Department of Public Safety Investigative Unit. The Commission’s website is at <http://www.lcc.ohio.gov/>.
3. Ohio law is clear that liquor permits are not property to which a security interest could attach. *Abraham v. Fioramonte* (1952), 158 Ohio St. 213, *Banc of America Strategic Solution, Inc. v. Cooker Restaurant Corp.*, Franklin App. No. 05AP-1126, 2006 Ohio 4567 (Ohio liquor permits may not be subject to a security interest).
4. Ohio law allows a liquor permit to be suspended or revoked for failure to pay any excise taxes – O.R.C. § 4301.25(A)(6).
5. For this purpose, sales taxes are considered excise taxes – O.R.C. § 5739.02 as are corporate franchise taxes, see *In re Nat’l Steel Corp*, 321 B.R. 901 Bankr. N.D. Ill., 2005), as are BWC premiums, see *In re Suburban Motor Freight, Inc., supra*.

6. Ohio law further prohibits the transfer of a permit if there are outstanding sales or withholding taxes. Ohio law requires DLC to check with the Ohio Department of Taxation (“Taxation”) for delinquent sales and withholding taxes prior to transferring a permit. O.R.C. § 4303.26(B). DLC will not transfer a permit until it receives a “proceed letter” from Taxation.
7. The Commission can refuse to transfer or renew a liquor permit pursuant to O.R.C. § 4303.292 for failure to pay workers’ compensation premiums or non-compliance claims - 2004 Op. Attorney General No. 04-026.
8. The Commission can refuse to transfer or renew a liquor permit pursuant to O.R.C. § 4303.292 for failure to pay unemployment contributions. 1990 Op. Attorney General No. 1990-052. Unemployment contributions are excise taxes. *State ex. rel., Youngstown Sheet & Tube v. Leach*, (1962) 173 Ohio St. 397.
9. The Commission can refuse to renew a liquor permit for outstanding smoking ban violation fines issued pursuant to R.C. 3794. *Suburban Inn Inc. v. Ohio State Liquor Control Commission*, Case No. 12CV014936, Franklin County Common Pleas, 8/26/13.
10. Ohio law prohibits any entity other than the named permit holder to conduct business under the permit. O.R.C. § 4303.27. Therefore, management agreements to operate a business with a liquor permit between parties are not recognized by the State which must hold the permit holder (i.e. trustee) liable for all unremitted taxes and outstanding tax returns from the date of appointment (for trustees) through the date of actual transfer of the permit by DLC. The permit holder will further be responsible for any citations issued against the permit by DLC.
11. Ohio law allows an inactive permit be placed in safekeeping and is entitled to be renewed one time while in safekeeping. O.R.C. § 4303.272.
12. Ohio law requires annual renewal of a liquor permit. O.R.C. § 4303.271.

B. Federal Law

1. Bankruptcy law is clear that liquor permits are property of the bankruptcy estate to which security interests can attach. *In re Terwilliger’s Catering Plus, Inc.*, 911 F. 2d 1168 (6th Cir. 1990) held that a valid pre-petition IRS lien took priority over any pre-petition debt owed to the State of Ohio. Court characterized O.R.C. § 4303.26(B) as giving the State a security interest in a liquor permit at transfer.
2. *In re Shary*, 152 B.R. 724 (Bankr. N.D. Oh. 1993) held that the State’s failure to object to the sale motion or confirmation implicitly conveyed its consent to the sale pursuant to 11 U.S.C. § 363(f)(2). *Shary* further reinforced the notion that the State holds a security interest in the permit at the time of transfer as suggested by *Terwilliger’s, supra*.

C. Tidbits and Other Useful Information For Permit Transfers

1. Trustee should place non-operating permits in safekeeping pursuant to O.R.C. § 4303.272 as soon as possible to avoid having to file monthly sales tax returns on the vendor's license related to the permit. See DLC website at <http://www.com.ohio.gov/liqr/>. If the permit is not placed in safekeeping and not being operated, the trustee must continue to file monthly sales tax returns.
2. Trustee should have the permit transferred into his/her name as trustee prior to transferring to third party buyer – now required by Ohio Division of Liquor Control.
3. Trustee must ensure annual renewal application for liquor permit is timely filed and paid with the Ohio Department of Commerce, Division of Liquor Control.
4. Taxation requires the filing of all pre-petition tax returns as well as filing and payment of all post-petition tax returns related to liquor permits in bankruptcy.
5. If permit is being operated during bankruptcy, Taxation will require affidavits from trustee to ensure that all sales and withholding taxes are being correctly reported, taxes remitted and returns filed.
6. Trustee must have court authority to sell permit and other business assets to third party – Ohio administrative code prohibits selling a “bare” permit. O.A.C. § 4301:1-1-14. – “when such transfer is in connection with the bona fide sale of the business or personal property assets of such permit holder...”
7. The “value” of the liquor permit (the sale price) should be clearly listed in the motion and order/notice authorizing the sale.
8. Properly notice the State of Ohio taxing authorities on any pleadings related to the sale and transfer of a liquor permit to avoid potential transfer issues. See Ohio Law, *supra*, and Section VI, Notices in Bankruptcy, *infra*.

**VII. NOTICES IN BANKRUPTCY**

- A. 11 U.S.C. § 342(c)(2) requires a debtor provide notice to creditors at an address used in the last two mailings received from the creditor in the 90 days prior to the petition date or at a designated address.
- B. Federal Rule of Bankruptcy Procedure 5003(e) provides:

The United States or the state or territory in which the court is located may file a statement designating its mailing address. The mailing address in the register is conclusively presumed to be a proper



address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

- C. Ohio Rule of Civil Procedure 4.2(J) states that service of process shall be made as follows:

Upon this state or any one of its departments, offices and Institutions as define in division (C) of section 121.01 of the Ohio Revised Code, by serving the officer responsible for the administration of the department, officer or institution or by serving the attorney general of this state:

- D. Designated addresses for the State of Ohio can be found on the U.S. Bankruptcy Court, Northern District of Ohio website at <https://www.ohnb.uscourts.gov/federal-and-state-agencies-and-certain-taxing-authorities>;

<https://www.ohnb.uscourts.gov/federal-and-state-agencies-and-certain-taxing-authorities>

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**Northern District of Ohio**  
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## Federal and State Agencies and Certain Taxing Authorities

Federal Rule of Bankruptcy Procedure 5003(e) provides that:

"The United States or the state or territory in which the court is located may file a statement designating its mailing address. The United States, state, territory, or local government unit responsible for the collection of taxes within the district in which the case is pending may file a statement designating an address for service of requests under § 505 (b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found. ... The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law."

*The following register of agencies has been provided to the U.S. Bankruptcy Court. Appropriate governmental officials may submit agency information for posting on the register, subject to approval of the Clerk. The Clerk shall publish a current register annually on each January 2nd.*

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## State of Ohio Agency Addresses

### State Agency Designations for Compliance with Rule 5003

**Belmont College**  
Attn: Controller  
68094 Hammond Road  
St. Clairsville, OH 43950

**Bowling Green State University**  
1001 E. Wooster Street  
Bowling Green, OH 43403

**Central Ohio Technical College**  
Attn: Student Accounts Receivable Specialist  
1179 University Drive  
Newark, OH 43055

- E. It is strongly recommended that you use the addresses as listed on the Northern District website when preparing the Debtor's schedule and petition in order to provide proper notice to the State creditors. This is particularly important as all of the State of Ohio taxing authorities (Taxation, BWC & ODFJS) file their own proofs of claims in bankruptcy cases.
- F. Common **mistakes on notice** include:
1. Using post office box for personal income tax returns as address for Taxation– not advisable anytime of the year but particularly not during tax season.
  2. Using local district office addresses for any taxing authorities.
  3. Noticing the Ohio Attorney General or outside counsel but not the actual taxing authority. Failure to notice the actual taxing authority may result in a nondischargeable debt not being proofed or paid.
  4. Not using the State designated addresses on the bankruptcy court websites or not calling our office when you have a question on noticing a state creditor – JUST ASK to avoid later explaining to your client why the debt is either now not discharged for failure to properly notice the State creditor or why the non-dischargeable debt was not paid through the bankruptcy.

## VIII. CHAPTER 11 ISSUES

### A. Plan Payments

1. Priority tax claims to receive regular installment payments with interest over a period of no more than five years from the petition date pursuant to § 1129(9)(C);
2. Interest rate paid on priority tax claims determined by applicable non-bankruptcy law pursuant to §511;
  - a. See O.R.C. §§ 131.02(D) and 5703.47 for interest rates on most debts certified to the AGO – for CY 2019 = 5%.See [http://www.tax.ohio.gov/ohio\\_individual/individual/interest\\_rates.aspx](http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx)
  - b. See O.R.C. § 4141.23(B) for interest rate on

unemployment compensation contributions = 14%

B. Plan Provisions Eliminating Setoff Rights Are Improper

1. Plan provisions which propose to eliminate or alter the setoff rights of tax creditors upon confirmation are improper. *In re Alta + Cast*<sup>6</sup>, 2004 WL 484881 (Bankr. D. Del);
2. Proponents of these improper plan provisions continue to mistakenly rely on *Continental Airlines, Inc.* 134 F. 3d. 536 (3d Cir. 1998), *cert. den.*, 119 S. Ct. 336 (1998) which did not involve an anti-setoff plan provision. Rather, *Continental Airlines* dealt with the situation of what happens when neither the debtor (in a plan) nor the creditor addresses setoff rights until well after confirmation.
3. Further “carve out” of the objecting tax creditors only in confirmation orders but allowing the “improper” revision to remain in the plan and bind other non-objecting creditors is contrary to *Espinosa v. United States Aid Funds, Inc.* 130 S. Ct. 1367 (2010) where the U.S. Supreme Court prescribed two significant checks on plan proponents’ ability to “game the system” by deliberately including improper provisions in plans:
  - a. The duty of the bankruptcy courts to deny confirmation of plans containing such provisions even if no party objects and
  - b. The possibility of sanctions against plan proponents & their counsel for attempting to sneak through such provisions.
4. Anti-setoff language buried in the “fine print” of a Ch. 11 plan is a serious problem for tax creditors who are involuntary creditors that do not make credit-based decisions about whether to conduct business with entities that file Ch. 11. *United States v. Kimbell Foods, Inc.* 99 S. Ct. 148, 1463 (1979) (a tax creditor “is an involuntary creditor of delinquent taxpayers, unable to control the factors that make tax collection likely”).
5. Tax creditors should be able to rely on §553(a) to have their setoff rights, known or unknown, preserved despite confirmation of a Ch. 11 plan with improper plan provisions.

C. 363 Sale Issues

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<sup>6</sup> The Westlaw version of this case contains an “m” after the debtor’s name. The body of the opinion makes it clear that the debtor’s correct name was Alta + Cast indicating that the added “m” was a typographical error so the correct name of the debtor is used in this citation.

1. Sales of property “free & clear” pursuant to § 363(f) does not extinguish the debtor’s experience rating for unemployment contributions which can be used to determine the purchaser’s unemployment contribution rate pursuant to State law. *In re Wolverine Radio Company*, 930 F.2d. 1132 (6<sup>th</sup> Cir. 1991).
2. Debtor’s unemployment experience rate is not a claim, debt or interest that can be extinguished by § 363(f), *Id.* at 1145-1146.
3. Michigan unemployment system certified as complying with requirements of Federal Unemployment Tax Act for experience based tax rate and as part of a comprehensive federal-state system provides for security of unemployed workers does not conflict with federal bankruptcy law. *Id.* at 1146.
4. Bankruptcy Code should not provide purchaser with a more preferable tax rate than employers who purchase the assets of a predecessor not in bankruptcy. *Id.* At 1149.

D. Structured Dismissals & Hopscotching Over Priority Creditors

1. *Czyzewski v. Jevic Holding Corp*, 2017 BL 89680, U.S. , No, 15-649, reversed & remanded 3/22/2017.  
The issue was whether a bankruptcy court can authorize settlement that provides for the dismissal of the bankruptcy case & distribution of settlement proceeds in a manner that is inconsistent with the Bankruptcy Code’s priority scheme. Certiorari was sought to resolve a three circuit split on this issue. The *Jevic* Court held, 6-2, that a distribution scheme cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Bankruptcy Code establishes for final distributions in business bankruptcy proceedings.
  - a. Fifth Circuit decision in *In re AWECO, Inc.*, 725 F2d 293 (5<sup>th</sup> Cir. 1984) held that a settlement entered into as part of a Ch. 11 plan was subject to the overall requirement that the plan be “fair and equitable” pursuant to 11 U.S.C. § 1129(b)(1) and that those words were a “term of art” that specifically incorporated the absolute priority standard. *Id.* at 298. As soon as a debtor files a petition for relief, fair & equitable settlement of creditors’ claims becomes a goal of the proceeding. *Id.* A bankruptcy court abuses its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors. *Id.*
  - b. The Second Circuit has taken an intermediate position rejecting a *per se* rule against any violation of the absolute priority rule but strongly cautioned against allowing such deviations in *In re Iridium Operating*,

*LLC*, 478 F. 3d 452 (2d Cir. 2007). The bankruptcy court had approved settlement of a suit brought by the Creditors' Committee against a secured lender. Some proceeds of the settlement would be used to fund a trust that would pursue litigation on behalf of the estate against an entity that had asserted its own priority claims in the case. Any amount left in the litigation trust after the suit was concluded would be paid to general unsecured creditors instead of being returned to the estate for allocation under the normal priority provisions. *Id.* at 459.

The Second Circuit approved the first aspect of the settlement which did not entail any priority skipping but remanded the second aspect for further analysis and justification. *Id.* at 466. In rejecting the *per se* rule, the *Iridium* Court was concerned about the heightened risk that parties to a settlement may engage in improper collusion. Compliance with the Code's priority scheme should be the most important factor for the bankruptcy court to consider when determining whether a settlement was fair and equitable under Rule 9019 to be certain that the parties have not employed a settlement as a means to avoid the priority strictures of the Code. *Id.* at 464. However, where the remaining factors weigh heavily in favor of approving a settlement the bankruptcy court, in its discretion, could endorse a settlement that does not comply in some minor respects with the priority rule if the parties & the reviewing court clearly articulate the reasons for a settlement that deviates from the priority rule. *Id.* at 464-465.

- c. The Third Circuit in *Jevic* approved a settlement even though it concededly did not follow the priority rules that would have been applicable had the debtor sought to confirm a plan or converted to a Ch. 7 liquidation. Moreover, the settlement was admittedly structured to completely eliminate all rights of one group of priority creditors, the employees, to ensure they did not receive any estate funds that could be used to continue their pending WARN Act litigation. However, because nothing in the Code explicitly required that a settlement agreement satisfy the Code's priority requirements, the Court reasoned that a settlement need only meet the Rule 9019 to be fair and equitable. Although asserting that such a result would be justified only rarely, the *Jevic* Court found the settlement acceptable because it was the "least bad alternative" since it provided payment to a number of creditors, not just the secured creditors, even if it did so at the expense of higher priority creditors who were entitled to be paid ahead of the unsecured creditors.<sup>7</sup>

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<sup>7</sup> The original version of the settlement would have targeted the entire \$1.7M to the general unsecured creditors but after objections of the United States Trustee, priority tax creditors and employees, that portion of the settlement was revised to ensure that administrative and priority tax claims were paid. As involuntary lenders, the State taxing authorities suffer tremendously when such priority skipping settlements are approved by the Courts and consequently, Ohio had joined eighteen other States on a *Brief of Amici Curiae in Support of Petition for Certiorari* in this case.

