

SINGLE ASSET REAL ESTATE CASES **UNDER BAPCPA**

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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.

Primary Changes under BAPCPA

- Elimination of the \$4 million debt limit
- Setting the interest rate at the nondefault contract rate
- Specifying that payment to the secured party may be made from cash collateral
- Modifies deadline to add phrase “or 30 days after the court determines that the single asset provisions are applicable.”

Criteria to meet definition

- property must be a single property or project
- property cannot be residential property with fewer than 4 units
- property must generate substantially all of the income of the debtor
- debtor must not conduct any substantial business on the property other than (i) the operation of the property; and (ii) activities incidental to the operation of the property

Issues Raised In Single Asset Real Estate Cases

Several issues within § 362(d)(3) have come before the courts including (a) the purpose of § 362(d)(3); (b) what types of property constitute single asset real estate property; (c) whether the courts must terminate the stay if certain conditions are met in a single asset real estate case, or whether courts have the power to modify or condition the stay; (d) what the standard is for satisfying the plan requirements under § 362(b)(3)(A-B); and (e) whether a debtor’s filing in bad faith may deprive the debtor of his protections from relief of the stay under § 362(d)(3)(A-B).

The cases are categorized below according to these issues. A brief summary follows each case.

PURPOSE OF § 362(D)(3)

- **In re LDN Corp., 191 B.R. 320, 326 (Bankr. E.D. Va. 1996)**
 - Congress enacted the statutory provision because it was concerned about the delay in the bankruptcy process and the resulting unfairness to secured lenders when single asset real estate projects are involved.
 - This concern was particularly present in cases where the owner of the property is attempting to avoid the loss of the building and there is no real hope that a viable and confirmable plan can be produced.

- **In re Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1988)**
 - Previously, effect of *Phoenix Piccadilly* was to bar the large majority of single asset real estate cases because they were usually filed in bad faith and to delay imminent foreclosure.

- **In re Jacksonville Riverfront Development, Ltd., 215 B.R. 239, 244 (Bankr. M.D. Fla. 1997)**
 - In enacting § 362(d)(3) Congress clearly expressed an intention that the stay not be lifted and the case not be dismissed simply because the case is a single asset real estate case.

DETERMINING WHETHER DEBTOR'S PROPERTY CONSTITUTES A SINGLE ASSET REAL ESTATE PROPERTY

This initial determination involves a number of considerations. The factor that has generated the greatest number of published decisions is whether there is substantial business other than from the operation of the real property and activities incidental thereto. Courts generally agree that even if a debtor operates out of a single location, it is not a single asset debtor if it is operating a business or providing a service unrelated to the real property. The first published decision to consider these issues held that a marina was not single asset real estate because, in addition to renting moorings, it stored, repaired and winterized boats, provided showers and a pool, sold gas and operated a concession stand.

The remaining published decisions are primarily involve either golf courses or hotels, although recent cases involve the timber industry and a housing subdivision. Generally, golf courses are not single asset real estate because of the related services such as pro shops, cart rentals and restaurants that are typically found in all golf courses. Hotels, on the other hand, can be single asset real estate depending upon the extent of other operations such as a gift shop or restaurant.

The following are representative cases:

- **In re Kkemko, Inc., 181 B.R. 47 (Bankr. S.D. Ohio 1995)**
 - Chapter 11 debtor's marina was not single asset real estate because under bankruptcy law, marina docks are not regarded as real estate.

- Also, evidence that marina stored, repaired and winterized boats, had showers and a pool, sold gas and provided other amenities showed that debtor was involved in other businesses on the property.
 - The Court also concluded that any residential real property with more than four residential units is single asset real estate.
 - *See also In re Whispering Pines Estate, Inc.*, 341 B.R. 134 (Bankr. N.H. 2006) (Hotel was not a single asset real estate because it served breakfast, maintained a swimming pool, provided phone and Internet service, and operated room cleaning and towel-laundry services).
- **In re Pensignorkay, Inc., 204 B.R. 676 (Bankr. E.D. Pa. 1997)**
 - Four criteria must exist before real property can be considered single asset real estate as follows:
 - Property must constitute a single property or project
 - Property must be nonresidential or residential with four or more units
 - Property must generate substantially all of debtor's income
 - Debtor must not be involved in substantial business on the property other than operation of such property.
 - Case also required debtor's secured debt to be less than \$4,000,000 but this was eliminated from § 101(51B) by BAPCPA.
- **In re Oceanside Mission Assocs., 192 B.R. 232, 234 (Bankr. S.D. Cal. 1996)**
 - Definition of single asset real estate in § 101(51B) includes undeveloped land that generates no income.
 - *See also In re Syed*, 238 B.R. 133 (Bankr. N.D.Ill. 1999) (Vacant apartment building was not required to generate present income to qualify it as a single asset real estate case where debtor had previously used apartment to generate income and planned on resuming apartment rentals in the future).
- **In re Philment Dev. Co., 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995)**
 - A series of semi-detached houses constituted single project and thus a single asset real estate.
 - Even though the houses were separately sold to limited partnerships and had separate mailing addresses, the houses were a single project because the mortgagee treated the financing as single project.
 - *Compare with In re Shattuck, LLC*, 1999 WL 33457789 (Bankr. D. N.H. 1999) (holding that lease structure alone could not qualify debtor's golf course as a single asset real estate where debtor operated other business on the property.)
- **In re Kara Homes, Inc., et al., 363 B.R. 399 (Bankr. N.J. 2007)**
 - Although the Debtor performed several functions for its real estate development project, such as acquiring the land, building the homes,

marketing the homes for sale and maintaining the properties, it qualified as a single asset real estate case.

- Fact that the sale of homes was primary sale of income, and that all activities were incidental to the operation of the real property were determinative.
- **In re Club Golf Partners, L.P., 2007 Bankr. LEXIS 1225 (Bankr. E.D. Tex. 2007)**
 - Golf club included 18 hole course, driving range, tennis courts, casual club house and restaurant, and thus did not qualify as single asset real estate entity.
 - Test for whether the debtor qualifies as single asset real estate entity is whether the revenue generated from the property is simply and passively received as investment income, and not the product of entrepreneurial, active labor and effort.
 - *See also In re Larry Goodwin Golf, Inc.*, 219 B.R. 391 (Bankr. M.D.N.C. 1997) (Even though debtor operated or held real estate for income rather than operation of businesses on the property, the property was still a single asset real estate).
- **In the Matter of: Scotia Pacific Co. LLC v. The Pacific Lumber Co.; Scotia Pacific Co. LLC, No. 07-40487 (5th Cir. Filed Nov. 13, 2007)**
 - Court used *In re Club Golf Partners* test, described as “active-versus-passive criterion,” to determine whether timberlands conservation, road planning, design, engineering, and harvesting of timber constituted a passive investment income or whether revenue was the product of entrepreneurial, active labor and effort.
 - Court found that it was not a single asset real estate case.
- **In re McGreals, 201 B.R. 736 (Bankr. E.D. Pa. 1996)**
 - Two adjacent properties, one developed and rented and one not, were not used in a way that they comprised a single project and thus parcels were not a single asset real estate.
 - *But see In re Rear Still Hill Road, LLC*, Case No. 07-31556-LMW (Bankr. Conn. 2007).

COURT FLEXIBILITY TO MODIFY OR CONDITION THE STAY RATHER THAN TERMINATE IT

- **In re Oceanside Mission Assocs., 192 B.R. 232, 234 (Bankr. S.D. Cal. 1996)**
 - The Court found that it was required to grant relief from stay unless debtor filed a plan or commenced interest payment within 90 days of petition.
- *But see In re LDN Corp.*, 191 B.R. 320, 327 (Bankr. E.D. Va. 1996)
 - The debtor in this case filed its plan later than 90 days after the petition filing, and made no interest payments to mortgagor-creditor. Debtor urged

the Court to find that payments to creditor for adequate protection constituted payments on interest under § 362(d)(3)(B).

- The Court rejected debtor's argument and found that relief was mandatory where debtor did not strictly comply with provisions of § 362(d)(3)(A-B).
- **In the matter of: Buoy, Hall & Howard and Associates, 1995 WL 17006338 (Bankr. S.D. Ga. 1995)**
 - The Court issued an order extending the time within which debtor must file its plan. Debtor filed its plan on the modified date, though that date was later than the 90 day period specified in § 362(d)(3).
 - The Court held that debtor's plan was timely and denied relief from the stay.
- **In re Archway Apartments, Ltd., 206 B.R. 463 (Bankr. M.D. Tenn. 1997)**
 - Debtor filed plan outside the 90-day period specified in § 362(d)(3) through a simple, honest error and erroneously believed they had complied with the time limitation.
 - The Court acknowledged that § 362(d)(3) requires relief from the stay if a plan is not filed within the 90-day limit.
 - However, the Court found that relief is not limited to mandatory termination. Rather, courts are free to terminate, annul, modify or condition the stay and fashion the appropriate relief.

STANDARD FOR SATISFYING § 362(D)(3)(A-B): IS THE PROPOSED PLAN SUFFICIENT?

- **In re Heather Apartments Limited Parntership, 366 B.R. 45 (Bankr. Minn. 2007)**
 - A Debtor seeking protection under § 362(d)(3) (A) by relying on a plan to sell all or most of its assets must show a likelihood that the sale will close promptly.
 - To do so, the Debtor must show that there is a binding purchase agreement; a binding lending commitment; and substantial progress in satisfying the "ministerial minutiae" for closing.
- **In re 68 West 127 Street, LLC, 285 B.R. 838, 847-48 (Bankr. S.D.N.Y. 2002)**
 - For the purpose of determining whether debtor has submitted a plan that has a reasonable possibility of being confirmed within a reasonable time, standard is similar if not identical to § 362(d)(2)(B).
 - Debtor must show only that its plan has a reasonable prospect of success, not that the plan shall be confirmed. *See also In re Deep River Warehouse, Inc.*, 2005 WL 1287987 (Bankr. M.D.N.C. 2005)(citing *In re 68 West 127 Street, LLC*); *In re Terraces Subdivision, LLC*, Case no. A07-00048-DMD (Bankr. Alaska 2007).

FILING IN BAD FAITH CAN DEPRIVE DEBTOR OF PROTECTION FROM RELIEF UNDER THE § 362(D)(3)(A) EXCEPTION

- **In re Duvar Apt., Inc., 205 B.R. 196 (B.AP. 9th Cir. 1996)**
 - Debtor transferred single asset immediately prior to filing bankruptcy for no consideration without recording the deed and took other acts evidencing a bad faith filing.
 - Creditor requested relief from stay before the expiration of debtor's 90 day period to file his plan under § 362(d)(3).
 - Court held that it had authority to grant relief from the stay during the 90 day period after filing. Court could grant relief under § 362(d)(1) in a case of bad faith filing even during the initial 90 day period.