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**Landlord -
Tenant Law**

Sterling Education Services

**WHEN TENANT OR LANDLORD FILES
BANKRUPTCY**

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Presented By:
RAYMOND H. AVER, ESQUIRE

LAW OFFICES OF RAYMOND H. AVER
A Professional Corporation
1950 Sawtelle Boulevard, Suite 120
Los Angeles, California 90025
(310) 571-3511 – Telephone
ray@averlaw.com

THE BANKRUPTCY SYSTEM

The bankruptcy system is based upon a balancing of competing interests between debtors and creditors and between different classes of creditors. Thus, each decision by a bankruptcy judge depends on the facts presented, the applicable law and, more so than in other judicial proceedings, the "weighing of the equities."

In many respects, bankruptcy is the ultimate negotiation. The overriding goal of any practitioner representing a landlord should be to gain as large an advantage as early in a case as is possible. Given the fact that the landlord occupies a unique position among these interests, it is not unusual for the landlord's position to be given less weight than arguments which may bring more money into the estate or provide general creditors with a greater distribution. Thus, speed and a show of strength are a must for a landlord in order to compensate for these inherent inequities in the system.

Given the discretion afforded a bankruptcy judge under the United States Bankruptcy Code (the "Code") and interpretive case law, there may be a divergence of opinion on an issue among the various bankruptcy courts. Practitioners often muse that one can find a bankruptcy court case that will support any argument that one may make. While this is an exaggeration, it is important to remember that bankruptcy judges are not uniform in their opinions and their rulings reflect this very delicate balance of interests among the competing parties.

AN OVERVIEW OF THE BANKRUPTCY CODE

The Code provides for five "chapters" - under which a bankruptcy case may be filed. Chapter 9 involves a bankruptcy of a municipality and Chapter 12 involves the filing of a bankruptcy of a "family farmer" as that term is defined in the Code. There are few landlord/tenant cases under these chapters.

The three chapters under which landlord/tenant issues usually arise are:

- **Chapter 7.** A liquidation of all the debtor's assets. A Chapter 7 case may be filed by an individual or a corporation. A trustee appointed by the court inventories assets of the debtor's estate, converts non-exempt assets into cash and distributes the cash to creditors. Upon distribution, assuming there have been no objections to either the debtor's discharge in general or to the dischargeability of a certain debt, the debtor is "discharged" (i.e., generally released from all prior financial obligations).

- **Chapter 11.** A reorganization of any person or entity who or which may be a debtor under Chapter 7. Generally, the debtor continues to operate its business and files a plan providing for payment of all or a certain percentage of its pre-bankruptcy debt. The plan usually provides for a discharge of the debtor once it is consummated. From the landlord's point of view, this type of case involves more issues and requires greater monitoring than a Chapter 7 case because the tenant-debtor will usually remain in possession of the leased premises while it tries to reorganize and the disposition of the lease may be a key to a successful reorganization.
- **Chapter 13.** A reorganization of an individual with regular income (whether from wages, salaries or income from a debtor's proprietorship). This is sometimes called a "consumer reorganization" bankruptcy, but on occasion an individual with a small going business will file a case. The debtor must have no more than \$250,000 in unsecured debts and \$750,000 in secured debts. 11 U.S.C. § 109(e). This figure is adjusted annually for inflation. A Chapter 13 debtor will typically file a plan which will provide payment of a certain portion of the debtor's pre-petition debts to creditors over a 36 to 60 month period. This payment will come from the debtor's future earnings or from the sale of some of the debtor's property. While the plan is in effect, the debtor will make monthly payments to a Chapter 13 Trustee who will then disburse a pro rata share of these payments to the creditors. The debtor is discharged from his debts if the plan is successfully completed. Because of the similarity in treatment of leases in Chapter 11 and Chapter 13 cases, these materials will not give extensive treatment to Chapter 13 cases. ..

TYPES OF CASES

- **Voluntary Case:** Filed by a Debtor
- **Involuntary Case:** Filed by a Creditor against the Debtor. In order to force a party into an involuntary bankruptcy, the petition must be filed by three or more entities each of which is the holder of a claim that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, with the claims aggregating at least \$10,000 (again adjusted annually for inflation) or more or if there are less than twelve holders of claims against the Debtor, one or more claim holders who have an aggregate of \$10,000 or more in claims. 11 U.S.C. § 303.

THE PLAYERS

The individual or entity that files for bankruptcy protection is the **Debtor**.

The Creditor or **Claimant** is the one to whom the debtor owes money. Most often, the landlord finds itself in this category. There are different types of creditors:

- **Secured Creditor:** One who has a valid lien against the debtor's property created by a security agreement, landlord's lien, mechanic's lien or other mortgage of property.
- **Administrative Claimant:** One whose debt accrues after the filing of the case (e.g., attorneys, appraisers, accountants, people who provide services after the petition filing, landlords from whom debtor continues to rent).
- **Super-priority Claimant:** An administrative creditor whose claim is paid before other administrative claimants (e.g., creditor who extends credit to the debtor after the petition is filed).
- **Unsecured or General Creditor:** A creditor whose debt arose prior to the filing of the petition. Generally, its claim is the last to be paid. In large reorganization cases, the unsecured creditors may form a committee in order to have a larger voice in the case. In a few cases, the committee may have a stronger voice in the reorganization than the debtor.

The **Trustee** is the one who administers the debtor's estate. Depending upon the type of the bankruptcy, there are different kinds of trustees.

- **Debtor-in-Possession:** In Chapter 11 reorganizations, the debtor assumes the duties of a trustee to operate the business and act in the best interest of the estate.
- **Chapter 11 Trustee:** The court may appoint a qualified individual to operate a business during reorganization for the benefit of the creditors.
- **Chapter 7 Trustee:** In liquidation cases, the court will appoint a trustee to collect the assets of the estate and sell the non-exempt assets for the benefit of the creditors.
- **Chapter 13 Trustee:** In a wage earner or "consumer" reorganization, the Chapter 13 Trustee collects plan payments, disburses funds to creditors and oversees the progress of the case. In large metropolitan areas, a standing trustee is appointed to administer all Chapter 13 cases.

- **United States Trustee's Office:** In all cases, whether a Chapter 7, 11 or 13, the United States Trustee assigns one of its staff to assist in the supervision and administration of the debtor's estate. The United States Trustee's Office is a branch of the United States Department of Justice.

The **LANDLORD** occupies a unique (and often unappreciated) position in a bankruptcy.

If it is owed money for rent and services prior to the bankruptcy, it is a creditor. If the lease is secured by a lien on assets of the debtor, the landlord may be a secured creditor with a greater priority to payment than a general unsecured creditor.

If the tenant remains on the premises or the trustee uses the premises after the bankruptcy filing, the landlord becomes an administrative claimant by providing services to the estate.

The landlord is usually the holder of an unexpired lease on which the decision must be made to reject (or terminate) it or have it assumed by the tenant-debtor or assigned to a third party. The decision to reject the lease gives rise to special rules governing "rejection" claims.

If the debtor goes out of business, the landlord may find itself as a high-priced storage company for the trustee or secured creditors who have not yet repossessed their collateral. This gives rise to a claim for the use and benefit to the estate or the secured creditors.

In short, the landlord does more than extend credit. It provides a shelter for the business in order for the tenant to service other creditors. The landlord's real property likely continues to accrue tax, mortgage, maintenance, insurance and other obligations for which the landlord may or may not be reimbursed. Thus, a bankruptcy filing may have multiple and varying effects on a landlord, each of which must be carefully analyzed so that the landlord will attain a maximum benefit under less than ideal circumstances.

GOALS OF THE PARTIES

- **Debtor.** A debtor files a bankruptcy in order to obtain relief from its debts and to start life anew unimpaired by past financial problems.
- **Creditor.** A creditor seeks its fair share (along with other creditors) of the debtor's assets. The system is set up to provide equal treatment to creditors of similar status. Often creditors battle among themselves regarding their priority and rights to the debtor's assets.
- **Landlord.** Not only does the landlord want its fair share, it does not want its property tied up (especially if the debtor's lease is below market) in bankruptcy. Careful monitoring of the tenant and the tenant's affairs might put the landlord on notice that a bankruptcy is eminent.

With respect to the negotiation of a lease agreement prior to the specter of bankruptcy, the following issues should be addressed in order to give the landlord as much protection as the law will allow in the event of a bankruptcy by the tenant:

- The granting to the landlord of a contractual landlord's lien.
- The requirement of a security deposit clause, with the allowance of a draw down and replacement thereof conditioned only on the tenant's failure to pay sums due under the lease agreement.
- The obtaining by the tenant of a letter of credit to the benefit of the landlord. As long as the letter of credit is issued by the financial institution at least ninety (90) days prior to any bankruptcy filing by the tenant, the landlord may draw down the letter without violating the automatic stay.
- A determination of the ownership of tenant improvements and fixtures, including trade fixtures. An agreement that these items are owned by the landlord will make it difficult for the tenant-debtor or trustee to argue that they are property of the bankruptcy estate.
- Obtaining a personal guaranty of a principal of the business, a parent company or any other third party. The bankruptcy of a tenant should not affect the liability of a guarantor.

Even with the best planning, however, the precise timing of a bankruptcy usually comes as a surprise. The Bankruptcy Code attempts to even the playing field for all parties by allowing the undoing or disregarding of certain pre-petition transactions.

For instance, a tenant who pays back rent outside the ordinary course of business within 90 days of the filing of the petition may have committed a "preference" which can be set aside later. This means that the landlord may have to return to the debtor's estate the back rent it has received. 11 U.S.C. §547.

In California, a landlord may lock out a tenant from the premises before a bankruptcy is filed. However, the filing of a bankruptcy case will likely require the landlord to allow the tenant to re-enter the premises in order to protect the assets of the estate.

On the other hand, the termination of the lease by the landlord and the departure of the tenant (and its assets) from the premises prior to the bankruptcy will usually be effective to avoid participation by the landlord in the bankruptcy case, other than to seek to enforce a damages claim against the tenant.

THE *IPSO FACTO* AND ANTI-ASSIGNMENT CLAUSES

Leases often contain many clauses which provide for termination or forfeiture of rights in the event of a bankruptcy filing. These provisions, known as "*ipso facto*" clauses are unenforceable against the tenant who has filed for bankruptcy. In addition, there are many clauses which do not necessarily terminate rights in the event of a bankruptcy, but are nevertheless deemed unenforceable as they may interfere with the power of the court to effectuate reorganization under the Code. For instance, clauses which may interfere with the ability of a debtor to assign a lease of real property are unenforceable. Thus, any clause that could result in a breach of a real property lease by a tenant who files for bankruptcy is probably unenforceable. 11 U.S.C. §365(b)(2). The same is not necessarily true for leases of personal property and security interests in personal property with individual chapter 7 debtors. Under BAPCPA, the last omnibus modifications to the Bankruptcy Code, a provision in a "lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding" under the Bankruptcy Code or the insolvency of the debtor is effective if the debtor fails to timely file a statement of intention and to take timely the action specified in such statement, or timely enters into a reaffirmation agreement or redeems such property. 11 U.S.C. §521(d).

IMPORTANCE OF A TIMELY, PERFECTED AND SUPERIOR CONTRACTUAL LANDLORD'S LIEN

Many states have laws that provide for a statutory landlord's lien on the tenant's property for rent unless the lien is specifically excluded in the lease. It is important to realize that the filing of a bankruptcy case enables a trustee (or debtor-in-possession) to avoid statutory liens. 11 U.S.C. § 545.

Thus, if the landlord is to have a larger say in the reorganization of a debtor or stand in the front of the line to claim the debtor's assets in the event of a liquidation, it must have a contractual landlord's lien perfected by the filing of a UCC-1 Financing Statement in the appropriate state or county office for the filing of such instruments. The contractual landlord's lien will turn an unsecured claim for which the landlord may receive pennies on the dollar into a secured lien which will give the landlord a priority position on the assets of a debtor.

It is also important for the lien to remain superior as to some assets or to some level of liability. A landlord with a subordinate lien or a lien on collateral of little value does it no good. A lender may want the landlord to completely subordinate its lien in order to fund a loan package for a tenant. Upon receipt of a request for a subordination agreement, the landlord must weigh the benefits of retaining its superior lien position against the financial concern of the tenant. If possible, the landlord should try to maintain a superior position as to some assets (inventory, for example) or subordinate its position for all but a certain number of months or years of rent. Realistically, lenders rarely carve out such positions for landlords, but the concept should always be part of a subordination negotiation.

COMMENCEMENT OF THE CASE

A bankruptcy case commences by the filing of a petition by the debtor (if it is voluntary) or by creditors (if it is involuntary). As soon as the case is filed, the automatic stay goes into effect regardless of whether the landlord knows it or not. While the automatic stay will be addressed below, its importance cannot be understated. Any action undertaken by a creditor toward a debtor while the stay is in effect is voidable (although some circuit courts of appeal have held such actions are void). *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *In re Dunbar*, 235 B.R. 465, 470 (9th Cir. B.A.P. 1999).

- **The First Crucial Days of a Chapter 11 Case.** The filing of a Chapter 11 reorganization case usually initiates considerable activity by various creditors who want to improve their respective positions. Often there is a flurry of early motions dealing with continued financing of the debtor or efforts by creditors to limit the debtor's use of property in which they may have an interest.

Although their names may vary from case to case, among the typical "early" motions that affect disposition of property and establish priorities are:

- **Motion for Approval of Post Petition Financing:** If a debtor is to continue business, it must have a source of financing. A financial institution, factor or other financing entity will usually agree to provide a source of cash as long as it receives the highest priority possible on debtor's assets. Because of its unique position, landlord should try for a "carve out" of its security, if any.
- **Motion for Approval of Sale of Assets Other than in Ordinary Course of Business:** Occasionally, a debtor may find it advisable to sell a substantial portion of its assets at a higher price than liquidation in order to downsize and provide some cash for future operations. The sale of a substantial asset during reorganization is suspect because it may indicate an inability to reorganize, although it may be part of a pre-arranged plan. Also, if it disposes of a major asset used in the creation of income, the transaction may be deemed to be an improper substitute for a Plan of Reorganization. One should be skeptical of such a motion at an early stage of a reorganization.
- **Motion to Use Cash Collateral:** "Cash collateral" is a key term in reorganization cases. It includes cash, negotiable instruments, documents of title, security deposit accounts, cash received from receivables, or other cash equivalents which serve as security for a debt. 11 U.S.C. § 363(a). After the case is filed, the debtor will usually want to use the cash in that account or receivables from its customers to continue operations. It must show the court that the creditor will remain "adequately protected" through the imposition of a substitute lien or a lien on proceeds generated by use of the collateral. 11 U.S.C. § 363.

- **Motion to Prohibit Use of Collateral:** Sometimes a secured creditor who has experienced a default may try to prohibit the debtor from using equipment, machinery, cash, receivables, inventory or other items which constitute collateral. It will file a motion with the court alleging that the continued use of the collateral by the debtor will diminish the value of the collateral which the creditor intends to repossess later in the case.
- **Emergency Motion to Reject (or Compel Rejection of) Executory Contracts or Unexpired Leases:** As more fully explained below, the debtor has the right to assume or reject executory contracts in force at the time of the filing of the bankruptcy, including unexpired leases. The Code gives the debtor 120 days to make this decision. 11 U.S.C. § 365(d)(4). In some cases, the debtor may want out of the contract immediately to reduce expenses. The court will usually oblige the debtor. Sometimes the other party to the contract (for instance, a landlord who may be able to immediately rent the property to another tenant at a higher price) will ask the court to compel rejection of the contract. If the lease may be useful for the reorganization of the debtor, the motion to compel will probably be denied.
- **Motion to Extend Time Within Which to Reject or Assume Unexpired Nonresidential Real Property Lease:** Related to the motion to assume or reject unexpired leases discussed above, is the motion to extend time to do so. The court may extend the 120 day period, upon motion made prior to the expiration of the 120 day period, for 90 days, for cause. If the court grants an extension, the court may grant a subsequent extension only upon prior written consent of the landlord. Landlords should beware of such motions for two reasons: 1) confirmation may be months (or even years) away and, with the ever-changing real estate market, the landlord may find itself at a disadvantage should the motion be granted; and 2) the motion may be silent as to safeguards concerning the nonpayment of rent by the debtor during the extension and the result to the landlord in the event thereof.

As one can observe from the above examples of "first day" motions, there is a great deal of positioning between the debtor and creditors and among the creditors themselves. The landlord is sometimes forgotten in the battle of creditors, so it is incumbent upon a landlord who wants to be dealt with fairly to take an active role in the matters which will affect it. The landlord must assure that other creditors do not take a priority position over the landlord with respect to its security, if any. It can safely be said that a landlord who takes a leadership role among the creditors will have its position taken seriously by all parties. Those landlords who "relax" will not fare well during the course of the administration of the estate. The first step to protecting the landlord's rights in a bankruptcy case is to file a Request For Special Notice or a Request Courtesy Notification Of Electronic Filing (NEF). *See* Attachment A for a form Request For Special Notice and a form Request Courtesy Notification. *See* Attachment B for a summary of actions that a landlord should consider upon a tenant's bankruptcy filing.

THE AUTOMATIC STAY AND ITS EFFECT

The automatic stay is one of the most well-known and fundamental debtor protections provided by the Code. Simply stated, the filing (commencement) of a bankruptcy case operates as an injunction or stay against a myriad of actions, applicable to all entities, whether or not those entities or persons actually know of the filing of the case. Historically, the stay has provided the debtor with “breathing space” from creditors’ collection efforts. In addition, the stay provides the debtor with time to propose a repayment or reorganization plan. The automatic stay also protects creditors by permitting the trustee to inventory the estate and provide for an orderly liquidation.

Among the actions stayed by 11 U.S.C. § 362 are:

- commencement of any lawsuit, issuance of process, institution of a claim or prosecution of a claim that could have been or was commenced before the filing of the bankruptcy petition;
- the enforcement against the debtor or its estate, of a judgment obtained before the commencement of the bankruptcy case;
- any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- any act to create, perfect or enforce a lien against property of the estate (however, post-petition acts by a secured creditor necessary to maintain or continue its perfected and secured status are allowed);
- any act to collect, assess, or recover a claim against the debtor that arose prior to the filing of the bankruptcy case; and
- the set off of any debt owing to the debtor that arose before the commencement of the case against any claim against the debtor.

The stay therefore extends to acts against the debtor, the debtor’s property, and the property of the bankruptcy estate. *In re Advanced Ribbon & Office Products*, 125 B.R. 259, 263 (9th Cir. BAP 1991). Property of the estate includes “all legal and equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541. It includes any interest in a commercial or residential lease that has not been terminated and some “possessory interests” that continue after lease termination.

Specifically, with respect to a lease that has not been terminated, or has not expired, a landlord may not do any of the following (nonexclusive) acts:

- Threaten a tenant
- Declare a default, including serving a notice to quit the premises

- Perform any self help activities
- Hinder tenant's business in any way
- Sue for unlawful detainer, or continue with a suit
- Terminate lease
- Evict tenant
- Apply security deposit to rent owed
- Lockout tenant
- Foreclose on landlord's lien
- Seize tenant's property
- Shut off utilities
- Show property to prospective tenants
- Move property of tenant who has abandoned premises.

A violation of the automatic stay is disobedience of a federal court order. A violator may be held in contempt, and sued for compensatory and punitive damages. 11 U.S.C. §§105 and 362(k).

Exceptions to the Automatic Stay

On the other hand, the stay does not prohibit such acts as the commencement or prosecution of a criminal action against the debtor; the commencement of, continuation of or enforcement of an action by certain governmental agencies who seek to enforce their police or regulatory powers; or the act of a lessor under a lease of nonresidential property that has terminated by its own terms before or during the bankruptcy case to obtain possession of such property. 11 U.S.C. § 362(b)(10).

This emphasized portion of the above paragraph is especially important to landlords because it means that the landlord may be entitled to seek eviction during the bankruptcy without interference from the stay if the lease has terminated prior to the filing or has expired by its own terms after the filing. [CAVEAT - Since each case is different, and there are different interpretations of the law by different courts, the landlord must be very careful when proceeding with a post-petition eviction without Bankruptcy Court approval.]

The Bankruptcy Code places limits on the automatic stay with respect to individual debtors who are repeat filers. 11 U.S.C. §362(c)(3) (the stay expires 30 days after a bankruptcy filing where a prior case was dismissed within one year before the current bankruptcy filing,

absent a court order continuing the stay within the 30 day period); and §362(c)(4) (the stay does not go into effect at all if the debtor had two or more cases pending that were dismissed within the previous year, absent a court order imposing the stay within 30 days after the petition date). While this is not relevant in corporate cases, small businesses owned by individuals may file serial cases to remain in spaces without actually going through the whole bankruptcy process.

The Bankruptcy Code also places limits on the automatic stay with respect to residential leases. The automatic stay does not apply when a landlord seeks to enforce a judgment for possession of residential property if the landlord obtained the judgment before the tenant filed bankruptcy. 11 U.S.C. §362(b)(22). The tenant can invoke the automatic stay for a period of 30 days if it files with the petition and serves upon the landlord a certification under penalty of perjury that: (a) there are circumstances under state law under which the tenant would be permitted to cure the entire monetary default that gave rise to the judgment for possession; and (b) the tenant has deposited with the clerk of the court any rent that would become due during the 30-day period after the filing of the bankruptcy petition. 11 U.S.C. §362(l)(1). In order to preclude the termination of the stay under section 362(b)(22), the debtor must also file with the court and serve upon the landlord within the 30-day post-petition period a further certification stating under penalty of perjury that it has cured the entire monetary default that gave rise to the judgment for possession. 11 U.S.C. §362(l)(2). The Code provides for an expedited hearing if the landlord objects to any certification filed by the tenant. If the landlord objects, the court must hold a hearing within 10 days after the filing and service of the objection. 11 U.S.C. §362(l)(3). If the court upholds the landlord's objection, the stay terminates immediately and the landlord need not seek relief from the stay to recover possession of the property. If the court finds for the tenant, the stay continues to apply.

The Bankruptcy Code also exempts from the automatic stay an eviction action that seeks possession of residential real property "based on endangerment of such property or the illegal use of controlled substances on such property." 11 U.S.C. §362(b)(23). The statute is unclear and will likely invite litigation. It does not define "endangerment" or "illegal use of controlled substances." It also does not clearly indicate whether the landlord must have filed an eviction action for the specific purpose of stopping that activity (rather than for non-payment of rent). The exemption only applies if the landlord certifies that "such an eviction has been filed" or that the tenant "has endangered property" or allowed the use of an illegal controlled substance in the 30-day period before filing the certification. The tenant can reinstate the stay for 15 days by objecting to the landlord's certification, with a hearing to be held in 10 days. 11 U.S.C. §362(m). Given the uncertainty in the language of the statute, it may often be simpler for the landlord to move for relief from the stay.

Motions for Relief From the Automatic Stay

In order to enforce a right stayed by the bankruptcy filing, the creditor must file a motion with the court for relief from the stay. After a preliminary hearing and, if necessary, a full final hearing, the court can lift the stay or modify it if it is shown that the right of the creditor outweighs the need for the stay. Generally the stay issue should be resolved anywhere from 21 to 60 days after the motion is filed.

The local rules in the Central District of California govern the filing of motions for relief from the automatic. Although, the respective judge's self calendaring procedures, found on the bankruptcy court's web site, should also be reviewed. The local rules govern such things as: the scheduling of hearings (LBR 9013-1(b)); the papers required to file a motion (LBR 4001-1(b) and 9013-1(c)); the service of motions for relief from the automatic stay (LBR 9013-1(d), which differs depending upon whether the motion involves a residential unlawful detainer or not; and the time limits for filing and serving a stay relief motion (LBR 4001-1(c)(1)).

In addition, motions for relief from the automatic stay must be made only by using those forms designated for mandatory use in the F4001-1 series of the court-approved forms. Failure to use the mandatory forms may result in the denial of the motion or the imposition of monetary or other sanctions in the judge's discretion. (LBR 4001-1(b)). *See* Attachment C for the form Notice Of Motion And Motion For Relief From The Automatic Stay Or For Order Confirming That The Automatic Stay Does Not Apply Under 11 U.S.C. §362(l).

In the landlord/tenant context, the most frequent grounds for lifting a stay are to allow eviction of a tenant who has defaulted post-petition and to allow drawing down of a security deposit to apply against the pre-petition claim.

There is a relatively new body of law on whether a pre-petition waiver of reliance on the automatic stay is effective after a party files for bankruptcy. If such a waiver were effective a landlord might be able to take quicker action against a defaulting tenant who has filed for bankruptcy protection. There is an obvious public policy argument against such waivers -- they could emasculate the cornerstone of the Bankruptcy Code. They have not been tested in court with respect to leases. In cases where they have been tested, their utility has been limited. They have been used in settlement agreements, workouts and forbearance agreements. There is also a wide range of opinion in the courts that have dealt with them. They have been upheld when:

- They are explicitly drafted to waive protection of the automatic stay
- There is proof of a knowing and intelligent consent
- The waiver is drafted narrowly to apply to the agreement and situation at hand
- The waiver is supported by consideration

The “waiver” does not negate the need for a hearing in bankruptcy court. It is not “self-executing.” The court must determine the scope and consent issues. Also, a waiver would not prevent third parties from objecting to lifting or the stay.

HANDLING THE UNEXPIRED LEASE IN BANKRUPTCY - REJECTION, ASSUMPTION, ASSIGNMENT

The following three options are available to any debtor-in-possession (or trustee, if one is appointed), whether or not a shopping center lease is involved. The fourth option specifically concerns the shopping center lease.

- **Rejection of Lease:** If the debtor decides that the lease is burdensome to the estate he will opt to reject the lease. In this case, the lease effectively terminates and landlord can make a claim for damages not to exceed the statutory cap.
- **Assumption of Lease:** If the lease is necessary to the reorganization, the debtor/tenant may undertake the obligations of the lease but must cure all defaults, give adequate assurance of prompt compensation to landlord and give adequate assurance of future performance. BAPCPA makes cure easier with respect to non-monetary defaults as certain non-monetary defaults in real property leases may now be cured after the fact when a debtor wants to assume the lease. 11 U.S.C. §365(b)(1)(A).
- **Assumption and Assignment:** Sometime the debtor determines that the lease is not necessary to its reorganization but is still profitable to the debtor's estate. If this is the case, the debtor may take the lease and assign it to a third party but must satisfy all requirements of assumption (see above) and the assignee must show adequate assurance of future performance.
- **Special Case of the Shopping Center Lease:** Because of the special character of a shopping center (master lease, contractual interdependence among the tenants, fixed hours of operation, common areas, joint advertising, percentage rent clauses, contiguous grouping of stores, special tenant mix, etc.), the Code provides that a tenant-debtor who wishes to assume and assign a lease must prove to the court that (1) the financial condition and operating performance of the proposed assignee is similar to the debtor at the time the debtor became obligated under the lease; (2) any percentage rent due under the lease will not decline substantially; (3) the assumption or assignment is subject to all provisions of the lease and will not breach any other lease financing agreement or master agreement; and (4) the assumption or assignment will not disrupt the tenant mix of the shopping center.

BAPCPA rectified a perceived ambiguity in the Code regarding enforcement of tenant mix provisions by making it clear that provisions of 11 U.S.C. § 365(b)(3) trump any other provisions of § 365. Thus, the courts cannot declare use and exclusivity provisions unenforceable in determining whether a lease can be assumed.

Shopping Center leases are accorded greater protection since the center is often a carefully planned enterprise, and although it consists of numerous individual tenants, the center is planned as a single unit, often subject to a master lease or financing agreement. Under these agreements, the tenant mix in a shopping center may be as important to the landlord as the actual promised rental payments, because certain mixes will attract higher patronage of the stores in the center, and thus a higher rental for the landlord from those stores that are subject to a percentage lease agreement.

LANDLORD CLAIMS

There are three types of claims available to a landlord: secured, unsecured, and administrative. See Attachment D for a form Proof of Claim.

- **Secured Claim:** If the landlord has a properly perfected contractual landlord's lien, it is secured. A secured claimant is entitled to receive an amount equal to the value of the collateral securing its lien. Unless the debtor's assets dwindle substantially in value, a landlord with a security interest will probably have a greater chance of having its claim paid in full than an unsecured landlord. One should be aware however, that in most cases landlords may have already subordinated their claim before the bankruptcy filing. If the landlord has a properly perfected contractual landlord's lien, the pre-petition and landlord's rejection damages will be secured and accorded a higher priority than unsecured claims.
- **Unsecured Claim:** If the landlord fails to receive a contractual lien, its claim is deemed to be unsecured. Usually, pre-petition rental falls into this category, as well as the landlord's rejection damages. An unsecured creditor usually receives a very small percentage of its claim because much of the assets of a tenant will be consumed in secured and administrative claims.

Note on Oversecured vs. Undersecured: When the value of the collateral exceeds the amount owed to the creditor, the creditor is deemed to be oversecured. The Code allows an oversecured creditor to recover post-petition interest, and any fees, costs or other charges provided for in the underlying agreement. It is important to note that these amounts must be recovered out of the collateral.

Conversely, when the value of the collateral is less than the amount owed to the creditor, the creditor is deemed to be undersecured. An undersecured creditor (not receiving any administrative rent) should ask that the stay be lifted as soon as possible, in order to maximize its recovery in the bankruptcy.

- **Administrative Claim for Rent.** After the filing of the petition, the landlord is entitled to payment of rent and other obligations of the lease, (as well as payment for services which benefit the estate such as storage, maintenance of premises, etc.). The landlord has a right to current payment of rent during the administrative period, although there is some authority that if the landlord does not press this right in a timely manner, it may not be able to recover this rent until all of the other administrative claims are paid.
- **Administrative Claim Prior to Rejection of the Lease.** Until the lease is rejected by court order or by operation of law, the landlord is entitled to administrative rent in the amount reserved in the lease. The majority of cases also allow the landlord an administrative claim to 120 days after the filing of the Petition (depending on when the case was filed) without the necessity of a hearing or a showing of benefit to the estate.
- **Administrative Claim After Rejection of Lease.** There may be some circumstances in which the lease is rejected or otherwise terminated and the tenant continues to occupy the premises. In such cases, the landlord is entitled to rent for the debtor's use of the premises which benefited the estate.
- **Administrative Claim after Assumption and then Rejection of Lease.** Prior to BAPCPA, a landlord had an unlimited administrative claim when a lease was assumed by a debtor and then rejected. BAPCPA capped this claim at two years of rent. 11 U.S.C. §503(b)(7).
- **Property Tax Claims.** While there is a great deal of disagreement among the courts, one would think that real estate taxes which became due after the filing of the petition are administrative expenses. Thus, if the lease recites that taxes are due upon billing to tenant and the billing date is after the filing of the petition, the landlord should recoup all real estate taxes reflected by that bill. However, some courts may prorate the taxes between pre- and post-petition dates even if the bill was due post-petition. Remember, taxes due prior to the petition date are considered pre-petition general non-priority debts.
- **Claims for Environmental Clean-Up and Restoration Costs.** There are several lines of cases on the availability of an administrative claim for environmental clean up. One line holds that an administrative claim is only available if the contamination occurred post-petition. The better rule for landlords is contained in those cases which hold that any pre-petition

environmental damages caused by property of the estate will enjoy administrative expense priority as long as actual costs are incurred post-petition to remedy the damage, but if no costs are incurred, the claim will be a general claim against the estate.

- **Claims Arising from Rejection of Lease.** If the lease is rejected by operation of law (meaning that the debtor did not exercise its right within the time limits set forth) or if the debtor voluntarily rejected the lease, a special claim limit is enforced on damages resulting from the breach that arises by such rejection. As pointed out previously, this claim may be either secured or unsecured depending upon the existence of a perfected contractual lien.

CALCULATION OF THE CLAIM

The Code places a ceiling (commonly known as "the cap") on a claim for future rent by a lessor resulting from rejection of the lease of either the greater of (1) the rent reserved in the lease without acceleration, for one year; or (2) fifteen percent (15%) not to exceed three years of rent for the remaining term of the lease. 11 U.S.C. § 502(b)(6).

Both of these alternatives are usually measured from the date the petition is filed. For a short term lease (i.e. under five (5) years, the landlord will receive the most by computing the rental for one year. If the rent called for in the lease is constant for the entire term of the lease, the fifteen percent provision will yield a higher damage claim amount only if the remaining lease term exceeds six and two-thirds (6 2/3) years.

The first step in calculating damages for a claim is to determine how much rent or other damage was owed prior to the filing of the case. This amount is not subject to the § 502(b)(6) cap. The landlord may then use the measure of damages provided under the lease or by common law to calculate future damages. In many instances, this measure is the present value of the future rental stream (components of rent are usually defined in the lease) less the fair market value of the lease, also reduced to present value. In addition, most leases provide for the landlord to recover the cost of commissions and tenant improvements for a new tenant.

Since damages subject to the cap are determined by state law, the landlord must reduce its claim by any amount by which it has mitigated its damages. Also, the landlord should probably reduce its damages by any security deposit it holds (although the stay must be modified to allow it to take the deposit).

Once the landlord goes through this exercise, it can compare its future damages to the cap and file a claim for either the capped amount or the damages if they fall under the cap. Remember, past damages are in addition to the capped amount.

Since the landlord's claim arising from rejection of the lease is severely limited, courts generally hold that post-petition rent received by the landlord from either the debtor or a third party to whom the property has been relet, should not be applied in satisfaction of the landlord's maximum amount allowed by law.

In some cases a claims bar date will be set early, but in more complex cases, the court will set a bar date depending on the circumstances. Usually, the "standard" bar date will not apply to future damages of landlords whose leases have not been rejected by the time of the general bar date. The landlord may have to file a claim for past damages by the original bar date and an amended or new claim for rejection damages. The latter date is usually 30 days after rejection, but it depends on the order from the court or plan of reorganization.

SOURCES OF COMPENSATION OTHER THAN THROUGH CLAIMS PROCESS

A landlord should leave no stone unturned in trying to make the best of a tenant's bankruptcy. Below are other sources of compensation which should be considered by the landlord of a bankrupt tenant.

- **Security Deposit:** A security deposit held by a landlord on a rejected lease must be applied against the rejection damages or other pre-petition claim. In order to draw down the security deposit, the landlord must seek permission from the Court by relief from the automatic stay.
- **Letter of Credit:** A letter of credit issued at least ninety (90) days prior to a bankruptcy filing is very advantageous to a landlord, since it is well established that a letter of credit and the proceeds therefrom are not property of the debtor's estate. Recent litigation in this area indicates that if a landlord has a letter of credit in excess of what should be its claim under § 502(b)(6), the landlord should forego filing a claim and look to the institution that issued the letter of credit for compensation. *See, In re Stonebridge Technologies*, 2005 U.S. App. LEXIS 24024 (5th Cir. 2005).
- **Third Party Guaranty:** Sometimes the landlord requests a third party guaranty either from a principle of the tenant or from a parent company of the tenant. Generally, and as long as the guarantor is not a party to the bankruptcy, the stay does not apply against guarantors of a secured debt. The reasoning behind this general rule is that guaranties are obligations of third parties and, as such, are not property of the estate. Although some jurisdictions allow courts enjoin the enforcement of guaranties, most jurisdictions allow a creditor to proceed against a guarantor without danger of violating the automatic stay.

- **Trustee Sales:** Occasionally, the bankruptcy case fails for the tenant-debtor and its assets must be sold. A trustee will be appointed and he/she may attempt to use the leased premises as the site of the sale. The disruption of the business of other tenants, the violation of lease provisions prohibiting auctions or other sales on the premises and the potential injury to the premises or others resulting from an unusual influx of people on the premises should cause landlords to be very hesitant when such a sale is proposed. Unfortunately, the bankruptcy cases usually allow such sales even in violation of a lease provision. However, a landlord may be in a position to negotiate a "fair deal" for such use of the premises which may include a percentage of receipts, additional rent for the unusual circumstances or other additional considerations.
- **Recovery from Secured Creditor:** Occasionally, a secured creditor may have property on the leased premises which has been abandoned by a tenant-debtor or which is under control of the trustee. With the proper agreement in place, the landlord may recover reasonable compensation from the secured party until that party is able to retrieve the collateral and remove it from the premises.
- **Other Remedies of Landlord in Bankruptcy Court:** A creditor who senses that a debtor is not taking its fiduciary duty as a debtor-in-possession seriously or who believes that the debtor has been dishonest before or after the filing of the bankruptcy may undertake several remedies. The creditor might initiate an investigation by the United States Trustee or United States Attorney if fraud is suspected or might move for dismissal of the case or object to the discharge of the debtor.

In addition, should the creditor feel that its interests are not being adequately protected, it might move for relief from the automatic stay in order to foreclose on its security interest or in order to repossess the leased premises. The creditor might move for an order prohibiting the use of cash collateral or move for a conversion of the case to liquidation.

SOURCES OF PAYMENT TO THE ESTATE (AND FROM THE LANDLORD)

In some instances, the tenant may have paid the landlord a lump sum of past due rent just prior to the filing of a bankruptcy case or paid the rent of another party just prior to filing. Depending on the circumstances these payments may be a preference under 11 U.S.C. § 547 or a fraudulent transfer under 11 U.S.C. § 548.

A preference is a transfer made within 90 days of the bankruptcy filing, unless the landlord establishes it was made in the ordinary course of business and was made according to ordinary business terms in the industry. However, on all cases filed after October 17, 2005, the "and" referenced in the proceeding sentence becomes an "or" making it easier for a

landlord to prove a defense if it has chronically accepted late rent. In a non-consumer bankruptcy case, a payment of less than \$5,000.00 is not an avoidable transfer. See, 11 U.S.C. § 547.

In addition, to the extent that the landlord provides "new value" to the tenant as a result of the payment, the transfer is not a preference.

As for a fraudulent transfer, if the debtor did not receive "reasonably equivalent value" for the transfer to the landlord, the transfer may be suspect.

THE PLAN PROCESS

In reorganization cases, the Plan of Reorganization is the culmination of all the negotiations and posturing. The technicalities for adopting the Plan are beyond the scope of this paper, but from a landlord's perspective the following practice pointers should be helpful:

- Before the plan is disseminated to the creditors, the court must approve a disclosure statement. A creditor should read it like a prospectus and if it does not contain sufficient information for a creditor to make an informed vote on the plan, an objection should be lodged pointing out the infirmity.
- Press the debtor to commit to whether the landlord's lease will be assumed or rejected. Many times the disclosure statement will leave out this information and instead state that it will be provided shortly before the vote on the plan.
- If sufficient numbers of creditors band together (for instance a committee is formed) those creditors will have a greater say in the formation of a plan. A landlord ought to be a member of a creditor's committee.

CONCLUSION

The bankruptcy process for a landlord can be one fraught with delay and frustration, or a way for the landlord to negotiate a better deal. The key is to be one of the major players so the landlord can shape the process driving the case. An aggressive and vigorous landlord may not win every battle, but it will be heard and its position likely enhanced.

Attachment A

1 RAYMOND H. AVER - SBN 109577
2 LAW OFFICES OF RAYMOND H. AVER
3 A Professional Corporation
4 1950 Sawtelle Boulevard, Suite 120
5 Los Angeles, California 90025
6 Telephone: (310) 571-3511
7 e-mail: ray@averlaw.com

8 Attorneys for [Secured, Unsecured, Administrative] Claimant
9 [Name of Creditor]

10 UNITED STATES BANKRUPTCY COURT

11 CENTRAL DISTRICT OF CALIFORNIA [DIVISION]

12 In re:) Case No. _____
13 [Debtor's Name],) Chapter ____
14 Debtor.) REQUEST FOR SPECIAL NOTICE
15) Date: [No Hearing Required]
16) Time:
17) Place:

18
19 TO THE CLERK OF THE ABOVE-ENTITLED COURT; THE DEBTOR(S) AND ITS/THEIR
20 COUNSEL:

21 _____ ("Claimant"), a creditor of _____
22 _____ ("Debtor"), by and through the undersigned attorneys,
23 files this Request for Service of Papers pursuant to Federal Rule of
24 Bankruptcy Procedure 2002(a), (b), (f), and (g).

25 The Law Offices of Raymond H. Aver, A Professional Corporation,
26 puts all parties in interest on notice that it represents Claimant in
27 the above-captioned case, as local counsel, and requests that all
28 counsel of record provide the undersigned counsel with copies of all

1 notices, pleadings, and other papers filed in the above-captioned
2 case. All counsel of record are requested to direct all written or
3 telephonic communications to the Law Offices of Raymond H. Aver, APC,
4 as follows:

5 Raymond H. Aver, Esquire
6 Law Offices of Raymond H. Aver
7 A Professional Corporation
8 1950 Sawtelle Boulevard, Suite 120
9 Los Angeles, California 90025
10 Telephone: (310) 571-3511
11 e-mail: ray@averlaw.com

12 Please take further notice that the foregoing request includes
13 all notices and papers referred to in the Federal Rules of Bankruptcy
14 Procedure and additionally includes, without limitation, all documents
15 required to be submitted to the Office of the United States Trustee
16 and/or any trustee appointed to Debtor's case, as well as notices of
17 any application, complaint, demand, hearing, motion, pleading or
18 request, formal or informal, whether conveyed by mail, telephone, or
19 otherwise.

20 The Law Offices of Raymond H. Aver, APC, additionally requests
21 that the Debtor and the Clerk of the Court place the counsel listed
22 above and their address on any mailing matrix or list of creditors to
23 be prepared or existing in the above-captioned case.

24 Neither this Request For Special Notice nor any subsequent
25 appearance, pleading, claim, proof of service, document, lawsuit,
26 motion, nor any other writing or conduct shall constitute a waiver of
27 Claimant's:

28 a. Right to have any and all final orders in any and all
non-core matters entered only after de novo review by a United States
District Court judge;

1 b. Right to trial by jury in any proceeding as to any and
2 all matters so triable, whether or not the same is designated as
3 involving legal or private rights, or in any case, controversy, or
4 proceeding related thereto, notwithstanding the designation vel non of
5 such matters as "core proceedings" pursuant to 28 U.S.C. section
6 157(b) (2), and whether such jury trial right is pursuant to statute or
7 United States Constitution;

8 c. Right to have the reference withdrawn by the United
9 States District Court in any matter or proceeding subject to mandatory
10 or discretionary withdrawal; and

11 d. Other rights, claims, actions, defenses, setoffs,
12 recoupment, or other matters to which Claimant is entitled under any
13 agreement or at law or in equity or under the United States
14 Constitution.

15 Claimant hereby expressly reserves all rights, without exception,
16 without confessing or conceding jurisdiction in any way by this filing
17 or by any other participation in this case or the matters related
18 thereto.

19
20 Dated: _____

LAW OFFICES OF RAYMOND H. AVER
A Professional Corporation

21
22
23 By: _____
24 RAYMOND H. AVER
25 Attorneys for [Secured, Unsecured,
26 Administrative] Claimant
27 [Name of Creditor]
28

1 NOTE: When using this form to indicate service of a proposed order, DO NOT list any person or entity in Category
2 I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the
CM/ECF docket.

3 PROOF OF SERVICE OF DOCUMENT

4 I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
1950 Sawtelle Boulevard, Suite 120, Los Angeles, California 90025

6 The foregoing document described REQUEST FOR SPECIAL NOTICE will be served or was served (a) on the
7 judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

8 **I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling
9 General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via
NEF and hyperlink to the document. On _____, I checked the CM/ECF docket for this bankruptcy case
10 or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to
receive NEF transmission at the email address(es) indicated below:

11 _____ Service information continued on attached page

12 **II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL** (indicate method for each person or entity served):
13 On _____, I served the following person(s) and/or entity(ies) at the last known address(es) in this
14 bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the
United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing
the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the
document is filed.

15 _____
16 Service information continued on attached page

17 **III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each
18 person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____, I served the following
19 person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method),
by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal
delivery on the judge will be completed no later than 24 hours after the document is filed.

20 _____
21 Service information continued on attached page

22
23 I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and
24 correct.

25 _____
26 Date Type Name Signature

Attachment A - 1

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

Name, Address, Telephone Numbers, and California State Bar Number (if applicable)	CASE NO.:
	CHAPTER:
	<input type="checkbox"/> REQUEST COURTESY NOTIFICATION OF ELECTRONIC FILING (NEF)
In re: Debtor(s)	<input type="checkbox"/> REQUEST <u>REMOVAL</u> FROM COURTESY NOTIFICATION OF ELECTRONIC FILING (NEF)

**REQUEST TO BE ADDED OR REMOVED FROM
COURTESY NOTIFICATION OF ELECTRONIC FILING (NEF)**

To the Clerk of the U.S. Bankruptcy Court, I hereby:

- ☐ **Request Courtesy Notification of Electronic Filing.** The above named wishes to receive courtesy electronic notice of all documents filed in the above referenced case. I understand the courtesy electronic notification shall be delivered via the Court's Case Management/Electronic Filing (CM/ECF) system as a Notice of Electronic Filing (NEF) and that I must be a registered User of the Court's CM/ECF system to be eligible for courtesy NEFs.

I understand it is my responsibility to add myself and my e-mail address to the above referenced case via CM/ECF in order to receive a courtesy NEF.

I further understand this request **DOES NOT** impose any obligation on the Court, the debtors or any other party in the case to deliver courtesy copies of any orders, pleadings or other documents entered on the docket by mail, telephone, facsimile, or any other means of electronic transmission.

I will use docket event "Request for Courtesy Notice of Electronic Filing (NEF)."

- ☐ **Request Removal from Courtesy Notification of Electronic Filing.** By selecting this option, courtesy notification of court orders and all other pleadings entered on the docket in the above referenced case will no longer be sent via electronic means to the above named.

I will use docket event "Request for REMOVAL from Courtesy Notice of Electronic Filing (NEF)."

(WARNING: This form must be used to be added or removed from receiving Courtesy NEFs and may NOT be used in place of *Substitution of Attorney* form F 2090-1.4)

Dated: _____
Signature

(NOTE: This form can only be filed electronically via the Court's CM/ECF system. Scan this form to a PDF document, then file electronically.)

This form is mandatory. It has been approved by the United States Bankruptcy Court for the Central District of California.

April 2010

Attachment B



LEGAL ISSUES: **Bankruptcy**

By Raymond H. Aver

Apartment owner protections in tenant bankruptcies

A tenant's bankruptcy filing invokes an automatic stay which, in most instances, prevents a landlord from interfering with the tenant or the tenant's property during the bankruptcy. This means you cannot send demand letters, pursue eviction, file or continue litigation for unlawful detainer or damages, or even threaten to exercise any of your usual means of dealing with dead beat tenants. The stay is effective even if you do not have notice of the bankruptcy. Any act taken in violation of the stay is void, and of no legal effect even if it is not challenged during the bankruptcy case. A willful violation of the stay is even worse. It could expose you to serious consequences, including being found in contempt, and liable for compensatory damages, attorney fees, and, in appropriate circumstances, punitive damages.

The automatic stay protects residential tenants even though their lease has expired or they have defaulted under the terms of the lease prior to bankruptcy. Tenants in bankruptcy frequently argue that because they occupy an apartment after the bankruptcy filing their continued possession of the premises is a protected property interest. Unfortunately, the bankruptcy courts agree with this argument and have concluded that the auto-

matic stay protects tenants from eviction, even where the tenants had failed to make the monthly rental payments due under the residential lease for an extended period, had been served with a Notice to Pay Rent or Quit, and had stipulated to a judgment declaring the lease forfeited following the filing of an unlawful detainer action.

Many leases contain provisions providing that the lease terminates automatically when the tenant files for bankruptcy, becomes insolvent, or makes an assignment for the benefit of creditors. The Bankruptcy Code provides that these type of provisions are unenforceable and do not justify a landlord's "self-help" eviction even if the lease authorizes such an eviction upon a tenant's bankruptcy.

So what is a landlord to do?

Motion to terminate automatic stay

One weapon available to landlords under the Bankruptcy Code to regain possession of a leased premises is to file a motion to terminate the automatic stay. The Bankruptcy Code requires that a hearing be held and the stay ordered continued within 30 days of the date the landlord files the motion; otherwise, the stay is terminated. This requires the landlord to wait approximately 30 days to a court order. In appropriate circumstances, the motion can be accom-

 <p>Magic Chef DISHWASHER</p> <ul style="list-style-type: none"> • 5 Cycles • Available in White, Almond & Black • Sound insulation <p>\$199</p>	 <p>Magic Chef 30" GAS RANGE</p> <ul style="list-style-type: none"> • Lift-up porcelain top • Lifetime top burners • Two oven racks <p>\$239</p>	 <p>Magic Chef REFRIGERATOR</p> <ul style="list-style-type: none"> • 15.9 Cu Ft. • 100% Frost-Free • On Wheels • Reversible Doors <p>\$399</p>	 <p>Airtemp</p> <p>SPECIAL BUY \$378 <i>While They Last</i></p> <ul style="list-style-type: none"> • 10,000 BTU • 115 Volts • 3 Speed • 5 Year warranty • Parts & labor • In-home service
<p>Air Conditioning SPECIALISTS</p> <p>"We sell all major brands of appliances"</p> <p>(818) 769-8000 • (213) 877-8957</p> <p>25th Anniversary Same Location! Same Owners! • 5720 Lankershim Blvd., No. Hollywood (2 Blocks No. of Burbank Blvd.)</p>			

panied by a request for an order shortening the notice time of the hearing. One good strategy to consider is to immediately file a motion for relief from the automatic stay and ask the court to conduct the hearing on shortened notice as soon as the landlord becomes aware of a tenant's bankruptcy.

In cases involving residential leases, the motion will typically allege that the debtor has no equity or interest in the property and that the property is not necessary for reorganization, or that nonpayment of rent or other reason for termination of the lease constitutes "cause" for the court to terminate the automatic stay. The motion should always seek relief from the stay to enforce the landlord's state law rights under the lease and should, in addition, request that the order:

- Be effective in the pending bankruptcy case despite conversion of the case to another chapter;
- Remain effective for 180 days following the dismissal of the tenant's bankruptcy case;
- Remain effective even if the debtor transfers possession of the leased property to a third party; and
- Allow the landlord to enforce the remedies incidental to recovery of possession, such as disposition of abandoned personal property.

While some bankruptcy judges may not be willing to grant such comprehensive relief, others will and in those cases landlords will be protected against continuing loss of rental income and legal expense caused by tenants who voluntarily convert their chapter 11 or chapter 13 cases to chapter 7, file multiple bankruptcies, or transfer possession to or share possession with another who then files bankruptcy to further frustrate the landlords' efforts to obtain possession.

Lease assumption or rejection
In addition to the stay relief pro-

visions, the Bankruptcy Code contains provisions governing the formal process for assumption or rejection of unexpired leases and provides a landlord with another weapon to combat a tenant's bankruptcy. Lease assumption or rejection has injected a degree of certainty into the landlord-tenant relationship after a tenant files bankruptcy by requiring tenants to take affirmative action to assume unexpired leases. It also allows the bankruptcy court, the landlord and other creditors to know whether the tenant (or the bankruptcy trustee) will perform the obligations of the lease, and it provides a landlord with assurances that defaults in rent will be cured if the lease is assumed.

The Bankruptcy Code places strict deadlines for tenants to assume or reject unexpired leases. The deadline depends on the chapter in which the case is pending and whether the leased property is residential or non-residential.

In a chapter 7 case, the tenant must assume an unexpired lease within 60 days of the filing of the voluntary bankruptcy case or the lease is deemed rejected and cannot be revived.

In a chapter 11 or 13 case, a lease of nonresidential property must be assumed within 60 days of a voluntary bankruptcy filing or it too will be deemed rejected. The deadline may be extended, but the tenant must file a motion seeking bankruptcy court approval of the extension prior to expiration of the 60-day period.*

Residential property leases must be assumed or rejected prior to confirmation of the plan of reorganization in chapter 11 or 13 cases, unless the bankruptcy court shortens the deadline in response to a motion filed by the landlord. In some cases, it therefore may be strategically advantageous for the

landlord to wait 60 days after the bankruptcy filing in chapter 7 cases and in chapter 11 or 13 cases involving nonresidential property to seek relief from stay, and request an order that the lease has terminated by reason of its rejection under federal law and requiring the tenant to immediately surrender the premises.

Prerequisites & consequences of assumption or rejection

If the tenant has defaulted under the terms of an unexpired lease, the tenant may not assume that lease unless the default is cured or adequate assurance is given that the default will be promptly cured. The assurance must also cover all future performance of the lease. In addition, the tenant must compensate the landlord for actual consequential out-of-pocket losses or provide adequate assurance that such compensation will be promptly forthcoming. If the tenant is in default under the lease when the petition is filed, the bankruptcy court will not require the landlord to continue paying for utilities or other services incidental to the lease before the tenant assumes the lease, unless the landlord is compensated for any such services supplied before assumption.

However, if the landlord agreed that the tenant could cure the pre-bankruptcy default by entering into a pre-bankruptcy rent workout agreement or promissory note, the bankruptcy court may not require a tenant to cure defaults or to provide adequate assurance of performance. Landlords should therefore carefully consider whether to substitute or modify rent obligations for potentially insolvent tenants and should, at a minimum, ensure that each agreement references the other and contains cross-default provisions.

Please turn to page 64

* BAPCPA extended the 60 day period to assume or reject a lease of nonresidential real property to 120 days.

LEGAL ISSUES

Continued from page 13

The tenant by assuming the lease agrees to be bound by the lease terms and to cause the lease obligations to become obligations of the bankruptcy estate, as distinguished from the debtor, and thus a subsequent breach gives rise to an administrative expense claim, which has a higher priority of repayment under the bankruptcy and therefore a greater likelihood of being paid than a general unsecured claim, which is the status of most landlord claims in bankruptcy cases. Alternatively, and notwithstanding express language to the contrary contained within the lease, the tenant may assign its interest in the lease to a third party

bankruptcy filing and the court order approving rejection of the lease. The compensation is set at the reasonable rental value, which may not be the same as the lease rate. Any post-petition rent accruing after the filing of the petition but before rejection should be granted administrative priority. In most cases, the landlord should file a claim in the tenant's bankruptcy.

Other weapons for landlords in bankruptcy cases

Upon the filing of a bankruptcy case, the clerk of the bankruptcy court will mail a notice of commencement of the case to all creditors and parties of interest listed on the debtor's bankruptcy schedules.

One weapon available to landlords under the Bankruptcy Code to regain possession of a leased premises is to file a motion to terminate the automatic stay.

and thereby avoid further liability under the lease.

A tenant's motion to reject an unexpired lease, by contrast, is rarely denied even where the proposed rejection would result in significant injury to the landlord. Rejection of an unexpired lease, once approved, is deemed a breach of that agreement, and the landlord's claim for damages for breach is deemed to have arisen immediately before the filing of the bankruptcy petition. Unless the debtor's obligations under the lease are secured, the landlord's claim for damages as a result of rejection will be treated as a pre-petition general unsecured claim.

The landlord is, however, entitled to compensation for post-petition rent or rental value from the debtor or the estate for the use of the premises during the limbo period, i.e., the period between the

The notice contains the deadline for filing proofs of claim, complaints objecting to the dischargeability of debts and complaints objecting to the debtor's discharge. An experienced bankruptcy attorney should be consulted as to whether grounds exist for and the propriety of filing a dischargeability or discharge complaint in the bankruptcy.

The reverse side of the notice contains a proof of claim form which should be promptly completed and filed with the bankruptcy court. The notice also identifies the date of the debtor's meeting of creditors. The meeting of creditors is generally scheduled approximately 60 days following the bankruptcy filing. All creditors and parties of interest may attend the meeting of creditors and may question the debtor, who must answer the questions under penalty of perjury.

In addition to the meeting of creditors, the Bankruptcy Rules provide another discovery device not available in state or district court actions, commonly known as a 2004 exam. A 2004 exam is an extraordinarily broad discovery tool and allows for the examination of any person under oath on any matters that relate to the "acts, conduct or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Effective questioning of the debtor at the meeting of creditors and at a 2004 exam can provide valuable information to assist in implementing a strategy to obtain possession of leased property from the debtor or to satisfy a claim for unpaid rent and other related losses. This is especially true where the tenant files bankruptcy solely to avoid eviction. Bankruptcy courts have subjected the debtor and the debtor's attorney to monetary sanctions for abusing the bankruptcy process in such cases. ■

Raymond H. Aver is the founder of the Law Offices Of Raymond H. Aver, A Professional Corporation in Los Angeles, California. Mr. Aver has practiced law in the creditors' rights and bankruptcy areas throughout California for the past 25 years. He frequently represents landlords and tenants in lease restructurings and bankruptcy litigation.

Please feel free to contact Mr. Aver directly with any questions or comments you have concerning issues of creditors' rights and bankruptcy law. He may be reached by telephone at (310) 571-3511, by fax at (310) 571-3512, or by e-mail at ray@averlaw.com.

Attachment C

3. ☐ a. This motion is being heard on REGULAR NOTICE pursuant to LBR 9013-1. If you wish to oppose this motion, you must file a written response to this motion with the court and serve a copy of it upon the Movant's attorney (or upon Movant, if the motion was filed by an unrepresented individual) at the address set forth above no less than 14 days before the above hearing and appear at the hearing of this motion.
- ☐ b. This motion is being heard on SHORTENED NOTICE. If you wish to oppose this motion, you must appear at the hearing. Any written response or evidence must be filed and served: ☐ at the hearing ☐ at least _____ days before the hearing.
- (1) ☐ An Application for Order Setting Hearing on Shortened Notice was not required (according to the calendaring procedures of the assigned judge).
- (2) ☐ An Application for Order Setting Hearing on Shortened Notice was filed per LBR 9075-1(b) and was granted by the court and such motion and order has been or is being served upon the debtor and trustee, if any.
- (3) ☐ An Application for Order Setting Hearing on Shortened Notice has been filed and remains pending. Once the court has ruled on that motion, you will be served with another notice or an order that will specify the date, time and place of the hearing on the attached motion and the deadline for filing and serving a written opposition to the motion.
4. You may contact the Clerk's Office or use the court's website (www.cacb.uscourts.gov) to obtain a copy of an approved court form for use in preparing your response (optional court form F 4001-1.RESPONSE), or you may prepare your response using the format required by LBR 9004-1 and the Court Manual.
5. If you fail to file a written response to the motion or fail to appear at the hearing, the court may treat such failure as a waiver of your right to oppose the motion and may grant the requested relief.

Date: _____

Respectfully submitted,

Printed name of law firm

Signature

Printed name of Individual Movant or attorney for Movant

**MOTION FOR RELIEF FROM THE AUTOMATIC STAY OR FOR ORDER
CONFIRMING THAT THE AUTOMATIC STAY DOES NOT APPLY
(Unlawful Detainer)**

Movant: _____

1. **The Property at Issue:** Movant moves for relief from the automatic stay to obtain possession of the residential or nonresidential premises at the following address (Property):

Street Address:

Apt./Suite No.:

City, State, Zip Code:

The Property is: ☐ Residential ☐ Nonresidential

2. **Case History:**

- a. ☐ A voluntary ☐ An involuntary petition under chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was filed on (specify date): _____
- b. ☐ An Order of Conversion to chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on (specify date): _____
- c. ☐ Plan was confirmed on (specify date): _____
- d. ☐ Other bankruptcy cases of the Debtor were pending within the year ending on the petition date. See attached declaration.
- e. ☐ Other bankruptcy cases affecting this Property have been pending within the two years ending on the petition date. See attached declaration.

3. **Grounds for Relief from Stay: (Check all that apply)**

- a. ☐ Pursuant to 11 U.S.C. § 362(d)(1), cause exists because, as of petition date, Debtor had no right to continued occupancy of the premises, as follows:

(1) ☐ An unlawful detainer judgment in favor of Movant was entered prepetition.

A. ☐ The Debtor has not filed with the petition and served on the Movant the certification required under 11 U.S.C. § 362(l)(1).

B. ☐ The Debtor or adult dependent of Debtor has not deposited with the clerk any rent that would become due during the 30-day period after the filing of the petition.

C. ☐ The Debtor or adult dependent of Debtor has not filed and served on the Movant the further certification required under 11 U.S.C. § 362(l)(2) that the entire monetary default that gave rise to the judgment has been cured.

D. ☐ The Movant has filed and served an objection to the certification referenced in (a)(1)(A) and/or (a)(1)(C) above. A copy of the objection is attached hereto as Exhibit _____. A hearing on this objection is set for: _____.

(2) ☐ An unlawful detainer proceeding was commenced prepetition.

- (3) ☐ Movant acquired title to the premises by foreclosure sale prepetition and recorded the deed within the period provided by state law for perfection.
- (4) ☐ Movant acquired title to the premises by foreclosure sale postpetition and recorded the deed within the period provided by state law for perfection.
- (5) ☐ The lease or other right of occupancy expired by its terms prepetition.
- (6) ☐ The lease has been rejected or deemed rejected by operation of law.
- (7) ☐ Lease payments have not been made since the filing of the petition.
- (8) ☐ An eviction action has been filed to obtain possession of the subject residential Property on grounds of endangerment of the property or because of illegal use of controlled substances on the Property and Movant has filed and served upon Debtor a certification that ☐ such an action was filed or ☐ that within the 30 days preceding the certification Debtor has endangered the subject Property or illegally allowed the use of controlled substances on the Property. A copy of Movant's certification is attached as Exhibit _____. Debtor ☐ has ☐ has not filed an objection to Movant's certification. A copy of Debtor's objection, if any, is attached as Exhibit _____.
A hearing on this objection is set for: _____.
- b. ☐ Pursuant to 11 U.S.C. § 362(d)(2)(A), Debtor has no equity in the Property; and pursuant to 11 U.S.C. § 362(d)(2)(B), the Property is not necessary to an effective reorganization.
- c. ☐ The bankruptcy case was filed in bad faith to delay, hinder or defraud Movant.
- (1) ☐ Movant is the only creditor or one of very few creditors listed on the master mailing matrix.
- (2) ☐ Other bankruptcy cases have been filed asserting an interest in the same Property.
- (3) ☐ The Debtor filed what is commonly referred to as a "face sheet" filing of only a few pages consisting of the Petition and a few other documents. No Schedules or Statement of Affairs (or Chapter 13 Plan, if appropriate) has been filed.
4. **Evidence in Support of Motion: (*Important Note: Declaration(s) in support of the Motion MUST be attached hereto.*)**
- a. Movant submits the attached Unlawful Detainer Declaration to provide evidence in support of this Motion pursuant to LBRs.
- b. Other declaration(s) are also attached in support of this Motion.

WHEREFORE, Movant prays that this court issue an order granting the following (*specify forms of relief requested*):

1. ☐ Termination of the stay to allow Movant (and any successors or assigns) to proceed under applicable non-bankruptcy law to enforce its remedies to obtain possession of the Property.
2. ☐ Annulment of the stay so that the filing of the bankruptcy petition does not affect postpetition acts, as set forth in the attached declaration(s).
3. ☐ An order confirming that the automatic stay does not apply.

4. Alternatively, if immediate relief from stay is not granted with respect to the Property because the Property is the subject of a lease that may be assumable:
- a. ☐ Establishment of a deadline for assumption or rejection of the lease.
 - b. ☐ Adequate protection in the form of regular payments at the lease rate from petition date until assumption or rejection of the lease.
5. Additional provisions requested:
- a. ☐ That the order be binding and effective despite any conversion of this bankruptcy case to a case under any other chapter of Title 11 of the United States Code.
 - b. ☐ Termination or modification of the co-debtor stay of 11 U.S.C. § 1201 or § 1301 as to the above-named co-debtor, on the same terms and conditions.
 - c. ☐ That the 14-day stay prescribed by FRBP 4001(a)(3) be waived.
 - d. ☐ That Extraordinary Relief be granted as set forth in the Attachment (*attach optional court form F 4001-1.EXT.RELIEF.ATTACH*).
 - e. ☐ For other relief requested, see attached continuation page.

Date: _____

Respectfully submitted,

Printed name of Movant

Printed name of attorney for Movant (if applicable)

Signature

Printed name of Individual Movant or attorney for Movant

UNLAWFUL DETAINER DECLARATION

Movant: _____

I, _____, declare as follows
(Print Name of Declarant)

1. I have personal knowledge of the matters set forth in this declaration and, if called upon to testify, I could and would competently testify thereto. I am over 18 years of age. I have knowledge regarding Movant's interest in the residential or nonresidential real property that is the subject of this Motion (Property) because:
☐ I am the Movant and owner of the Property.
☐ I manage the Property as the authorized agent for the Movant.
☐ I am employed by the Movant as (state title and capacity):
☐ Other (specify):
2. I am one of the custodians of the books, records and files of Movant as to those books, records and files that pertain to the rental of this Property. I have personally worked on books, records and files, and as to the following facts, I know them to be true of my own knowledge or I have gained knowledge of them from the business records of Movant on behalf of Movant, which were made at or about the time of the events recorded, and which are maintained in the ordinary course of Movant's business at or near the time of the acts, conditions or events to which they relate. Any such document was prepared in the ordinary course of business of Movant by a person who had personal knowledge of the event being recorded and had or has a business duty to record accurately such event. The business records are available for inspection and copies can be submitted to the court if required.
3. The address of the Property that is the subject of this Motion is:
Street Address:
Apt./Suite No.:
City, State, Zip Code:
4. Movant is the legal owner of the Property, or the owner's legally authorized agent. A true and correct copy of the Trustee's Deed upon Sale, lease, rental agreement, or other document evidencing Movant's interest in the Property is attached as Exhibit _____. A true and correct copy of any applicable document establishing Movant's authority as agent for the owner is attached as Exhibit _____.
5. The Property is: ☐ Residential property ☐ Nonresidential property
 - a. Debtor occupies the Property
☐ on a month-to-month tenancy ☐ pursuant to a lease that is in default
☐ after a foreclosure sale on: _____ ☐ other (specify):
 - b. ☐ Debtor has failed to pay the monthly rent of \$ _____ since the following date (specify date): _____
 - c. ☐ In addition, Debtor has failed to pay other obligations under the lease, including the following (See attached continuation page for itemization):
 - (1) ☐ Common area maintenance charges
 - (2) ☐ Property taxes

This form is mandatory. It has been approved for use in the United States Bankruptcy Court for the Central District of California.

(3) ☐ For additional obligations, see attached continuation page.

6. Debtor's bankruptcy petition in this case was filed on (specify date): _____

7. Procedural status (state all that apply, and provide dates for completed steps):

- a. ☐ Movant caused a Notice to Quit to be served upon the Debtor on (specify date): _____
A true and correct copy of which is attached hereto as Exhibit _____.
- b. ☐ Before the filing of the petition, Movant had commenced an unlawful detainer proceeding in state court and completed the following:
- (1) ☐ Movant filed a Complaint for Unlawful Detainer against the Debtor on (specify date): _____, a true and correct copy of which is attached as Exhibit _____.
- (2) ☐ Trial was held on (specify date): _____.
- (3) ☐ An Unlawful Detainer Judgment against the Debtor was entered on the Complaint for Unlawful Detainer on (specify date): _____, a true and correct copy of which is attached as Exhibit _____.
- (4) ☐ A Writ of Possession for the Property was issued by the state court on (specify date): _____, a true and correct copy of which is attached as Exhibit _____.
- (5) ☐ The Debtor has not filed with the petition and served on the Movant the certification required under 11 U.S.C. § 362(l)(1).
- (6) ☐ The Debtor or adult dependent of Debtor has not deposited with the clerk any rent that would become due during the 30-day period after the filing of the petition.
- (7) ☐ The Debtor or adult dependent of Debtor has not filed and served on the Movant the further certification required under 11 U.S.C. § 362(l)(2) that the entire monetary default that gave rise to the judgment has been cured.
- (8) ☐ Movant has filed and served an objection to Debtor's certification referenced in paragraph (5) and/or (7) above, a copy of which is attached hereto as Exhibit _____. A hearing on this objection is set for: _____.
- (9) ☐ An eviction action has been filed to obtain possession of the Property on grounds of endangerment of the Property or because of illegal use of controlled substances on the Property and Movant has filed a certification that ☐ such action was filed or ☐ that Debtor has endangered the subject Property within 30 days preceding the certification or allowed the illegal use of controlled substances on the Property. A copy of Movant's certification is attached hereto as Exhibit _____. Debtor ☐ has ☐ has not filed an objection to Movant's certification. A copy of Debtor's objection, if filed, is attached hereto as Exhibit _____. A hearing on this objection is set for: _____.
- c. ☐ The lease was rejected on (specify date) _____:
- (1) ☐ by operation of law.
- (2) ☐ by Order of the court.
- d. ☐ The regular lease payments have not been made since the filing of the petition.
8. ☐ Debtor has no equity in the Property because Debtor does not have a lease interest that could be assumed or assigned under 11 U.S.C. § 365.

9. ☐ The Property is not necessary to an effective reorganization because (*specify*):
- ☐ The Property is residential and is not producing income for the Debtor.
 - ☐ The Property is commercial, but no reorganization is reasonably in prospect.
 - ☐ Other (*specify*):
10. ☐ The bankruptcy case was filed in bad faith to delay, hinder or defraud Movant.
- ☐ Movant is the only creditor or one of very few creditors listed on the master mailing matrix.
 - ☐ Other bankruptcy cases have been filed asserting an interest in the same property.
 - ☐ The Debtor filed what is commonly referred to as a "face sheet" filing of only a few pages consisting of the Petition and a few other documents. No Schedules or Statement of Affairs (or Chapter 13 Plan, if appropriate) has been filed.
 - ☐ Other (*specify*):
11. ☐ Other bankruptcy cases that have prevented Movant from recovering possession of this Property include the following:
- Case name:
Case no.: Chapter:
Date filed: Date dismissed:
Relief from stay re this Property ☐ was ☐ was not granted.
 - Case name:
Case no.: Chapter:
Date filed: Date dismissed:
Relief from stay re this Property ☐ was ☐ was not granted.
 - ☐ See attached continuation page for more information about other cases.
12. ☐ Movant seeks annulment of the automatic stay so that the filing of the bankruptcy petition does not affect any and all of the actions set forth in paragraph 7 that were taken after the filing of the bankruptcy petition in this case.
- ☐ These actions were taken by Movant without knowledge of the bankruptcy filing, and Movant would have been entitled to relief from stay to proceed with these actions.
 - ☐ Although Movant knew about the bankruptcy filing, Movant had previously obtained relief from stay to proceed with these enforcement actions in prior bankruptcy cases affecting this Property as set forth in paragraph 11 above.
 - ☐ For other facts justifying annulment, see attached continuation page.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date

Printed Name

Signature

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document entitled: **NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY OR FOR ORDER CONFIRMING THAT THE AUTOMATIC STAY DOES NOT APPLY UNDER 11 U.S.C. § 362(l) (with supporting declarations) (UNLAWFUL DETAINER)** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (date) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date

Printed Name

Signature

This form is mandatory. It has been approved for use in the United States Bankruptcy Court for the Central District of California.

Attachment D

1 RAYMOND H. AVER - SBN 109577
LAW OFFICES OF RAYMOND H. AVER
2 A Professional Corporation
1950 Sawtelle Boulevard, Suite 120
3 Los Angeles, California 90025
Telephone: (310) 571-3511
4 e-mail: ray@averlaw.com

5 Attorneys for [Secured, Unsecured, Administrative] Claimant
[Name of Creditor]
6
7

8 UNITED STATES BANKRUPTCY COURT

9 CENTRAL DISTRICT OF CALIFORNIA [DIVISION]

10

11 In re:)	Case No. _____
12 [Debtor's Name],)	Chapter _____
13)	PROOF OF CLAIM
14 Debtor.)	
15)	Amount of Claim: _____
16)	Claimed as: [Secured, Unsecured,
17)	Administrative Priority]
18)	

19

20 1. Name and address of Claimant:

21 [Name of Creditor]
c/o Law Offices of Raymond H. Aver
22 A Professional Corporation
1950 Sawtelle Boulevard, Suite 120
23 Los Angeles, California 90025
Attention: Raymond H. Aver, Esquire
24

25 2. Basis for Claim:

26 Lease of [commercial/residential] real property.

27 3. Date Debt Incurred:
28 _____

1 4. If court judgment, date obtained: N/A

2 5. Total Amount of Claim at Time Case Filed:

3 \$ _____

4 ☐ Check this box if claim includes interest or other charges in addition to the
5 principal amount of the claim. Attach itemized statement of all interest or
6 additional charges.

6 6. Secured Claim:

7 ☐ Check this box if your claim is secured by collateral (including a right of
8 setoff.)

8 Brief Description of Collateral:

9 ☐ Real Estate

9 ☐ Motor Vehicle

9 ☐ Other

10 Value of Collateral: \$ _____

11 Amount of arrearage and other charges, at time case filed, included in
12 secured claim, if any: \$ _____.

12 Interest continues to accrue at the rate of \$___ per diem, late charges
13 continue to be incurred in the amount of \$___ per month, and attorneys'
14 fees and costs in the sum of \$___ have been incurred.

14 7. Credits: The amount of all payments on this claim have
15 been credited and deducted for the purpose of making this proof of
16 claim. If any payments which have been made by the debtor to this
17 Claimant are recovered by the debtor, other debtors, or any party in
18 interest in this case or relinquished by or on behalf of Claimant for
19 any reason, the amount of this proof of claim shall be deemed
20 increased by the amount of the recovery or relinquishment, plus
21 interest as appropriate, and Claimant reserves the right to so amend
22 this proof of claim.

23 8. Supporting Documents: A true and correct copy of the
24 Lease Agreement, dated _____, on which this claim is based,
25 is attached as Exhibit A hereto. An itemized statement of all
26 interest or additional charges is attached as Exhibit B hereto.

27 9. Reservation of Right to Amend: The information set forth
28 herein is believed to be accurate and complete as of the date hereof.

1 However, Claimant reserves the right to amend or supplement this
2 proof of claim for the purpose of specifying or clarifying the amount
3 or nature of any claim set forth herein and for any other purpose.

4
5 Dated: _____ By: _____
6 [Name of Creditor Representative]
7 Authorized Agent
8

9 *PENALTY FOR PRESENTING FRAUDULENT CLAIM:*

10 *FINE OF NOT MORE THAN \$500,000*

11 *OR IMPRISONMENT FOR NOT MORE THAN*

12 *FIVE YEARS OR BOTH -*

13 *18 U.S.C. Section 152 and 3571*
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1 NOTE: When using this form to indicate service of a proposed order, DO NOT list any person or entity in
2 Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on
the CM/ECF docket.

3 **PROOF OF SERVICE OF DOCUMENT**

4 I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
12424 Wilshire Boulevard, Suite 720, Los Angeles, California 90025

6 The foregoing document described **PROOF OF CLAIM** will be served or was served (a) on the judge in chambers
in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

8 **I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling
General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via
NEF and hyperlink to the document. On _____, I checked the CM/ECF docket for this bankruptcy case or
adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive
NEF transmission at the email address(es) indicated below:

11 _____ Service information continued on attached page

12 **II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL** (indicate method for each person or entity served):
13 On _____, I served the following person(s) and/or entity(ies) at the last known address(es) in this
bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the
United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows.
Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours
after the document is filed.

16 _____ Service information continued on attached page

18 **III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each
person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on June 23, 2011, I served the
following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service
method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that
personal delivery on the judge will be completed no later than 24 hours after the document is filed.

22 _____ Service information continued on attached page

23 I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and
correct.

25 _____
Date

Type Name

Signature