

NO. D-1-GV-08-000050

OCT 15 2009 TR

At \_\_\_\_\_ M.  
J. S. Mendez Clerk

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
WEBB COUNTY TITLE	§	
& ABSTRACT COMPANY, INC.	§	201 <sup>st</sup> JUDICIAL DISTRICT

**MEMORANDUM RECOMMENDATION**  
**(International Bank of Commerce Motion for Relief from Automatic Stay)**

International Bank of Commerce (“IBC”) is a secured creditor in this case. IBC holds a real estate lien note dated December 6, 2006, and the lien applies to the building in Laredo, Texas out of which the insurer Webb County Title & Abstract Company, Inc. conducted its business prior to being placed in the instant receivership and liquidation proceeding by the Texas Department of Insurance. The building, although secured by and subject to IBC’s lien, appears to be the only major remaining hard asset in this Estate.

In the absence of judicial permission, IBC is stayed by TEX. INS. CODE § 443.008(c)(4) from enforcing its lien rights against the property. IBC by its motion seeks an Order lifting the automatic stay so that it may enforce its lien.

**1. Status of the Estate and its Computer System.** IBC’s motion is challenging in part because this Estate has special challenges:

1. As noted above, at this time it appears that the Estate has no real hard assets other than the building on which IBC possesses the lien, and the approximate \$5,000 per month in rent paid by the building’s sole tenant to the Estate. The tenant occupies approximately half the space, and the other half is not rented and therefore empty. The Estate generally is using the rental income each month to maintain and support the building and its obligations under the lease to its one tenant.
2. In the absence of any monies or other assets, the Estate is operating off of periodic loans from the Abandoned Property Fund.
3. One real dilemma involving the building is the Webb County computer system that has on it records of the company. The computer system, called an AIMS system, is, according to the Special Deputy Receiver’s primary representative Susan Salch (“SDR”), a very old system. Incredible as it sounds, the SDR credibly reported at the hearing on IBC’s motion that her IT subcontractor has told her that if the computer system is turned off to be moved out of the building, it may not come back on with accessible data. And it appears from the SDR’s testimony that, were the AIMS system unplugged

and later unable to work, it would be very expensive to purchase the software that would be necessary to read the data off of the back-up hard drives. Thus, the computer and its records presents a special, hard-to-solve challenge.

**2. Legal Requirements for Lifting the Stay.** Section 443.008(h) sets forth the standards for a Court to grant relief from the stay. IBC as the moving party has the burden under Subsection (j) of proving each issue by clear and convincing evidence.

Section 443.008(h)(1) provides for relief from the stay “for cause as described by Subsection (i).” IBC does not come within the descriptions of “cause” set forth in Subsection (i).

Section 443.008(h)(2) is the applicable provision here because it relates to a stay of an act against property, which would include IBC’s request to enforce its lien rights against the property. IBC must by clear and convincing evidence prove that “the insurer does not have equity in the property.” This requires a comparison between the fair market value of the property and the amount of secured debt against the property.

**3. Analysis of the Equity Question.** IBC introduced through its appraiser Scott Speck an appraisal of the property as of January 20, 2009, for a fair market value of \$1,260,000.00. Mr. Speck made certain assumptions regarding occupancy, etc., that are more optimistic than the present reality. Nevertheless, the \$1,260,000.00 is the only definitive proof of value in the record.

IBC in October, 2008, filed a Proof of Claim in this proceeding (not yet acted upon by the SDR) in the amount of \$1,104,597.06. IBC asserts that this \$1,104,597.06 figure reflects the amount owed on the underlying note secured by the building as of the date this insolvency proceeding was filed. If this is the relevant debt figure to compare with the building’s value (and the SDR so argues), then there is equity in the property based on the \$1.26 million value, and the motion should be denied.

IBC of course contends that the relevant debt figure for comparison purposes must also include (calculated as of June 9, 2009) the additional accrued interest (\$117,610), late charges (\$13,875.00), unpaid taxes, penalties and interest (\$114,714.87) and attorney’s fees (\$32,453.00), and a continuing per diem of approximately \$170.00 per day. IBC thus argues that this results as of June 9, 2009, in a total debt figure of \$1,276,743.00—or slightly more (approximately \$17,000 more) than the \$1,260,000.00 fair market value of the property.

The parties argue at length as to whether these additional amounts are properly included in the debt calculation or not. There is no clear guidance in the Insurer Receivership Act. Like most issues under the Act, the legal questions raised in the parties’ briefing are of first impression because there are no case authorities addressing these issues. The federal Bankruptcy Code may be useful by analogy and IBC has cited to certain federal case authorities speaking to the manner of calculating debt (and post-petition accruals) in bankruptcy proceedings. However, the Bankruptcy Code may differ

in substance from the provisions in the Insurer Receivership Act such that guidance from that source may not be appropriate---or it may.

For now, the Master's analysis is as follows: If IBC is correct that its \$1,276,743 debt calculation should be used, resulting in a lack of equity of approximately \$17,000.00 as of June, 2009, or approximately \$30,000.00 as of the present time using IBC's per diem figure, this results in a margin that is too small to prove "no equity" by the stringent "clear and convincing evidence" standard required by the statute. There are many variables here, and a margin of 2-3% **at this time** based upon the evidence adduced at the hearing simply is too close to warrant lifting the stay as to the building in this particular Estate.

**4. Special Status of IBC as a Secured Creditor.** A secured creditor has special rights not to be taken lightly in a receivership proceeding. Here, while not pointing blame because this is a very difficult receivership to move forward given the absence of any non-secured assets/money, the fact remains that IBC as a secured creditor with substantial rights in the building has sat for almost two years with no meaningful action taken by the Estate with regard to its secured claim or its security for its unpaid claim. Its POC, a year old, has not been acted upon by the SDR. The amount owed IBC, whether secured or unsecured, continues to grow. The building is 50% occupied. The SDR is using rents that are subject to IBC's security agreement to maintain the building, etc. (as permitted by Section 443.260(i)), but is not providing to IBC any detailed accounting of the rental income received and the building-related use of such income. There is no marketing plan to sell the building so that IBC's security can be liquidated and its secured debt paid down or off. The Special Master is not aware of the SDR's intentions with regard to its compliance with Section 443.260(a). Finally, the SDR just prior to the hearing sent a demand letter to IBC regarding a potential claim in order to set up a "set-off" argument at the hearing, but no formal claim ever has been filed against IBC during the pendency of this receivership.

Therefore, although IBC's request to lift the stay is denied at this time, substantial progress now must be made on all fronts to liquidate IBC's claim consistent with Section 443.260(a).

**5. Recommended Course of Action.**

a. The Special Master recommends that IBC's motion to lift the stay be denied at this time.

b. This matter is set for further hearing before the Special Master on January 25, 2010, at 2:00 p.m. The matters to be considered at the hearing are set forth in sub-parts (c.) and (d.) below.

c. The Special Master is mindful that as interest and other amounts continue to accrue or be incurred, the differential may become substantial enough to warrant a "no

equity” finding if it later is determined that IBC is correct in its legal arguments. In addition, the IBC appraiser used some overly-optimistic assumptions such that the true fair market value of the property determined anew under current economic conditions in general and as to the building in particular might very well be less than Mr. Speck’s prior opinion as to value. This could result, depending on any new opinion as to value, in a “no equity” determination even if the SDR’s arguments are sustained that the relevant debt number is the number as of the date of receivership filing without any post-receivership accruals or additions.

Therefore, IBC will be afforded the opportunity at the January 25, 2010 hearing to present evidence of an updated appraisal and its expert’s updated opinion of the building’s fair market value under current conditions. The Master also will consider any evidence from the SDR as to fair market value.

In addition, regarding the legal issues raised by the parties as to how to calculate the debt element of the equity analysis, the Special Master requests further briefing from both parties (1) as to how the debt-calculation issues present here have been resolved in the federal bankruptcy context and whether or not an analogy to the Bankruptcy Code for guidance is warranted or not; and (2) a discussion of any legislative history, if any, relating to the calculation of debt under Section 443.008(h)(2)(A), with each side to file initial briefs on or before January 8, 2010, and responses on or before January 20, 2010.

d. Based on the above, the Special Master further expects that the SDR will have substantially moved forward or accomplished the following by the January 25, 2010 hearing:

- (1) That the SDR has processed and allowed or disallowed IBC’s Proof of Claim, unless the SDR has good reason why such has not occurred.
- (2) That if the SDR intends to assert any formal claim against IBC, that such claim formally has been asserted and filed of record (the Master taking no position on the merits or not of any such claim).
- (3) That the SDR continues to use rental income from the building as necessary to preserve and maintain the building and in order to comply with the terms of the existing lease. If any funds remain after all such expenditures on a monthly basis, such funds should be maintained in trust for possible future distribution to IBC. The SDR further should provide to IBC on a monthly basis an accounting of all income received from the building and all expenses paid by the SDR out of such income.
- (4) That the SDR continues to maintain adequate and suitable insurance on the building.
- (5) That the SDR has solved the problems posed by the computer system. The Special Master appreciates the special problems presented by the computer system on site. However, Section 443.008(h) does not allow the Court to deny IBC’s motion to

lift the stay simply because the computer system may be necessary to an effective liquidation and cannot be unplugged. Moreover, a stalemate regarding IBC's security cannot continue to exist because the computer system cannot be unplugged for fear of losing data. No matter how untenable, that problem needs to be solved now on some basis.

(6) That the SDR has commenced steps to actively market and sell the property, preferably in coordination with IBC as the secured creditor on the property.

The status on all these fronts plus any updated value analyses and the briefing requested herein will be considered at the further hearing on January 25, 2010, on IBC's motion to lift the stay.

SIGNED this 15<sup>th</sup> day of October, 2009.



Tom Collins, Special Master