

CONSUMER BANKRUPTCY

Need Some Comfort? Comfort Orders in Chapter 13 Cases

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Virtually every lender has been faced with a situation where – usually on the eve of foreclosure – a debtor files a second, third or even fourth bankruptcy case. The automatic stay in bankruptcy prevents the lender from taking action to foreclose. The lender would then have to file a motion for relief from the stay. Many times even before an order was entered, the debtor would dismiss the case. This situation was addressed by the Bankruptcy Reform Act, effective in October of 2005, which now provides “automatic” relief from the stay in certain instances. However, title underwriters are uneasy about the “automatic” nature of the stay relief and often require that the Bankruptcy Court issue a “comfort order” confirming that the stay is not in place and that foreclosure would not violate the stay.

Consider this scenario: Debtor’s first and second Chapter 13 bankruptcy cases were dismissed within a year of his filing his third bankruptcy case the day before your foreclosure sale. **Can you proceed with the foreclosure sale?**

Pursuant to the new bankruptcy laws, if a single or joint case is filed by a debtor, and two or more cases of that debtor were pending within the previous year, but were dismissed (subject to an exception for certain Chapter 7 cases), the automatic stay “shall not go into effect upon the filing of the later case; and on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect.” 11 U.S.C. §362(c)(4)(A). **These orders are being termed “comfort orders.”**

A natural reaction may be to proceed with the foreclosure and not bother obtaining a comfort order, since the Bankruptcy Code expressly states that the automatic stay is not in effect. Practically speaking, however, mortgage lenders need to obtain a comfort order, because most title companies require a court order evidencing that the property was not sold in violation of the automatic stay. Moreover, a comfort order will make it clear to any other interested parties, such as the bankruptcy trustee or second lienholders, that no stay is in effect.

Unfortunately for lenders, “promptly” has not been defined by the Bankruptcy Code; and in most instances, it means that the mortgage lender will not be able to obtain a comfort order prior to its foreclosure sale. The bankruptcy courts in Texas have not revised their local rules to address “prompt” issuance of comfort orders. Currently, it takes at least 20 days from the date the motion is filed to obtain a comfort order, unless a motion for an expedited hearing is scheduled. **A lender should *immediately* file a**

motion for entry of a comfort order if the lender determines that the stay is ineffective after careful analysis of the debtor's bankruptcy history.

Below are some tips to keep in mind when you are faced with a similar scenario:

1. Watch out for the debtor's motion for extension of the automatic stay, which is usually filed at the same time of the bankruptcy petition. The debtor's motion does not create a stay, but once an order granting an extension is entered, the stay becomes effective immediately. Don't be surprised to see an aggressive debtor's attorney obtain an emergency hearing on the same morning of a foreclosure sale.
2. The debtor in the serial filing must be the *same debtor*; therefore, the rule does not apply in the instance where husband filed the first bankruptcy and the wife filed the subsequent bankruptcy case.
3. Do not request an emergency hearing for a comfort order unless it **really** is an emergency in order to stay in good stead with the bankruptcy courts.
4. If you are still uncomfortable with proceeding with a foreclosure sale, consider filing a motion for relief from the automatic stay on the grounds that the debtor has engaged in serial filing, **and request *in rem* relief**. If you file an order granting *in rem* relief in the real property records, it will be effective as to future bankruptcy filings for a limited period of time (usually two years), no matter who files a subsequent bankruptcy case.

*Originally published in the July 3, 2006
issue of Bankers Digest (www.bankersdigest.com)*