

BIG-FIRM EXPERTISE COUPLED WITH  
SMALL-FIRM ATTENTION

# SETTLEPOU NEWSLETTER

**SETTLEPOU**  
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## Creditor's Rights: Motion for Relief from Stay and *In Rem* Relief

By David M. O'Dens

At one time or another, all lenders have experienced the frustration of dealing with borrowers who file multiple bankruptcies in order to repeatedly hinder the lender's ability to foreclose on real property, typically preceded by numerous failed efforts by the borrowers to remedy their continuing defaults. Some Texas bankruptcy courts have begun to entertain and now issue *in rem* relief in their orders granting relief from the automatic stay against these serial bankruptcy filers.



**Some Texas bankruptcy courts now issue *in rem* relief in their orders granting relief from the automatic stay against serial bankruptcy filers**

What is *in rem* relief? It is a judicially created, extraordinary remedy which is in-

tended to preclude a future bankruptcy filing and automatic stay from applying to certain real property for a period of time. California courts first began granting *in rem* relief in 1996 to stop scheming debtors and non-debtors from interfering with creditors' enforcement of their rights against property. A few other states have started to follow suit and, more recently, the firm's Creditor's Rights section has seen Texas bankruptcy court orders containing *in rem* relief.

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## Don Gwin to be Featured Speaker at 2005 Advanced Real Estate Law Course



Don Gwin, Chair of SettlePou's Commercial Lending section, has been invited by the State Bar of Texas to speak at the 2005 Texas Advanced Real Estate

Law Course, which will be held July 7-9 at the Hyatt Hill Country Resort in San Antonio.

Mr. Gwin's presentation will focus on issues confronted by real estate practitioners representing parties to commercial loans guaranteed by, or made in participation with, the U.S. Small Business Administration.

Don Gwin and SettlePou's SBA and USDA lending group represent many of the nation's most active lenders to the

small business community. Mr. Gwin is a former Dallas-area District Counsel to the SBA and has over twenty years experience in the private sector representing lenders in a variety of transactions, including SBA and USDA loans.

The Advanced Real Estate Law course is the preeminent forum for the state's most experienced real estate and lending attorneys.

### Attorneys:

- SAYURI BELTRAN
- MATT BETHANCOURT
- MICHAEL S. BYRD
- SCOTT J. CONRAD
- MARSHA L. DEKAN
- J. GARTH FENNEGAN
- DON GWIN
- BARRY D. JOHNSON
- KATHERINE L. KILLINGSWORTH
- NORMAN H. KINZY
- BRADLEY E. MCLAIN
- MICHAEL P. MENTON
- KELLY J. MIDDLETON\*
- CARL W. MORGAN
- JEFF MOSTELLER
- DAVID M. O'DENS
- JEFFREY J. PORTER
- ROBERT L. POU III
- SHARON REULER
- JOHN D. "Jay" SETTLE
- NANCY A. SHAW
- J. ALLEN SMITH
- JAMES M. STANFORD
- CLAY M. TAYLOR
- STEVEN M. THOMAS
- DANIEL P. TOBIN
- CLIFF A. WADE
- C. RUSSELL WOODY

\*LICENSE PENDING



David M. O'Dens

Areas of Practice:

Commercial Bankruptcy, Asset Recovery, Lender Liability, SBA Liquidations, Real Estate Litigation, Title Insurance, and Appellate Law

THERE IS A GROWING TREND IN THE TEXAS BANKRUPTCY COURTS TO GRANT *IN REM* RELIEF UPON PROOF OF THE SPECIAL CIRCUMSTANCES NEEDED TO SUPPORT REQUESTED RELIEF.

**Creditor's Rights** *continued from page 1*

However, Texas bankruptcy judges who have issued *in rem* relief caution that the extraordinary relief is not granted lightly, and in some instances, sanctions will be issued if the requested *in rem* relief is inappropriate.

When is *in rem* relief appropriate? Unfortunately, there is not a bright-line rule, such as "three strikes and you're out." It has been our experience that *in rem* relief is granted when the facts surrounding a case show that the debtors are serial bankruptcy filers, have used the protection of the automatic stay to hinder collection of collateral (prevented a foreclosure sale on multiple occasions) and are likely do so again in the future. A popular scheme our firm has dealt with is separate husband/wife back-to-back bankruptcy filings. A more sophisticated scheme, which we have also dealt with, involves the transfer of a fractional interest in property to third-parties who later file for bankruptcy.

For example, David M. O'Dens and Sayuri Beltran, of the firm's Creditor's Rights section, recently obtained a favorable ruling on a motion for relief from the automatic stay, including *in rem* relief against the property a lender was attempting to foreclose. The lender held a first and second lien on the real property. On the eve of a non-judicial foreclosure sale, the husband filed for Chapter 7 bankruptcy protection invoking the automatic stay to prevent the

lender from conducting the sale. The lender was subsequently granted provisional relief from the stay with the husband defaulting under that order approximately three months later.

Upon the second posting of the property for non-judicial foreclosure and, again on the eve of the sale, the wife filed for Chapter 7 bankruptcy protection. The lender moved for relief from the stay and requested one hundred eighty days *in rem* relief against the property. Following a preliminary hearing, the U.S. Bankruptcy Court for the Northern District of Texas conducted a final evidentiary hearing on the lift stay request. At the conclusion of the hearing, the Bankruptcy Court granted the lender's motion, including a provision that the automatic stay of any future bankruptcy proceeding would not apply to the property for a period of one hundred and eighty days. *In re Kim Thornton* (No. 05-31192-BJH) (Bankr. N.D. Tex. March 31, 2005).

What is the forecast of *in rem* relief? Certainly there is a growing trend in the Texas bankruptcy courts to grant such relief upon proof of the special circumstances needed to support the requested relief. And, while there are a few Texas Bankruptcy judges that have expressly stated that they would not grant *in rem* relief, the now enacted bankruptcy reform legislation, effective in October, will allow bankruptcy judges to grant *in rem* relief as to real

property if a debtor's bankruptcy was filed as part of a scheme to hinder, delay or defraud creditors, including multiple bankruptcy filings. § 362(d)(4) & 362(b)(20). Additionally, the proposed bill limits the automatic stay protection to thirty days for debtors who file a second bankruptcy within one year of the dismissal of their prior bankruptcy case. § 362(d)(3).

*Should you have any further questions concerning this topic, please feel free to contact David M. O'Dens, Chair of the Creditor's Rights Section, at (214) 520-3300 or [odens@settlepou.com](mailto:odens@settlepou.com).*

### Business Counsel Services: Do You Use Email to Advertise Your Business?

For companies and marketers who utilize email to advertise their goods and services to potential customers, compliance with the CAN-SPAM Act is of utmost importance. The Act titled "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" went into effect January 1, 2004. The CAN-SPAM Act covers all email, which has the primary purpose of advertising or promoting a commercial product or service, including the content on a website. The Act establishes penalties for those who send commercial email and the companies whose products are advertised in commercial email if the email is not in compliance with the law. And the law gives consumers the right to ask those who sent them commercial email to stop sending it.

The Federal Trade Commission is charged with enforcing the civil sanctions of the Act and the Department of Justice enforces its criminal sanctions. Other federal and state agencies, however, can enforce the law against organizations under their jurisdiction, and companies that provide Internet access may sue violators as well.

The CAN-SPAM Act makes it unlawful for a company to advertise its business through commercial email messages that do not meet the following requirements. First, the transmission information (the "from" line) of a commercial email message cannot be

false or misleading. The "from" line is not misleading if it accurately identifies any person who initiated the message. Second, the email cannot have a subject head-



The CAN-SPAM Act establishes penalties for those who send commercial email and the companies whose products are advertised in commercial email if the email is not in compliance with the law

ing (the "Re:" line) that would likely mislead a recipient acting reasonably under the circumstances. Third, the email must contain a functioning return email address or other Internet-based mechanism that is conspicuously displayed. Further, this return address or mechanism must be capable of receiving communications for no less than 30 days from the recipient's receipt of the original message. Fourth, if a recipient of the email objects to receiving further emails, it is unlawful for the initiator(s) to send additional messages after 10 days following the their receipt of the recipi-

ent's request. And fifth, the email must contain the following: (i) a clear and conspicuous identification that the message is an advertisement; (ii) a clear and con-

spicuous means for the recipient to opt-out of receiving further messages; and (iii) a valid physical postal address of the sender.

In addition to an injunction, a civil suit for damages, and possible criminal sanctions, the statutory penalties for violating the Act can be fairly substantial. For each commercial email that is not in compliance, \$250 can be assessed with a cap on the statutory damages at \$2,000,000. And those damages can be tripled to \$6,000,000, if the initiator commits knowing and willful

violations of the Act. Damages may be reduced, however, where the initiator implemented practices and procedures intended to prevent violations of the Act.

As discussed above, the Act applies to anyone who *initiates* a commercial electronic mail message. The Act defines a commercial email message as "... any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose). Furthermore, when used with respect to a commercial email message, the Act defines *initiate* as "to originate or transmit such message or to *procure* the origination or transmission of such message." And it is important to note that more than one person may be considered to have initiated a message. Lastly, to *procure* is defined as "intentionally to pay or provide other consideration to, or induce, another person to initiate such message on one's behalf." Therefore, if you hire a marketing firm to advertise your goods or services and that firm does not comply with the Act, you can be held liable.

*Continued on page 4*

## Meet Your Lawyers:



Sayuri Beltran

Areas of Practice:  
Commercial Bankruptcy, Asset Recovery, Business Litigation and SBA Liquidation

**Hometown:** Dallas, Texas

**College:** University of Texas, Austin

**Law School:** Southern Methodist University

**Family:** Husband, Tommy and sons, Tristan and Mathis

**Personal Favorites:**

- **Food:** Desserts (especially Fudge Brownie Sundaes)

### Sayuri Beltran

- **Drink:** Vodka mixes, current favorite is Appletini
- **Hobby:** Taking snapshots of the kids
- **TV Show:** The Daily Show
- **Old Movie:** Forrest Gump
- **Recent Movie:** Love Actually
- **Book:** Where the Wild things Are by Maurice Sendak
- **Music:** All genres
- **Vacation:** Beach spots

with Jeep rental

- **Sport:** Playing hoops with my sons
- **Sports Team:** UT Longhorns

**What do you consider as the most important qualities of a good lawyer?**

Confidence combined with the awareness of all sides of a problem; candor, because we all want to know where we stand; and self-discipline in habits of preparation.

## Business Counsel Services *continued from page 3*

Based on the statutory civil penalties alone, compliance with the Act is imperative. And compliance for most would not be a substantial undertaking in time or resources. With more and

more companies utilizing the Internet and e-commerce applications every day, the requirements of the CAN-SPAM Act must be part of the standard operating procedure, at least as far as

commercial email is concerned.

For more information, please contact Michael S. Byrd at (214) 520-3300 or [mbyrd@settlepou.com](mailto:mbyrd@settlepou.com).

## Meet Your Legal Support Team:



Denise Bohac

**Position:** Legal Assistant

**Hometown:** Detroit, Michigan

**Education:** BA, St. Edward's University

**Family:** Husband, Richard, and sons, Chris, David, Patrick and Michael

**Personal Favorites:**

- **Food:** Salad and anything Richard cooks on the grill
- **Drink:** Pinot Grigio
- **Hobby:** Reading, knitting

### Denise Bohac

- and walking
- **TV Show:** American Idol (Hate to admit this!)
- **Old Movie:** When Harry Met Sally
- **Recent Movie:** Friday Night Lights
- **Book:** The Kite Runner by Khaled Hosseini
- **Music:** Christian, Country and Oldies
- **Vacation:** Red River, New Mexico
- **Sport:** College Football
- **Sports Team:** Any Big 12

team, especially Texas Tech where two of our sons graduated from and our youngest is a sophomore

Denise has worked full time as a legal assistant in SettlePou's Commercial Lending Section since May of 1989, but her association with the firm goes back a number of years when she worked part-time at various intervals while her children were small. She is currently the coordinator of the SBA Lending Group and interfaces with numerous banking and non-bank lending clients.

### Commercial Litigation: New Changes in Class Action Law

By J. Allen Smith

Recently, President Bush signed into law legislation which dramatically affects the laws concerning class-action lawsuits. The law will shift most class action lawsuits from state courts to federal courts. The bill, The Class Action Fairness Act of 2005, applies to class actions filed on or after February 18, 2005.

Among the changes to existing Class Action law, this bill signed by Bush amends both the diversity statute and the removal laws to provide for federal jurisdiction, at the election of either the plaintiff or the defendant, over class actions that do not satisfy the traditional complete diversity and amount in controversy requirements. The new law establishes federal jurisdiction over any action in which any one member of the class (named or not) has diverse citizenship from any one defendant, and where the aggregate amount in controversy exceeds \$5 million. The elimination of the complete diversity requirement and the provision for aggregation of claims to meet the amount in controversy requirement will result in more cases that formerly could not be brought in federal court being subject to federal jurisdiction.

There are five exceptions to these broad jurisdictional changes. First, a federal court may not exercise diver-

sity jurisdiction over a class action if two thirds of all class members in a class action are citizens of the forum state, and either the primary defendants are residents of the same state, or at least one defendant from whom significant relief is sought and whose conduct is a significant basis of the claims asserted is a resident of the forum state. Second, a federal court is permitted to decline jurisdiction where the primary defendants and between one-third and two-thirds of the class members are citizens of the forum state. Third, a class action based on state law may not be filed in or removed to federal court if the primary defendants are states, state officials or other governmental entities against whom the district court may be foreclosed from ordering relief. Fourth, a non-federal question class action is not subject to the new provisions for diversity jurisdiction or removal if the total number of class members is less than 100. Lastly, the Act excludes from its coverage certain actions involving securities and corporate governance claims.

The Act does not limit the claims a plaintiff can bring in a Class Action case or the amount of damages recoverable. However, the Act's jurisdictional and removal provisions will substantially change class action practice in the United States. The impact should be that large

numbers of cases that formerly could not be filed in or removed to federal court will now be removable at the election of defendants as set forth within the bill. It can be expected that defendants will exercise these removal provisions, while plaintiffs will seek to work around them, testing the scope of the two-thirds/one third provisions to prevent cases from being removed to federal court. The legislation is favorable for defendant corporations and their counsel. It aids in the removal of the prospect of any possible geographical bias towards plaintiffs helping to avoid massive settlements by companies that do not want to risk the unpredictability and expense of going to trial in State Courts.

*Should you have any further questions concerning this topic, please feel free to contact J. Allen Smith, Chair of the Commercial Litigation Section, at (214) 520-3300 or [asmith@settlepou.com](mailto:asmith@settlepou.com).*



J. Allen Smith

Areas of Practice:

Business Litigation, Financial Institution Litigation, Condemnation Law, Legislation and Regulatory Affairs, Real Estate Litigation and Appellate Law

PRESIDENT BUSH  
RECENTLY SIGNED

INTO LAW  
LEGISLATION  
WHICH  
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LAW WILL SHIFT  
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ACTION LAWSUITS  
FROM STATE  
COURTS TO  
FEDERAL COURTS.

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## *Meet Your Lawyers:*



**Carl W. Morgan**

**Areas of Practice:**  
Financial Institutions, Acquisitions  
and Divestitures, Business Entity  
Creation, Commercial Leasing and  
Commercial Property Develop-  
ment

### **Carl W. Morgan**

**Hometown:** Abilene, Texas  
**College:** University of Texas,  
Austin  
**Law School:** Texas Tech  
University  
**Family:** Wife, Rosa, and son,  
Benjamin

**Personal Favorites:**

- **Food:** Texas Barbecue
- **Drink:** Anything but light  
beer
- **TV Show:** Nova
- **Old Movie:** Seventh Seal

- **Recent Movie:** *Pirates of  
the Caribbean*
- **Book:** *It's Your Ship* by  
Michael Abrashoff
- **Music:** Jazz
- **Vacation:** Any beach
- **Sport:** Squash

**What do you consider as the  
most important qualities of  
a good lawyer?**

*Cost-efficient delivery of qual-  
ity legal services in a timely  
manner.*

Carl Morgan is a member of SettlePou's Lending and Commercial Real Estate practice. In addition to Lender representation for both real estate and asset based transactions, Mr. Morgan represents developers, physicians and individuals in the development of business strategies, including entity selection.