

## POINTS OF CHANGE AND/OR IRRITATION

### 1. Chapter 13 Cases – Dismissal

No longer will the Austin Bankruptcy Court enter orders of dismissal pursuant to debtors' motions under §1307 (b) which contain a determination or statement that the dismissal is **without prejudice**. The question of whether the dismissal is with or without prejudice of necessity involves §109(g) and that determination must be left for the subsequent case, if any.

For the time being, the Court has been simply striking that portion of the order which reflects "**without prejudice**". Commencing July 1, 2004, if an order is submitted with the "**without prejudice**" language contained therein, the underlying motion to dismiss will simply be denied.

### 2. Lift Stays – In rem Relief

No in rem relief will be granted either in agreed or default orders unless there is a hearing held and a record established. In rem relief is the nature of a sanction which should be granted by the Court only upon an appropriate record being established.

In rem relief that is improper in any event would be pronouncements that stay and future cases of the instant debtor would not be applicable to this property, the stay in future cases of anyone who owns an interest in the property in addition to the instant debtor would not be applicable, that the stay order in the instant cases is binding in all future cases involving this property so that the effect would be that there would be no effective stay in the future cases, and all like provisions. This type of in rem relief is against public policy. The stay in future cases simply cannot be waived ahead of time by the debtors. Additionally, there are severe due process problems with trying to restrict non-debtors' access to bankruptcy and the benefit of the stay.

Proper relief with abusive and serial filing debtors is a pro-active creditor who monitors the case. An appropriate provision in such instance would be that the debtor is not allowed to dismiss the case in the event the stay is lifted until the foreclosure has actually occurred. In this event it is incumbent upon the creditor to monitor the case and respond quickly in the event the debtor has been restricted in their voluntary dismissal rights. This is because the Court has too many Chapter 13 cases to monitor this by itself, and it is the creditor for whose benefit this provision has been included who should, in fact, monitor the case.

Currently, the Court has been striking the offending provisions of these types of orders. Beginning July 1, 2004, whether agreed or default, orders submitted with this type of offending language will simply be denied. Accordingly, a new lift stay motion will have to be filed.

Further, lawyers who agree to this type of language will be subject to sanctions in the nature of disallowance of fees in the future.

### **3. Single Asset Real Estate Cases -- 11 U.S.C. §101(51)(B)**

A Chapter 11 case which is a single asset real estate case as that term is defined in 11 U.S.C. §101(51)(B) has special provisions which apply only to them under 362(d)(3). Congress enacted this particular section to insure that these small single asset real estate cases move quickly through the court system. It is this Court's opinion that it is a complete and total waste of time, resources, and money to file a motion to lift stay under 362(d)(1) or (2) when (d)(3) applies. It will only be in the most extreme cases of abuse by the debtor that a (d)(1) or (d)(2) motion will be granted in a small asset real estate case. If you want relief, file your motion under (d)(3) and ask that the time limits and other conditions set forth in the statute be put in an order that can be enforced.

This is especially true when, as in two recent cases, the lender is not the original lender but is a competing developer who has bought the underlying debt and wants to foreclose the property out from under the debtor to develop it itself.

### **4. Two-Party Dispute Chapter 11 Cases**

Do not file a Chapter 11 bankruptcy for a debtor whose primary problem is a two-party dispute with a creditor or other party for the purpose of removing pending state court litigation between the two parties to the bankruptcy court. Although the Court has made the mistake recently of keeping such removed litigation, in the future such removed litigation will, in fact, be summarily remanded to the state court and a show cause set as to why the Chapter 11 case should not be dismissed in any event.

### **5. Documents -- Evidence**

If you really want to have a bad relationship with the Court, simply fail to stipulate as to the authenticity and admissibility of documentary evidence when there is no

dispute regarding the same. The Bankruptcy Court does not exist for the purpose of making one lawyer or another prove his or her trial skills in introducing documentary evidence.

## 6. Motions to Expedite

If you use 20-day objection language in your motion to expedite, don't expect them to be granted until 20 days has expired. Additionally, the underlying motion you seek to expedite should not have 20-day objection language either. Be consistent.

If you want a matter expedited, notice to other parties in a manner other than by first class mail is required in the future. Telephonic, fax and/or e-mail notice will be required. The certificate of service must state the specific type of notice with regard to the other interested parties in the matter. If the certificates of service do not contain such specific information on notice of the motion, it will be summarily denied.

If expedited motions are filed by a Wednesday, it will most likely be set the following Monday. If filed after Wednesday, it will most likely be set a week from the following Monday.

Please upload expedited motion orders under **EXPEDITED** order type. Motions to continue are considered expedites.

## 7. Removals – In General

In general removals from state court are frowned upon unless they go to the core of the bankruptcy issues at hand. Just because there is pending litigation in the state court between the debtor and other parties does not mean that it needs to be removed and litigated in the bankruptcy court. Make an informed judgment before you remove any case to bankruptcy court. Removal should not be a simple knee jerk reaction. Nor should it be a "litigation tactic". We are busy and don't need the business. Chances are it will take longer to get to trial on a removed matter; or you may get to try it in Waco or San Antonio. Specifically do not remove when you have previously agreed in a lift stay order that you will try the matter in state court.

## 8. Posturing

Too many lawyers get caught up in proving the “rightness” of their legal position and the “wrongness” of the other side’s position. It must be an “ego” thing. Too often in these situations it would be a simple manner to settle the economics of the case but that is overlooked because the attorney, or the client, or both, are too wrapped up in “winning”.

A recent example – an extensive motion for summary judgment probably costing the client between \$10,000 and \$20,000 to manufacture and present to the Court was on the issue as to whether or not a mortgagee’s lien encumbered trade fixtures that were installed by the tenant of the debtor after the debtor had leased the real property to the tenant with the mortgagee’s blessing. The debtor had been required to obtain a subordination of the mortgagee’s lien within twenty days of the signing of the lease but failed to do so and filed Chapter 11 before the twenty days were up. The tenant pays substantial rent all of which is going to the mortgagee who had not received payment from the debtor for some time prior to it being rented. The tenant improved the property by installing at least \$180,000 of new trade fixture improvements. The appraised value of the real property with the new improvements approximated the principal amount of the bank’s debt. The tenant had offered to buy the property for the bank’s debt. The bank refused because it also wanted the tenant to pay the attorneys’ fees the bank had incurred with regard to **other** indebtednesses owed by the debtor which were secured by other property owned by the debtor in which the tenant had no interest. The Court found the situation to be ridiculous and commented on the record that the Court did not understand why the bank had not fallen all over itself trying to make a deal with the tenant who wanted to buy the property for its debt and instead had gone to the trouble of incurring another \$10,000 to \$20,000 of attorneys fees when it was completely unnecessary, especially since the issue of the bank’s consent to the installation of the trade fixtures was a real issue, i.e., it could, in fact, lose after a trial. The Court ordered the parties to mediation. The motion for summary judgment was completely unnecessary. The attorneys should have been able to figure out how to settle that matter economically on their own long before even filing the adversary proceeding, much less the filing of the motion for summary judgment.

## 9. Orders Must Accompany Motions

When you file a motion, you **must** submit an order in the correct format at the same time. In the future if you file a motion without an order submitted in the proper format it will, in fact, be summarily denied. Do not attach the order to your motion. The order must be separately uploaded in the e-orders program and linked to your motion.

## 10. Motions to Extend Time to File Schedules - Rule 1007(c)

More and more debtors are filing motions to extend time to file schedules and statement of financial affairs. Rule 1007(c) requires that any extension of time for filing the schedules and statement of financial affairs may only be granted on motion **for cause shown**. The motions currently being filed usually do not show good cause or any cause at all for that matter.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the automatic stay is hereby terminated as to Wells Fargo, its successors and/or assigns, to permit said creditor to conduct a non-judicial foreclosure sale on the real property located at 17203 Valley Glen Road, Pflugerville, Texas 78660.

IT IS FURTHER ORDERED if the property is foreclosed or repossessed, the creditor must provide written notice by regular U.S. mail to the Debtor, Debtor's attorney and the Trustee. Once the above-referenced notice of foreclosure or repossession is received by the Trustee, no further disbursement will be made by the Trustee on the claim until an amended claim is filed by the creditor. In addition, if the claim is not amended within 90 days, then the claim will have been deemed to have been satisfied by the foreclosure/repossession and further treatment through the plan will have been deemed to have been waived.

IT IS FURTHER ORDERED that in the event of the filing of a Motion to Dismiss, the Court ~~will not~~ *may decide not* <sup>if</sup> *responds to such* dismiss the Debtor's case ~~until~~ *certifies it has completed a foreclosure* Wells Fargo, its successors and/or assigns, ~~certifies it has completed a foreclosure sale of the Property.~~ *to dismiss the Debtor's case until Wells Fargo, its successors and/or assigns, certifies it has completed a foreclosure sale of the Property. Motion asking that the case be maintained pending foreclosure.*

~~IT IS FURTHER ORDERED that in the event the stay shall lift as to Wells Fargo, its successors and/or assigns, or in the event this bankruptcy proceeding shall be dismissed, Debtor will be barred from re-filing a new bankruptcy for a period of 180 days from the date the Order Lifting Stay or the Order Dismissing Case is entered, whichever date comes first.~~ *JAN*

IT IS FURTHER ORDERED that if Debtor's case is dismissed, or the 11 USC §362(a) stay lifts for any reason, Wells Fargo, its successors and/or assigns, shall be allowed to conduct a non-judicial foreclosure sale of the Property. ~~if for any reason the Debtor or any other persons claiming an interest in the property seek protection by virtue of a new bankruptcy proceeding, such proceeding shall not have any stay effect on the exercise of the legitimate rights of Wells Fargo, its successors and/or assigns, with regard to the Property.~~ *JAN*

If the property subject of this Order is foreclosed or repossessed, the Creditor must provide written notice by regular US mail to the Debtor, their attorney, and the Trustee.

- a) Once the above-referenced Notice of foreclosure or repossession is received by the Trustee, no further disbursement will be made by the Trustee on the claim until an amended claim is filed by the creditor. In addition,
- b. If the claim is not amended within 90 days, then the claim will have been deemed to have been satisfied by the foreclosure or repossession and further treatment through the Plan will have been deemed to have been waived.

9. Conversion, Dismissal, or Discharge. So long as the property is exempt, should Debtor's case be converted, dismissed, or the Debtor discharged before the terms of this Order are complete, the terms of this Order are void and the Automatic Stay shall terminate as to Movant, its successors and assigns, without further notice or action by the Court

*DRM*  
~~10. In Rem Relief. Upon termination of Stay, Movant is granted In Rem Relief with regard to the property described above for a period of three hundred and sixty five (365) days from the entry of the termination of Stay, as to all entities and all persons having or claiming an interest in the real property in this motion, and said termination of stay applies to any future bankruptcy filings for a period of three hundred and sixty five (365) days from the date the Stay is terminated.~~

11. Waiver. The provision of Rule 4001(a)(3) is waived and Movant, its successors and assigns, may immediately enforce and implement this Order upon termination of stay.

IT IS ORDERED, ADJUDGED AND DECREED that the Agreement of the parties, as hereinabove stated, is approved and the Automatic Stay is to remain in effect except as hereinabove agreed. Movant certifies that Rule 4001 has been complied with and that the Trustee has expressed no opposition.

6. In the event that Debtor fails to comply with any of the conditions set forth in Paragraph 1 of this Order, and upon Movant's providing to Debtor and Debtor's attorney written notice of the noncompliance, by first class and certified mail, and upon Debtor's failure to cure the noncompliance and pay an additional amount of \$50.00 to reimburse Movant for the attorney fees and costs incurred in connection with the Notice of Default within eleven (11) days from the date of the written notice, the 11 USC § 362(a) stay as to Ford Motor Credit, its successors and/or assigns, shall be terminated without notice or order of the Court, and Ford Motor Credit, its successors and/or assigns, shall be permitted to exercise any rights granted to it by the contract documents with respect to the Collateral including, but not limited to, taking possession and selling, leasing or otherwise disposing of the Collateral. Debtor's right to notice is expressly limited to one (1) event of noncompliance. Upon the second event of noncompliance, the 11 USC §362(a) stay as to Ford Motor Credit, its successors and/or assigns, shall be terminated without further notice or order, and Ford Motor Credit, its successors and/or assigns, shall be permitted to exercise its rights stated herein.

7. In the event of the filing of a Motion to Dismiss, the Court will ~~not~~ <sup>unless</sup> dismiss the Debtor's case ~~until~~ <sup>files a Response and</sup> Ford Motor Credit, its successors and/or assigns, certifies it has completed a sale of the Collateral. *JRM*

8. ~~In the event the stay shall lift as to Ford Motor Credit, its successors and/or assigns, or in the event this bankruptcy proceeding shall be dismissed, Debtor will be barred from refiling a new bankruptcy for a period of 180 days from the date the Order Lifting Stay or the Order Dismissing Case is entered, whichever date comes first.~~ *JRM*

9. If Debtor's case is dismissed, or the 11 USC §362(a) stay lifts for any reason, Ford Motor Credit, its successors and/or assigns, shall be allowed to obtain possession of the Collateral. ~~If for any reason the Debtor or any other persons claiming an interest in the property seek protection by virtue of a new bankruptcy proceeding, such proceeding shall not have any stay effect on the exercise of the legitimate rights of Ford Motor Credit, its successors and/or assigns, with regard to the Collateral.~~ *JRM*

10. The Trustee shall continue to pay Movant's claim through the plan. If the Collateral is foreclosed or repossessed, Movant must provide written notice by regular U.S. mail to the Debtor, Debtor's attorney and the Trustee. Once the Trustee receives such notice, no further disbursements will be made on Movant's claim until an amended claim is filed by Movant. If an amended claim is not filed within 90 days of the notice of foreclosure/repossession, Movant's claim will be deemed to have been satisfied by the foreclosure/repossession and further treatment through the plan will be deemed to have been waived.