Eight Years and Acres Later:
Single Asset Real Estate Cases After BAPCPA

Russell M. Blain[1]
Edward J. Peterson[2]
Amanda E. Chazal[3]
STICHTER, RIEDEL, BLAIN & PROSSER, P.A.
Tampa, Florida

INTRODUCTION

The Bankruptcy Reform Act of 1994 created special treatment for single asset real estate debtors and a definition for "single asset real estate" ("SARE") in §101(51B) of the Bankruptcy Code. The subsequent enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), in expanding the SARE debt limit and thereby redefining SARE, ostensibly created new leverage for lenders—often the only significant creditors in a SARE case—to expedite the disposition of a case. These changes were made "to put additional responsibility on a single asset real estate debtor and prevent a perceived abuse of the bankruptcy process on the part of these ventures." *In re 652 West 160th LLC*, 330 B.R. 455, 460 (Bankr. S.D.N.Y. 2005) (citing S. Rep. No. 103-168 (1993)). As stated by Collier, §362(d)(3) was added to the Bankruptcy Code "to terminate the stay when the debtor neither proposes a viable plan nor makes payments to the secured party."[4]

Since the financial meltdown of 2008 and ensuing economic crisis, there have been an unprecedented number of filings by real estate-owning entities, putting §§101(51B) and 362(d)(3) of the Code, purportedly added to protect the interests of

---

[1] rblain@srbp.com.

[2] epeterson@srbp.com.

[3] achazal@srbp.com.

[4] 3 COLLIER ON BANKRUPTCY ¶ 362.07[5] (15th ed. 2005).

secured creditors in single asset real estate cases, to the test. In the ensuing time period, have the provisions of §362(d)(3) served their stated purpose?

I. DETERMINING STATUS AS SARE DEBTOR

The term "single asset real estate" under its original definition applied to only those debtors with contingent, liquidated, secured indebtedness of $4 million or less. The BAPCPA amendment to §101(51B) eliminated the $4 million cap, making even large real estate projects subject to the SARE-specific provisions of the Bankruptcy Code. The revised version of §101(51B) of the Code defines "single asset real estate" 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 who is not a family farmer 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.

11 U.S.C. §101(51B).The §101(51B) definition, discussed by the Fifth Circuit in *In re Scotia Pac. Co.*, 508 F.3d 214, 220(5th Cir. 2007), sets forth a three-pronged test that must be met for a debtor to be determined to be a SARE entity:

- the debtor has real property constituting a single property or project other than residential property with fewer than four residential units;
- the real property generates substantially all of the gross income of a debtor; and
- no substantial business is conducted on that property other than the business of operating the property and the activities incidental to the property.

In analyzing whether a debtor is a SARE candidate, a court must determine that all three elements of the statutory definition have been satisfied. *See In re View W. Condo. Assoc., Inc.,* No. 08-11561-BKC-RAM (Bankr. S.D. Fla. July 29, 2008) (*citing Scotia Pac.)*.

The determination of whether a debtor falls within the SARE characterization is a fact-intensive inquiry. If the debtor self-designates as a SARE, the court is constrained to require an evidentiary showing on which to make a determination. Cases decided after

the 1994 Act continue to hold that debtors that have other business activities are not SARE debtors.

A. Golf Course Cases

Some of the most instructive cases applying the BAPCPA amendments to SARE involve golf courses as debtors. In *In re Club Golf Partners,* No. 07-40096-BTR-11, 2007 WL 1176010 (Bankr. E.D. Tex. April 20, 2007), the debtor owned real estate but also operated a variety of revenue-producing activities on that real estate. The debtor employed third-party employees, without whom little or nothing of a revenue-producing nature would happen on the land. The debtor-derived revenues from a variety of commercial activities on the property, including membership sales, public access fees, golf cart usage fees, driving range fees, tennis court usage fees, pro shop merchandise sales, clubhouse restaurant food and beverage sales, and special event income. The court reasoned as follows:

> Because its business activities are variegated and multiple and are dependent on the entrepreneurial efforts and ongoing hard work of its principals and its other employees, and because it does not simply lease its property to tenants as the owner of a true single asset real estate such as an apartment house does, the Debtor's golf course does not fall within the scope of the definition of "single asset real estate" in Code §101(51B), and the Debtor is therefore not subject to Code §362(d)(3).

2007 WL at * 6.

The court in *In re Larry Goodwin Golf, Inc.*, 219 B.R. 391 (Bankr. M.D.N.C. 1997),determined that a golf course with golf cart rentals, a pool, concessions, and undeveloped property for sale constitutes a "substantial business" and not property held solely for income and that the debtor therefore did not fall within the SARE definition. Similarly, the court in *In re CGE Shattuck LLC*, No. 99-12287-JMD, 1999 WL 33457789 (Bankr. D.N.H. Dec. 20, 1999), found that a debtor was not a SARE debtor where its real property did not generate substantially all of its gross income and a percentage of its revenues were derived from pro shop, golf rentals, and golf-related services. The court in *In re Prairie Hills Golf & Ski Club*, 255 B.R. 228 (Bankr. D. Neb. 2000), determined that a debtor did not constitute a single asset real estate where it built and sold residences,

constructed roads to residences and to golf and ski areas, removed snow from golf and ski areas, sold liquor in the clubhouse, and leased golf and ski areas to a third party.

B. Hotel cases

Hotel cases provide additional insight into SARE issues. The court in *Centofante v. CBJ Dev. Inc.* (*In re CBJ Dev. Inc.*), 202 B.R. 467 (9th Cir. BAP 1996), found that a hotel was not a SARE debtor because its bar, gift shop, and restaurant constituted a significant business enterprise. In *In re Whispering Pines Estate, Inc.*, 341 B.R. 134 (Bankr. D.N.H. 2006), the court found that, in addition to a bar, restaurant, gift shop, and tour revenues, the debtor's hotel operation was sufficiently active to constitute a business other than mere operation of property. The debtor in *In re Scotia Dev., LLC*, 375 B.R. 764, 774-79 (Bankr. S.D. Tex. 2007), *aff'd*, 508 F.3d 214 (5th Cir. 2007), owned rights to harvest and sell timber. The court found that the debtor's timber operation was sufficient to exclude it from SARE treatment.

C. Debtors Susceptible to SARE Designation

The affiliated debtors in *In re Kara Homes, Inc.*, 363 B.R. 399 (Bankr. D.N.J. 2007), in submitting their initial bankruptcy petitions and statements of financial affairs, identified themselves as single asset real estate entities. After examining the debtors' operations, the *Kara Homes* court determined that the activities of acquiring land and planning and marketing communities were incidental to the debtor's efforts to sell homes and that the affiliated companies were single asset real estate entities. 363 B.R. at 406. The court in *In re Webb MTN, LLC*, No. 07-32016, 2008 WL 656271 *4, *6 (Bankr. E.D. Tenn. March 6, 2008), similarly found the debtor to be a SARE debtor where no development had actually commenced upon its property and it was not producing any income and was passive in nature.

D. Other SARE Status Determination Issues

If multiple single-purpose entities, each owning a single project, and their common parent file chapter 11 petitions, is each a SARE debtor? As it turns out, courts have determined that the business operations of a debtor's subsidiaries or affiliates can also preclude SARE designation. In *In re Philmont Development Co.*, 181 B.R. 220,

220-23 (Bankr. E.D. Pa. 1995), the court found that the debtor's ownership and management of nondebtor affiliates was sufficient to exclude the debtor from SARE treatment.[5] In considering the effect of affiliated entities on the SARE designation question, the following factors come into play:

- whether the entities are under common management and control;
- whether the entities' operations are vertically integrated;
- whether the entities file tax returns on a consolidated basis;
- whether a unified marketing process is in place;
- whether the entities have an auditor and tax advisor in common; and
- whether cross-guaranties are in place.

Does the SARE determination require an element of intent? Does it matter whether the case is viewed as an abusive chapter 11, filed primarily to frustrate the exercise of foreclosure remedies and with no reasonable probability of a feasible plan? *See In re 83-84th Owners Corp.*, 214 B.R. 530, 534 (Bankr. E.D.N.Y. 1997). The *Kara Homes* case involved multiple debtors, each responsible for acquiring developable land, arranging for construction of units, and marketing and selling the units. In determining each to be a SARE debtor, the court observed that "[m]arketing, sales and construction [were] handled from a construction trailer and model located on each property" and that the common area, amenities, and roadways were still in construction and development states. 363 B.R. at 403.

In *Philmont Development*, the SARE determination was made as to the limited partnership debtors, the only assets of which were the semi-detached houses that each had individually purchased from the general partner. 181 B.R. at 221. The court found that the semi-detached homes owned by the limited partnership debtors were comparable to the type of real property at issue in a typical single asset real estate case.

Unreported decisions go in both directions. A California court addressed this issue and held that, even if one or more debtors, when considered in isolation, would fall

[5] *See also In re Kkemko, Inc.*, 181 B.R. 47 (Bankr. S.D. Ohio 1995).

within the ambit of §101(51B), the consolidated, interrelated business operation of the collective group of debtors was sufficient to avoid a SARE designation. In the court's view, a ruling that the SARE provisions applied would inappropriately have elevated form over substance. *See Meruelo Maddux Properties, Inc., et al.,* No. SV 09-13356-KT (Bankr. C.D. Cal. June 17, 2009).

A Florida bankruptcy court adopted the *Meruelo Maddux* analysis and found that the debtors in *In re Fiddler's Creek*, No. 8:10-bk-3846-KRM (Bankr. M.D. Fla. February 23, 2010), some of which owned only raw land, were not subject to the SARE provisions because they were part of a larger enterprise and there was no indication of the type of abuse on which the enactment of §362(d)(3) was premised. The Florida court articulated the purpose of the SARE provisions as being the curtailment of abusive filings by debtors with an absence of economic activity, a lack of significant employees, and/or lack of going-concern value. Another Florida court took the opposite tack in *In re Odyssey Properties III, LLC, et. al.*, No. 8:10-bk-18713-CPM (Bankr. M.D. Fla. Aug. 2, 2010).

II. ARE POST-BAPCPA SARE CASES RESOLVED FASTER?

In addition to curbing abusive filings, the avowed purpose of §362(d)(3) was to limit the length of case pendency and the concomitant perceived imposition on secured creditors. The mechanism chosen was the creation of a set of special requisites for keeping the automatic stay in place. Consequently, §362(d)(3) was amended to read as follows:

> 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 rents 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.

11 U.S.C. §362(d)(3).

If a debtor is designated as a SARE, §362(d)(3) provides that stay relief must be granted or the stay modified unless the debtor takes one of two alternative actions within 90 days after the filing of the bankruptcy case. The debtor must either have filed a plan of reorganization that has a reasonable possibility of being confirmed or have commenced monthly payments to all creditors the claims of which are secured by the property (except judgment lienholders) in amounts equal to "interest at a current fair market rate."

If the debtor indicates on its voluntary petition that its business is "Single Asset Real Estate" as defined in §101(51B), the time periods of §362(d)(3) automatically apply, triggering modification of the stay 90 days after the SARE debtor's petition date. If the debtor does not mark the SARE designation on its petition, however, a subsequent SARE determination by the court made more than 60 days after the petition date extends the 90-day period to the date that is 30 days after the court's SARE determination. Section

362(d)(3) allows for an extension of the 90-day period for cause on the determination of the court if an order is entered within the 90-day period.[6]

For all the effort and language drafting that went into the BAPCPA amendments affecting SARE cases, does §362(d)(3) actually expedite the process and drive the debtor to file a plan sooner than would have been the case under prior law? On it face, the amended provision would appear to expedite the process by requiring that a plan be filed within 90 days. Suppose, however, that the debtor does not make a SARE designation in its petition and schedules. In that instance, nothing will trigger the expedited plan filing until a secured creditor subsequently files a motion seeking from a court a determination that the debtor is a SARE entity. In that instance, unless the court's determination is made within the first 60 days of the filing, the stay will not become subject to being modified until 30 days after the court's determination that the debtor is a SARE debtor. Moreover, §1121(b) gives a debtor the exclusive right to file a plan for 120 days. If the debtor has not made the SARE designation when filing its petition, the time limitation for filing a plan under §362(d)(3) will not expire until 30 days after the court has determined the debtor to be a SARE entity, and that 30-day period could extend past the 120-day exclusivity period. Accordingly, if the debtor has not made the SARE designation in the petition, and no creditor has moved quickly for a court determination, the 120-day exclusivity period in effect would trump the 90-day SARE filing period.[7] As discussed above, the issue of whether a debtor is a SARE debtor is often a factually intensive one that requires discovery and an evidentiary hearing -- which can cause further delay.

III. REQUIRED SUFFICIENCY FOR FILING A PLAN

The filing of a plan or the commencement of interest payments is not the end of the story. If a debtor chooses the option of filing a plan to avoid stay modification, the court will have to determine whether the plan has a "reasonable possibility of being confirmed within a reasonable time." Much case law has developed over what is meant

[6] The time period for exclusivity under §1121 can also be extended upon a showing of cause.

[7] One trend that appears to exist is a decrease in the early filings by secured creditors of motions to dismiss. Instead, creditors may be using subsection 362(d)(3) as a tool to wait to exercise their rights until after the SARE deadlines have run.

by a "reasonable possibility of being confirmed" and what constitutes a "reasonable time." Do these concepts require the court to conduct a mini-confirmation hearing in the guise of a hearing on stay relief?

Although a full confirmation hearing is not required to make this determination, courts have held that the debtor must propose a plan that is "arguably confirmable." *In re The Terraces Subdivision, LLC*, No. A07-00048-DMD, 2007 WL 2220448 (Bankr. D. Alaska 2007); *see also In re Heather Apartments Ltd. Partnership*, 366 B.R. 45 (Bankr. D. Minn. 2007). Obtaining stay relief pursuant to §362(d)(3)(A) requires more than a showing that confirmation of a proposed plan is questionable. One court expressed its view as follows:

> [A]djudicating a relief from stay motion under §362(d)(3)(A) is not to be a mini-confirmation hearing. At a confirmation hearing, a debtor must prove its entitlement to confirm a plan under 11 U.S.C. §1129 by a preponderance of the evidence, and concerning the plan feasibility requirements of §1129(a)(11) in particular, the debtor must demonstrate that the confirmation of the plan is not "likely" to be filed [sic] [followed] by liquidation or the need for further financial reorganization. By comparison, the showing required by a debtor under §362(d)(3)(A) is only that the plan have a reasonable possibility of being confirmed, which is a lesser showing than that required at confirmation . . . In proving a "reasonable possibility" of plan confirmation, the stage of the proceeding assists in the showing a debtor must make: At a minimum the debtor must show that (1) it is proceeding to propose a plan of reorganization, (2) the proposed or contemplated plan has a realistic chance of being confirmed and (3) the proposed or contemplated plan is not patently unconfirmable.

In re Harmony Holdings, 393 B.R. 409 (Bankr. D.S.C. September 11, 2008) (*citing In re Windwood Heights, Inc.,* 385 B.R. 832, 838 (Bankr. N.D. W.Va. 2008)). The debtor must show only that its plan has a reasonable prospect of success within a reasonable time. *In re 68 West 127 St., LLC*, 285 B.R. 838, 848 (S.D.N.Y. 2002).

Arguably, the only certain way that a court could conclude in the context of a stay relief hearing that a plan is "patently unconfirmable" is the lack of acceptance by at least one impaired class of creditors. Section 1129(a)(10) imposes the confirmation prerequisite that, if a class of claims is impaired under the plan, at least one class of

claims that is impaired under the plan must accept the plan, determined without inclusion of the acceptance by any insider. In meeting the confirmation requirement of §1129(a)(10), a SARE debtor would be in the position of having particular trouble obtaining the vote of an impaired class. It is common for the typical SARE debtor to have only a general unsecured claims class and its mortgage lender's secured claim class. Classifying the secured lender separately from other unsecured claims is often the only means by which the debtor can satisfy §1129(a)(10). The issue of whether a debtor can separately classify the unsecured deficiency claim of a secured creditor has been the subject of great debate among courts and may even require an evidentiary showing on the issue of whether the lender's deficiency claim is sufficiently similar to the claims of trade creditors to warrant being treated in the same class. If the debtor must separately classify the lender's deficiency claim in order to obtain the vote of an impaired class, then the debtor will also have to deal with the absolute priority rule by either proposing to pay in full the unsecured portion of the lender's claim or providing for an auction of equity.

Other typical confirmation issues for SARE cases include factually intensive matters such as whether the debtor has satisfied the good faith filing requirements of §1129(a)(3), proven feasibility under §1129(a)(11), and met the cramdown requirements of §1129(b). If the debtor satisfies the requirement of §1129(a)(10), it appears likely that the bankruptcy court would keep the automatic stay in place until the confirmation hearing, at which time the other contested confirmation issues such as appropriate cramdown interest rate would be decided.

IV. WHAT LEVEL OF INTEREST PAYMENTS?

With respect to the alternative requirement to avoid stay modification, the debtor can commence monthly payments of interest at the nondefault rate within the designated period. *See In re Cambridge Woodbridge Apartments, LLC*, 299 B.R. 832, 849-40 (Bankr. N.D. Ohio 2003). Such interest payments are measured by the "value of the creditor's interest in the real estate," which may be less than the full claim of the creditor. If there is a disagreement on the value of the creditor's interest in the real property,

evidence on this point will have to be presented to the court for determination. Litigation over the amounts of monthly payments could cause further delay.

V. IS §362(d)(3) DUPLICATIVE OF §§362(d)(1) AND 362(d)(2)?

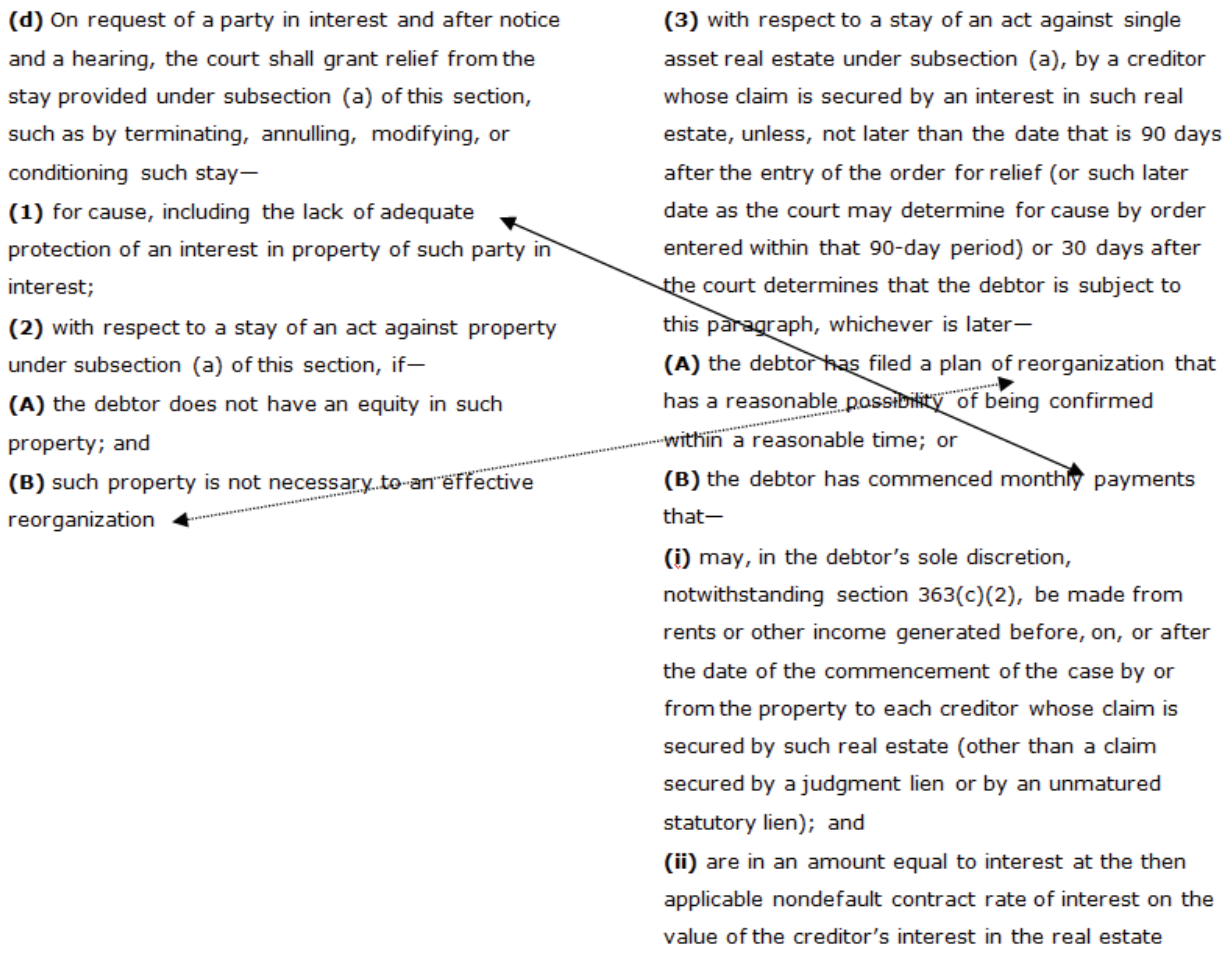
The provisions of subparagraphs (1) and (2) of §362(d) remain applicable to SARE debtors. In *Duvar Apts., Inc. v Dep, Ins. Corp. (In re Duvar Apts., Inc.)*, 205 B.R. 196, 200 (B.A.P. 9th Cir. 1996), the court determined §362(d) of the Bankruptcy Code to have been drafted in the disjunctive and thus found that each subsection is an independent alternative for relief without regard to SARE. What additional requirements does the SARE-specific §362(d)(3) impose?

Section 362(d)(3) mandates compliance with one of two alternatives for keeping the automatic stay in place: the debtor must either file a plan or commence monthly payments. The requirement to file a plan seems reflective of the language in §362(d)(2), except that §362(d)(3) includes the additional requirement that the plan actually have been filed. The court in *In re 68 West 127 St., LLC*, 285 B.R. 847, discussed this issue as follows:

> [T]he Debtor also has satisfied the similar, if not identical, standards of sections 362(d)(2)(B) and 362(d)(3)(A) of the Bankruptcy Code. Those sections' references to an "effective reorganization" and a "plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time" do not require a determination that the Debtor's plan shall be confirmed.

285 B.R. at 847-48. Further, the alternative requirement to commence monthly payments seems to mirror the substance of the requirement in §362(d)(2)to furnish adequate protection of an interest in property. The notable difference is that, in §362(d)(2), adequate protection can exist in multiple ways beyond monthly payments, including providing insurance, compliance reporting requirements, and providing an equity cushion.

The duplicative nature of §362(d)(3) is even more easily discernible in the following visual depiction of its language:



VI. CONCLUSION

SARE-specific §362(d)(3) was added to the Bankruptcy Code to limit the length of SARE cases. In the many instances in which the debtor does not of its own volition make the SARE designation, however, the 90-day deadline is not implicated and such cases can be as long in duration as that of a typical reorganization case. Further, the protections provided for in the language of §362(d)(3) arguably are duplicative of those in §362(d)(1) and §362(d)(2). It remains to be seen whether over the long haul the SARE amendments will expedite the reorganization process and provide a balancing or unbalancing factor in the tension between the real estate debtor and its secured creditor.

# # # #