

SINGLE ASSET REAL ESTATE CASES **UNDER BAPCPA**

By Alan M. Grochal and Catherine K. Hopkin
Tydings & Rosenberg LLP
Baltimore, Maryland

The Old Law

Prior to enactment of the Bankruptcy Reform Act of 1994 on October 22, 1994, Single Asset Real Estate cases were treated no differently than any other Chapter 11 proceedings. However, due to the proliferation of Single Asset Real Estate filings in the early 90's, Congress determined that a new definition should be added to the Bankruptcy Code to cover many single asset real estate limited partnerships, as well as provide a different test for obtaining relief from the automatic stay.

Accordingly, contained within the 1994 amendments, was a new definition for "single asset real estate" as follows:

"single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate non-contingent, liquidated secured debts in an amount no more than \$4,000,000.

A second amendment related to the definition of single asset real estate is found in section 362. Section 362(d) was amended to add subsection (3) which provided:

With respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

These changes were intended to address the problem that single asset real estate cases often had no source of income and languished in Chapter 11 for lengthy period of time.

BAPCPA

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or affectionately know by Judge Derby in Maryland as the “no creditor left behind law”) made certain modifications to both the definition of “single asset real estate” and section 362(d)(3).

Section 1010(51B) now reads as follows: The term “single asset real estate” means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.

Section 362(d) provides: On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor’s sole discretion, notwithstanding section 363(c)(2), be made from rent or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor’s interest in the real estate.

